Aligning religious law and state law: street-level bureaucrats and Muslim marriage practices in Pasuruan, Indonesia

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Introduction

1. Background

In 2012, Fikri, at the time the head of a district (*Bupati*) in West Java province, entered into a marriage with a seventeen-year-old teenager, Octora. The marriage was a traditional one and not registered. The reason it was unregistered because it was a polygynous marriage and Fikri did not have a permission from the local Islamic court to take a second wife. The marriage lasted only four days and ended in a unilateral repudiation (*talak*) which attracted extensive coverage in the public print and online media.[1] In a live-television-interview session, Fikri explained the reason he divorced Octora, "It is like when you buy new clothes. If something is damaged, you can return it." Fikri believed Octora was no longer a virgin when she married him. Fikri drew an analogy between his bride and an item of clothing. Most people found his analogy irritating and distasteful. The marriage elicited a wave of public rumours and was the topic of legal debates. Following the public protests and a people's march, the local parliament set up a special committee (*panitia khusus*) to investigate Fikri's conduct. The majority of the political factions in the parliament

[1] Although his marriage lasted for a limited time, it was not a *mut'ah* marriage. *Mut'ah* is an Arabic term, *mut'a*, that literally means pleasure or enjoyment. A *mut'ah* marriage is a marriage where a man agrees to give a woman something for a specified period in return for her sexual favour. The institution of temporary marriage was prohibited by the second caliph, 'Umar ibn Khattāb, who viewed it as fornication. This view is perceived to be fallacious by Shi'i Muslims, who have continued to practice temporary marriage. Shahla Haeri, *Law of Desire: Temporary Marriage in Shi'i Iran* (Syracuse, N.Y.: Syracuse University Press, 2014), p. 50.

came to the conclusion that the *Bupati* was guilty of wilful misconduct. On account of this contravention and his violation of the Marriage Law, the *Bupati* was considered to have broken his oath of the office (*sumpah jabatan*). Later, the Indonesian Supreme Court endorsed the parliament's decision. Fikri finally stepped down.

In this case, Fikri deliberately avoided registering his marriage. This would seem to suggest that Fikri regarded the importance of the validity of a marriage only from a restricted religious point of view. In Fikri's eyes, as in those of most Indonesians, marriage is more than a legal contract between two parties. It is an important communal and spiritual affair. Family law, including marriage law, has been the most important field in which the principles laid down by the religious norms which make family law the last stronghold of the Sharia hold sway.[2] Fikri brushed aside the significance of legalizing his marriage as the state law required him to do, among other reasons because his polygynous marriage simply did not qualify to be registered under Indonesian law. He was not in a position to present a permission to enter into a polygynous marriage granted by an Islamic court.

Furthermore, in Indonesia, and in other major parts of the world, marriage remains an essential part of the social and moral fabric.[3] Throughout the Muslim world, over the centuries the practice of Muslim marriage has been imbued with a multitude of local norms and influenced by the diversity of local actors.[4] Compliance to local norms and the involvement of local actors in a marriage ceremony are essential elements in winning social acceptance of a marriage. In Muslim communities, social acceptance is also unquestionably determined by the upholding of religious principles in the marriage ceremony. Generally speaking, the relationship between religious norms and social acceptance in Indonesia seems indivisible. However,

[2] Lynn Welchman, *Women and Muslim Family Laws in Arab States: A Comparative Overview of Textual Development and Advocacy* (Amsterdam: Amsterdam University Press, 2007), p. 11.
[3] Maria Platt, *Marriage, Gender and Islam in Indonesia: Women Negotiating Informal Marriage, Divorce and Desire* (Oxon and New York: Routledge, 2017).
[4] Dawoud Sudqi el- Alami, *The Marriage Contract in Islamic Law in the Shari'ah and Personal Status Laws of Egypt and Morocco* (London: Graham & Trotman, 1992).

for certain people, obtaining social acceptance is more important than having state recognition. One possible reason is because the state legal norm applies strict regulations on certain marriage practices, such as polygyny, yet religious norm does not. Sonneveld argues that, from a social point of view, there is no obvious difference whether a marriage is legal or not, as long as it has been socially accepted.[5]

It has been argued that regulation of family relationships is much more the domain of social norms rather than of formal legal enforcement.[6] However, in the framework of the modern nation-state, social acceptance is far from enough. The nation-state has assumed the right to signify legal validity by introducing the obligation to register a marriage. One reason is that the state law in many countries applies more egalitarian gender norms than is common in Indonesian society; signalling the withdrawal of its support from hierarchical, differentiated marital roles. Another reason is the right to resort to legal enforcement when family relationships have broken down. In divorce, informal mechanisms are not always effective in enforcing obligations and protecting rights.[7]

In the Indonesian context, people embrace three forms of validity of marriage. The first is religious validity. Fikri's marriage ceremony was carried out according to the requirements of Islam but was unregistered. In Indonesian life, marriage without registration is popularly known as *nikah sirri*. Literally *nikah sirri* means a secret marriage which does not entail either publicity (*i'lān*) or a festive meal (*walīma*). This notion arises from the legal discourse among classical Muslim jurists on the impermissibility of *nikāh al-sirr*, a marriage contract which is deliberately kept secret and concluded in the absence of male witnesses.[8] Diverging somewhat from this norm,

[5] Nadia Sonneveld, 'Rethinking the Difference Between Formal and Informal Marriages in Egypt', in *Family Law in Islam: Divorce, Marriage and Women in the Muslim World*, ed. by Maaike Voorhoeve (London: I.B. Tauris, 2012), pp. 77–107.
[6] Elizabeth S. Scott, 'Social Norms and the Legal Regulation of Marriage', *Virginia Law Review*, vol. 86, no. 8 (2000), p. 1903.
[7] *Ibid.*, p. 1901.
[8] According the classical Malikite scholars, marriage without male witnesses is permissible as long it is announced publicly (*i'lān*). Khoiruddin Nasution, *Status Wanita di Asia Tenggara:*

nikah sirri in Indonesia mostly refers to a religious marriage without registration.[9] Such a marriage is performed in the presence of local religious leaders (*kyai*) and witnesses (sometimes the marriage guardian is present too), in compliance with the Islamic law, but without the supervision of an official marriage registrar (*penghulu*).[10] For many and provably even most Muslims, the validity bestowed by religion is more important than the validity accorded by the state law.

The second requirement is legal validity. The state demands every single marriage be registered. The Kompilasi Hukum Islam (KHI, the Compilation of Islamic law), which is a major reference work for judges in Islamic courts, states that registration is meant to protect the proper institution of marriage (*ketertiban perkawinan*). This act of registration makes a marriage legally valid. If a marriage is legally valid, it must be religiously valid because, according to the Marriage Law, a marriage can be registered only if it has met with the religious requirements. However, instead of integrating registration into the legal conditions of a marriage, it is regarded as a legal complement. Although unregistered marriage has been considered to have no 'legal effect', it is not necessarily void. The legal obligation of registration laid down in Law 22/1946 on Registering Islamic Marriage, Divorce and Reconciliation does not affect the lawfulness of an unregistered marriage as long as it was concluded according to the religious requirements.[11] Bowen referred the complicated co-existence of religious validity and state recognition as "dual validity".[12]

The third requirement is social acceptance of persons living together in a form which is commonly referred to as a marriage. Mir-

Studi terhadap Perundang-Undangan Perkawinan Muslim Kontemporer di Indonesia dan Malaysia (Leiden: Indonesian-Netherlands Cooperation in Islamic Studies (INIS), 2002), p. 139.

[9] Eva F. Nisa, 'The Bureaucratization of Muslim Marriage in Indonesia', *Journal of Law and Religion*, vol. 33, no. 2 (2018), pp. 291–309.

[10] Silvia Vignato, '"Men Come In, Men Go Out": Single Muslim Women in Malaysia and Aceh', *Social Identities*, vol. 18, no. 2 (2012), pp. 239–57.

[11] Stijn van Huis, 'Islamic Courts and Women's Divorce Rights in Indonesia: The Cases of Cianjur and Bulukumba' (PhD Dissertation. Leiden University, 2015), p. 95.

[12] John R. Bowen, *Shari`a, State, and Social Norms in France and Indonesia* (ISIM Paper No. 3. Leiden: Institute for the Study of Islam in the Modern World, 2001), p. 10.

Hosseini refers to this as "a socially-valid marriage".[13] In practice in society, social acceptance often intertwines with religious validity. In Java generally, if a marriage is valid according to religion, it is assured of social acceptance. Social acceptance is inextricably tied up with avoiding social stigma when it comes to activities related to sexual intercourse. Thus, marriage acts as a social norm when it comes to regulating sexual relations. Especially in the case of teenage pregnancy, marriage is the only acceptable solution.[14] In addition, marriage also defines women's sexuality. Parker *et al*., for instance, have addressed the experience of being a *janda* (widow or divorcée) in Indonesia as a gendered and moral experience. They argue that the status of independent widows (*janda mati*) and divorcées (*janda cerai*) has been connected to immorality because it epitomizes the opposite to the constructions of an ideal marriage.[15]

If we now return to Fikri, we understand that his unregistered marriage has everything to do with how Sharia and the state law are perceived. His case is not uncommon and not exclusive to Indonesia. In many Muslim majority countries, we see similar tendencies. In Egypt, the tension between state law and religious law on marriage results in the practice of *'urfi* (customary) marriage.[16] Likewise, non-registration leads to *fātiḥa* marriage in Morocco.[17] It is clear that the participants in an unregistered marriage attach more importance to the Sharia than to the state law. They value the validity of a marriage

[13] Ziba Mir-Hosseini, *Marriage on Trial: Islamic Family Law in Iran and Morocco* (London and New York: I.B. Tauris, 2000), p. 145.

[14] Mies Grijns and Hoko Horii, 'Child Marriage in a Village in West Java (Indonesia): Compromises between Legal Obligations and Religious Concerns', *Asian Journal of Law and Society* (2018), p. 7.

[15] Lyn Parker, Irma Riyani, and Brooke Nolan, 'The Stigmatisation of Widows and Divorcees (janda) in Indonesia, and the Possibilities for Agency', *Indonesia and the Malay World*, vol. 44, no. 128 (2016), pp. 27–46.

[16] Mona Abaza, 'Perceptions of 'Urfi Marriage in the Egyptian Press', *ISIM Newsletter*, vol. 7 (2001), pp. 20–1.

[17] A marriage contract is signed at a ceremony which intertwines religious symbolism and rituals such as the recitation of the *Fatiha*, the first verse of the Koran, see Mir-Hosseini, *Marriage on Trial: Islamic Family Law in Iran and Morocco*, p. 32. It is often used to hide underage marriage, see Paul Scott Prettitore, 'Family Law Reform, Gender Equality, and Underage Marriage: A view from Morocco and Jordan', *Review of Faith and International Affairs*, vol. 13, no. 3 (Taylor & Francis, 2015), p. 39.

purely and simply from the perspective of Sharia. According to Sharia, marriage is crucial as it renders sexual relations between a man and woman licit.[18] Hallaq even argues that, in Islam, marriage is the key to maintaining social harmony and acts as the cornerstone of the entire Islamic order.[19]

In *Marriage on Trial*, Mir-Hosseini describes Sharia as still forming "the basis of family law, though reformed, codified and applied by a modern legal apparatus".[20] Furthermore, she argues that Islamic law, as divine law, has constituted "the backbone of Muslim society… ever since".[21] Meanwhile, those entering into an unregistered marriage regard registration as an invention of the modern state. Unregistered marriage demonstrates that there still is continuity in the tension between Sharia law and state law. According to Cammack, Islamic law emphasizes an exclusive divine sovereignty and claims revelation as its basic foundation, whereas the concept of nation-state tends to monopolize the law-making process through the doctrine of positivism.[22] The first is represented by *ulama*, while the later by a legislative body. Legislation has assumed the task of the classical *fiqh* tradition in the administration of the modern state.

The relationship between Sharia and state sovereignty in post-colonial Muslim societies has always featured as an important subject among legal anthropologists.[23] This is because in many societies people still feel traditional mechanisms (religious law, customary law

[18] Ziba Mir-Hosseini, 'Nikah', *Encyclopedia of Islam and the Muslim World* (New York: Macmillan, 2004), p. 510.

[19] Wael B. Hallaq, *Shari'a: Theory, Practice, Transformations* (Cambridge: Cambridge University Press, 2009), p. 271.

[20] Mir-Hosseini, *Marriage on Trial: Islamic Family Law in Iran and Morocco*, p. 8.

[21] *Ibid.*, p. 4.

[22] Mark Cammack, 'Islam, Nationalism and the State in Suharto's Indonesia', *Wisconsin International Law Journal*, vol. 17 (1999), pp. 27–63.

[23] There is an abundance of scholarly works which centre their discussion on the position of Sharia in the different nation-states. To mention some, Clark B. Lombardi, *State Law as Islamic Law in modern Egypt: The Incorporation of the Sharīʿa into Egyptian Constitutional Law* (Leiden: Brill, 2006); Morgan Clarke, *Islam and Law in Lebanon: Sharia within and without the State* (Cambridge: Cambridge University Press, 2018); Jan Michiel Otto (ed.), *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present* (Leiden: Leiden University Press, 2010).

and social organization) are sufficient to deal with disputes. Despite their stance, they are being challenged by new vigorous pressure exerted by the state authority whose aim is to sustain the concept of state sovereignty and citizenship. The incorporation of Sharia into the state law has caused conflict and tension and led to legal and political dissonance.[24] Regardless of this dissonance, on a practical level, the different legal bodies (Sharia law, state law and customary law) co-exist and relate to each other in an Islamic triangle, encompassing the changing relations between all of them.[25]

Indonesia, which is blessed with a myriad of local cultures, provides a pre-existing foundation on which Islamic law can be understood, practised and taken as a point of orientation by Muslims in multiple ways. Muslim society in Indonesia is crisscrossed by competing norms, social orders and claims about how people should live in an appropriately Islamized way and about what they should become.[26] Bowen sheds new light on the fact that Muslims are being challenged by competing legal systems in which negotiation is an irrevocable instrument in dealing with the incontrovertible involvement of state, judges, jurists and practitioners.[27] From his view, it is clear that negotiation is the key concept. At the same time, people are having to cope with the pressure caused by the significant growth in the demand for the greater participation of women in education and skilled employment,[28] for a redefinition of the rights and duties of

[24] Arskal Salim, *Challenging the Secular State: The Islamization of Law in Modern Indonesia* (Honolulu: University of Hawai'i Press, 2008), pp. 25–6.

[25] Léon Buskens, 'An Islamic Triangle: Changing Relationships between Sharia, State Law, and Local Customs', in *ISIM Newsletter*, vol. 5 (Leiden: Institute for the Study of Islam in the Modern World, 2000), p. 8.

[26] Franz Von Benda-Beckmann, *Property in Social Continuity: Continuity and Change in the Maintenance of Property Relationships through Time in Minangkabau, West Sumatra* (The Hague: Martinus Nijhoff, 1979); Franz Von Benda-Beckmann and Keebet Von Benda-Beckmann, 'Islamic law in a plural context: The struggle over inheritance law in colonial West Sumatra', *Journal of the Economic and Social History of the Orient*, vol. 55, no. 4/5 (2012), pp. 771–93.

[27] John R. Bowen, *Islam, Law, and Equality in Indonesia: An Anthropology of Public Reasoning* (Cambridge: Cambridge University Press, 2003).

[28] Linda Rae Bennett, *Women, Islam and Modernity: Single Women, Sexuality and Reproductive Health in Contemporary Indonesia* (London and New York: RoutledgeCurzon, 2005).

women and men and to promote the equality of women. This new trend has challenged the perceived understanding of Islamic law and traditional scriptural interpretations. In this context, Nancy Smith-Hefner has underscored that the changes taking place among urban, educated Muslim Javanese youth are also influenced by growing ideas about individual autonomy and increasing agency. The growing agency of women has opened up many possibilities and is guiding their actions in their quest to find solutions which will support their ideal of a better life.[29]

On the basis of this background, my thesis addresses these questions: *How does the Indonesian state regulate Muslim marriage*? *How do people practise and negotiate the state regulations on Muslim marriage, in the light of the variety of norms imposed on them*? *How do local officials deal with their practices*? *What role do intermediaries play in this process, in East Java particularly*? In an attempt to answer these key questions, the thesis first elucidates how the Indonesian state governs Muslim marriages. Since the early days of Independence, the government of Indonesia has included marriage, divorce and reconciliation among Muslims in its steady march towards greater bureaucratization. However, as in practice bureaucratization is not static but develops over time, this study hence investigates what legal reforms the state has set in motion, how local officials interpret and implement the state law, how religious leaders respond to these legal reforms, how the practices adopted by Muslims reveal their responses, how state officials deal with their practices and in what ways intermediaries play a role in this process. To understand how local society responds to these legal reforms, this thesis examines marriage practices in a Muslim community in Pasuruan, East Java.

By looking at local practices in Pasuruan, this thesis aims to offer a critical perspective on the relationship between locally based legal norms and the modern legal norms promoted by the state. This is because the state has tried and tested various ways to deal with

[29] Nancy J. Smith-Hefner, 'The New Muslim Romance: Changing Patterns of Courtship and Marriage Among Educated Javanese Youth', *Journal of Southeast Asian Studies*, vol. 36, no. 3 (2005), pp. 441–59.

Muslim marriage in its attempts to realize a modern interpretation of the 'common good'. However, Muslims have, and necessarily maintain, their own interpretation of how the 'common good' should be articulated in marriage. The bulk of their understanding is derived from religious texts or other cultural norms and emerges from a lived engagement with a multitude of ideas, expectations and local norms. In this framework, this thesis employs 'everyday practice', an important analytical category, in its attempt to take "a more nuanced look at Muslims' religious lives"[30] without incurring any unnecessary dichotomies. Employing this approach, I examine people's involvement in and experiences of marriage legality and subject these to interpretations.

This study suggests that, in Indonesia, the relationship between the state and religion is not a matter of competition but of mutual adjustment. It cannot be claimed that there is any clear-cut competition between religious law and state law. Of course, there is a certain segment of religious leaders who do oppose the state law, mainly those who reject the foundation of the nation-state, but the majority accept both the state and the state law. There are two conditions which explain why the former have chosen to resist. The first occurs when they think the state law really goes against fundamental tenets laid down in Sharia or when the state law introduces something explicitly impermissible according to Sharia, such as allowing same sex marriage or totally prohibiting polygyny. However, this would seem to be nearly impossible in Indonesia because, to a large extent, the legal reforms have scrupulously taken into account what is permissible and impermissible according to Sharia. In most cases, and this is the second form of resistance, when the state law is too rigid to deal with particular practices which are socially acceptable, religious law offers a way out. People assume that religious law offers a version of *maṣlaḥa* (common good) which has the virtue of flexibility, especially in tackling problems of sexual morality

[30] Samuli Schielke and Liza Debevec, 'Introduction', in *Ordinary lives and grand schemes: an anthropology of everyday religion*, ed. by Samuli Schielke and Liza Debevec (New York and Oxford: Berghahn Books, 2012), p. 4.

such as *zina* and teenage pregnancy. In this case, marriage is the only acceptable solution. Because marriage is perceived in society as a religious ceremony, religious law is required.

Another point which this study suggests is that the state's attempt to reform both Muslim marriage law and its own marriage bureaucracy has maintained the significance of informality in the legal implementation. This informality is important as it offers the capacity to make a compromise between people's deep interest in religious law and state law. It opens a door for the roles played by informal actors in helping ordinary people simultaneously negotiate their desire to observe their religion with all propriety and to seek state recognition. On the central state level, this informality is frowned upon as it makes inroads into the government's ideas of establishing clean governance.

2. Marriage, Religion and the State

For the majority of religious people, marriage is "more than a mere contract". It exceeds the compass of a private contract between two individuals. It serves as an important familial, communal, even spiritual event. They are completely convinced that the appropriate legal confirmation of a marriage requires more than just compliance with the state procedural forms of registration. It definitely requires a religious ceremony held before a qualified official who solemnizes the union and before a community who witness the new couple commencing a new chapter in their lives together.[31] Because these communal and religious dimensions of marriage are more important to so many people than the formally conferred civil status, the relationship between the state procedures and the religious law is an unresolved topic of debate. This persisting tension means that the relationship between the two is a recurring theme in the study of Islamic law and society.[32] The relationship between them is key to

[31] Joel A. Nichols, 'Religion, Family Law, and Competing Norms', in *Negotiating State and Non-State Law: The Challenge of Global and Local Legal Pluralism*, ed. by Michael A. Helfand (Cambridge: Cambridge University Press, 2015), p. 198.

[32] Baudouin Dupret, 'Legal Pluralism, Plurality of Laws, and Legal Practices: Theories, Critiques, and Praxiological Re-specification', *European Journal of Legal Studies*, vol. 1, no. 1 (2007), pp.

understanding the varied dimensions of Muslim practice in Indonesia. It is therefore important to understand the position of Sharia, *fiqh* and the state in Indonesian life.

Sharia, *fiqh* and the state law interrelate with each other at certain points. Sharia has been set down by God to be obeyed by Muslims.[33] Literally Sharia means "way", "path" or "the road to a watering place".[34] It is, therefore, defined as God's law, setting out the way of life a Muslim should follow. However, many Muslim scholars choose to emphasize the legal side of Sharia.[35] Although Sharia can be said to contain law, it embraces also elements and aspects which are not, strictly speaking, law.[36] The next concept is *fiqh*. While Sharia comes from God through the verses of the Qur'an, *fiqh* (which literally means understanding) is the interpretations made by human beings of those Qur'anic legal verses which have imprecise, multiple meanings. Therefore, *fiqh* is relative and subjective and varies according to the reasoning of different individuals. Differing opinions among jurists are inescapable.

The last is state 'Islamic' law. Summing this up in rather simple terms, it is a codification of Sharia or *fiqh* and is limited to a particular aspect of them. Of course, this position assumes the key role of the state in the legislation. Lombardi remarks that, under certain conditions, a government could legitimately impose its preferred understanding of God's law and hence could force its citizens to observe the government's interpretation in preference to their own interpretations.[37] However, it is impossible to ignore that there is still room for a Muslim to choose potential rules of behaviour rooted in an interpretation of God's law. Arabi came up with the idea of

1–26; Arskal Salim, *Contemporary Islamic Law in Indonesia: Shari'ah and Legal Pluralism* (Edinburgh: Edinburgh University Press, 2015).

[33] Qur'an 45: 18.

[34] Joseph Schacht, 'Shari'a', in *First Encyclopedia of Islam*, ed. by M. Th. Houstma et al. (Leiden: Brill, 1987), pp. 320–4.

[35] Salim, *Challenging the Secular State: The Islamization of Law in Modern Indonesia*, p. 11.

[36] Bernard G. Weiss, *The Search for God's Law: Islamic Jurisprudence in the Writing of Saif al-Dīn al-Āmidī* (Salt Lake and Herndon: University of Utah Press and International Institute of Islamic Thought, 2010), p. 1.

[37] Lombardi, *State Law as Islamic Law in modern Egypt: The Incorporation of the Sharīʿa into Egyptian Constitutional Law*, p. 19.

positivization, that is, the process of the integration of Sharia into the modern state political structure, which is allowed from a religious perspective as long as not it does not lead to the abandoning of the ethical and religious spirit of Islam.[38] The boundaries of where the state can impose its interpretation are if it does not command Muslim citizens to disobey God and if the law is expected to advance the welfare of the citizens. [39]

2.1. Sharia in the Nation-State

According to Hallaq, the introduction of the nation-state and the way it should deal with Sharia has been the most ubiquitous problem in the legal history of the modern Muslim world.[40] For centuries, Sharia, an intricate notion which comprises God's commands,[41] has reigned supremacy in Muslim societies.[42] Nevertheless, a considerable debate has arisen over how Sharia law as prescribed in the classical treatises should respond to the changing social life and adjust its management of social order. Different legal interpretations in Sharia make it difficult to present a unified language of law and to produce more decisive rules devised to create legal certainty. The local political powers have had the right to make and apply rules and regulations in an indirect initiative to provide "uniformity of the law" among different legal

[38] Oussama Arabi, *Studies in Modern islamic Law and Jurisprudence* (The Hague: Kluwer Law International, 2001), p. 194.
[39] Lombardi, *State Law as Islamic Law in modern Egypt: The Incorporation of the Sharīʿa into Egyptian Constitutional Law*, p. 19.
[40] Hallaq, *Shari'a: Theory, Practice, Transformations*, p. 359.
[41] Rudolph Peters, 'From Jurists' Law to Statute Law or What Happens When the Shari'a is Codified', *Mediterranean Politics*, vol. 7, no. 3 (2002), pp. 82–95; Aharon Layish, 'The Transformation of the Sharīʿa from Jurists' Law to Statutory Law in the Contemporary Muslim World', *Die Welt des Islams*, vol. 44, no. 1 (2004), pp. 85–113; Salim, *Challenging the Secular State: The Islamization of Law in Modern Indonesia*, pp. 13–4.
[42] Early in the ninth century, Sharia was the greatest subject of Islamic scholarship. Renowned as *fiqh* (literally *al-fahm* (Arabic) or understanding), it represents the intellectual efforts of Muslim jurists to understand the legal substance written in the holy texts. This intellectual enterprise, comprising a set of norms, commentaries and stipulations and laid down in the works of classical-medieval Muslim jurists, eventually developed into an established system of Islamic legal scholarship. Hallaq, *Shari'a: Theory, Practice, Transformations*..

schools.[43] This legal-cum-political right of the ruler, popularly known as *siyāsa shar'iyya*, has grown into an important instrument by which such a leader can advance his judicial authority. In practice, *siyāsa shar'iyya* granted the ruler the authority to legislate as a complement to Sharia law when the religious texts offered no opinion about a certain matter. New courts could be created as long as considered necessary for the attainment of the public good.[44] This judicial authority also required the incorporation of religious piety and knowledge of Sharia.

As a consequence, the formation of state Islamic law has involved power relations and encompassed the multifaceted social, political and legal narratives in society over the last two centuries.[45] Scholars have indicated that the core of the problem of dominant influence of European modernity in the shaping of Islamic legal institutions has meant a struggle in power relations. Religious authorities could be replaced by the state power in the administration of private affairs. Hallaq argues that, because the state has played powerful roles in controlling the direction of Sharia, it has diminished the institutional independence of religious scholars to formulate a legitimate interpretation of Sharia.[46] In other words, Sharia has been moving towards its demise in the light of the shifts in the conception of legal authority introduced by the modern nation-state. Nevertheless, many authors have shown that the codification of Islamic law still allows different legal opinions within Islam to struggle to find a true articulation of Sharia.

The modern legal approach, characterized by a tendency towards a hierarchical, administrative understanding of the law has heavily

[43] Layish, 'The Transformation of the Sharīʿa from Jurists' Law to Statutory Law in the Contemporary Muslim World', pp. 87–8.
[44] Frank E. Vogel, *Islamic Law and Legal System Studies of Saudi Arabia* (Leiden/Boston: Brill, 2000), pp. 173–4.
[45] Iza R. Hussin, *The Politics of Islamic Law: Local Elites, Colonial Authority, and the Making of the Muslim State* (Chicago and London: The University of Chicago Press, 2016), p. 7.
[46] Wael B. Hallaq, 'Can the Shari'a be Restored?', in *Islamic law and the challenges of modernity*, ed. by Yvonne Y. Haddad and Barbara F. Stowasser (Walnut Creek: Altamira Press, 2004), pp. 21–53.

influenced the legal conceptions in Sharia.[47] The very moral values and legal elements enshrined in religious law have been turned into a more restrictive administrative state code. Furthermore, the fact that the idea of legal reform derives from the rise of Western scholarship in Islamic law has had the consequence of leading to a misunderstanding of how Islamic normativity ought to function in the legal reform process.[48] In efforts to avoid this misunderstanding, it is likely that a state has involved local religious scholars to provide legal framing and justification. The state power and religious authorities have worked together to make a selection of wide-ranging jurists' laws. At least two consequences have become apparent, despite the fact that the legislation has been no more than codifying preferred *fiqh* doctrines. Firstly, religious scholars have experienced a struggle to reach an authoritative legal interpretation within their own circle. Secondly, despite the involvement of the traditional Islamic jurists in preparing the contents, there have been persistent challenges to the state's authority to legalize religious law. The legitimacy of legislated Islamic law has emerged as a question because the ultimate decision about the content of the codification has lain in the hands of the state political power.

That said, in scholarly terms, the institutionalization of Sharia which has taken place in Muslim majority states, including Indonesia, has been a political and practical encounter.[49] This situation is not exclusive to Indonesia. Buskens has noted that the making of Moroccan family law has involved the public and the political debates.[50] In relation to this, Hallaq argues that the transformation of Sharia into

[47] Mohammad Fadel, 'State and Sharia', in *The Ashgate Research Companion to Islamic Law*, ed. by Rudolph Peters and Peri Bearman (Surrey, England: Ashgate, 2014), p. 94.
[48] Léon Buskens, 'Sharia and the Colonial State', in *The Ashgate Research Companion to Islamic Law*, ed. by Rudolph Peters and Peri Bearman (Surrey, England: Ashgate, 2014), p. 212.
[49] Léon Buskens, 'Recent Debates on Family Law Reform in Morocco: Islamic Law as Politics in an Emerging Public Sphere', *Islamic Law and Society*, vol. 10, no. 1 (2003), p. 71; Léon Buskens and Baudouin Dupret, *The Invention of Islamic Law: A History of Western Studies of Islamic Normativity and Their Spread in the Orient*, ed. by Jean-Claude Vatin and François Pouillion (Leiden: Brill, 2014), p. 47.
[50] Buskens, 'Recent Debates on Family Law Reform in Morocco: Islamic Law as Politics in an Emerging Public Sphere', p. 123.

law results in what he termed "great synthesis".[51] This expression means that Islamic law has incorporated two aspects: traditionalism, that is, the ideas and norms indicated in the sacred texts, the Quran and prophetic traditions, and rationalism in the forms of scholarly consensus and analogical reasoning. A negative side to this legal-political process is that it has diminished the open scholarly discourse of Sharia[52] with respect to the pre-existing different *fiqh* schools (*madhhab*).

The legal reform of Islamic personal status (*al-aḥwāl al-shakhṣiyya*) in Indonesia has been far-reaching,[53] although it has involved the contesting of divergent religious and non-religious outlooks. Various scholars have contributed to our insights into particular contexts of this contestation. Jan Michiel Otto has argued that, despite the use of Sharia as the basis of the Indonesian marriage law, some provisions in it have encroached upon the patriarchal norms of classical doctrine.[54] Cammack has commented that the codifying of the law of the Islamic court has created an unstable accommodation between the modernists and the traditionalists in Islam and has changed the government's attitude towards Islam.[55] Furthermore, Hefner has also remarked that Sharia has been an arena of contestation in Indonesian society. These remarks suggest that Sharia is not a singular interpretation, but is composed of understandings which

[51] Wael B. Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge: Cambridge University Press, 2005), p. 122.
[52] Léon Buskens, 'A Medieval Islamic Law? Some Thoughts on the Periodezation of the History of Islamic Law', in *O ye Gentlemen: Arabic Studies on Science and Literary Culture. In Honour of Remke Kruk*, ed. by A. Vrolik and J.P. Hogendijk (Leiden: Brill, 2007), p. 472.
[53] Bowen, *Islam, Law, and Equality in Indonesia: An Anthropology of Public Reasoning*; Euis Nurlaelawati, *Modernization, Tradition and Identity: The Kompilasi Hukum Islam and Legal Practice in the Indonesian Religious Courts* (Amsterdam: Amsterdam University Press, 2010); Mark Cammack, 'The Indonesian Islamic judiciary', in *Islamic Law in contemporary Indonesia: Ideas and institutions*, ed. by R. Michael Feener and Mark Cammack (Cambridge (Mass): Harvard University Press, 2007), pp. 146–69.
[54] Jan Michiel Otto, 'Sharia and national law in Indonesia', in *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present*, ed. by Jan Michiel Otto (Leiden: Leiden University Press, 2010), pp. 433–90.
[55] Mark Cammack, 'Indonesia's 1989 Religious Judicature Act: Islamization of Indonesia or Indonesianization of Islam?', *Indonesia*, vol. 63, no. April (1997), pp. 143–68.

derive from complicated factors, including conservative religious orthodoxy and *maqāṣid* (higher aims)-based approaches to Sharia.[56]

2.2. State Law

In the early years after Independence, the Indonesian state devoted most of its attention to the administration of civil private matters. Hence, it was in this period that marital relations came under the control of the state and this shift has led to political and religious debates over the last four decades.[57] A key turning-point has been the enactment of the Marriage Law in 1974.[58] This Law made family relations subject to the state by requiring civil registration, although the substantive rules of the Law were still influenced by religious doctrines.

The contest between religious law and the state law on marriage has resulted in a number of compromises. They include the legal obligation of marriage registration, the regulation of the minimum ages at which marriages can be performed, polygyny and the role of the judiciary in family law matters. The Law conceptualizes marriage at the crossroads between religious precepts and state administration.[59] The Law decrees that a marriage can only be valid

[56] Robert W. Hefner, 'Sharia Law and Muslim Ethical Imaginaries in Modern Indonesia', in *Sharia Dynamics: Islamic Law and Sociopolitical Processes*, ed. by Timothy P. Daniels (Cham: Springer International Publishing, 2017), pp. 91–115.

[57] Mark Cammack, Lawrence A. Young, and Tim B. Heaton, 'Legislating Social Change in an Islamic Aociety: Indonesia's Marriage Law', *The American Journal of Comparative Law*, vol. 44, no. 1 (1996), pp. 45–74; Mark Cammack, Helen Donovan, and Tim B. Heaton, 'Islamic Divorce Law and Practice in Indonesia', in *Islamic Law in Contemporary Indonesia: Ideas and Institutions*, ed. by R. Michael Feener and Mark Cammack (Cambridge, MA: Harvard University Press, 2007), pp. 99–127.

[58] Kate O'Shaughnessy, *Gender, State and Social Power in Contemporary Indonesia: Divorce and Marriage Law* (London and New York: Routledge, 2009); Smith-Hefner, 'The New Muslim Romance: Changing Patterns of Courtship and Marriage Among Educated Javanese Youth'.

[59] Cammack, Young, and Heaton, 'Legislating Social Change in an Islamic Aociety: Indonesia's Marriage Law'; June S. Katz and Ronald S. Katz, 'Legislating Social Change in a Developing Country: The New Indonesian Marriage Law Revisited', *American Journal of Comparative Law*, vol. 26, no. 2 (1978), pp. 309–20.

after it has been performed according to the precepts of the religion of the bride and groom. Conformity with religious prescription is a must and unavoidable. However, in addition to religious compliance, a marriage needs to be authorized by the state, which is done by the act of registration.[60] The contest between religion and the state in divorce is not as strong as that in marriage. Women in Indonesia often have no choice but to go to court to petition for divorce or to request a divorce decree or certificate,[61] as they have to depend on the state authority to declare their divorced status. As a consequence, those who wish to obtain a divorce extra-judicially also have to go to court if they want to obtain a formal divorce certificate.

Legal and human rights approaches are often brought into play to support the substance of marriage registration.[62] The problems caused by unregistered marriage, for instance, have been closely connected with violations against the rights of women and children born out of legal wedlock. This approach is in line with the general orientation of the legal reform after the political transition in 1998, albeit it has had a less revolutionary impact on Islamic family law, which has strengthened the continuing improvement of the position of women in the matrimonial sphere.[63] Nonetheless, public debates about it still revolve around the contest between 'religious validation' and 'legal authorization'. This tendency features very strongly in the *fatwa* discourse.

Apart from what has just been described, various issues and cases relating to family law have to do with how the legal norms imposed by the state are interpreted, practised and negotiated by legal actors, be

[60] Nani Soewondo, 'The Indonesian Marriage Law and its Implementing Regulation', *Archipel*, vol. 13 (1977), pp. 283–94.
[61] Euis Nurlaelawati, 'Muslim Women in Indonesian Religious Courts: Reform, Strategies, and Pronouncement of Divorce', *Islamic Law & Society. 2013*, vol. 20, no. 3 (2013), p. 256.
[62] Jayne Curnow, 'Legal Support Structures and the Realisation of Muslim Women's Rights in Indonesia', *Asian Studies Review*, vol. 39, no. 2 (Routledge, 2015), pp. 213–28; Ingrid Westendorp, 'Personal Status Law and Women's Right to Equality in Law and in Practice: The Case of Land Rights of Balinese Hindu Women', *Journal of Human Rights Practice*, vol. 7, no. 3 (2015), pp. 430–50.
[63] Mark Cammack, Adriaan W. Bedner, and Stijn van Huis, 'Democracy, Human Rights, and Islamic Family Law in Post-Soeharto Indonesia', *New Middle Eastern Studies*, vol. 5 (2015), pp. 1–32.

they judges, litigants or lawyers. Facts emerging from court hearings, judges' decisions and court reports have been the source of many heated debates in Indonesia. The problem revolves around how a judge of the Islamic court, bound by state laws, refers to a normative understanding of classical *fiqh* treatises or how he goes about adopting norms to introduce change into local practicalities.

My study finds that, in terms of marital administration, the government has endeavoured to initiate legal changes through the civil administration. Acutely aware of the fact that any proposal for legal reform is always sure to spark controversy, the government has thought it best to begin to approach Muslim marriage within the framework of citizens' rights. Hence, the government does not deal with the legal status of a marriage directly, but with the consequence of an altered legal status to the rights which a citizen can claim (Chapter 1). This shift has enabled the government to improve the efficacy of its marriage bureaucracy and encouraged people to depend more fully on its authority in seeking to arrange their marital affairs. Nevertheless, this effort has not succeeded in entirely changing people's behaviour in particular societal contexts (Chapter 5).

Alongside the role of the civil administration in this direction, Islamic courts have also remained a significant factor in helping women obtain their rights. Studies done by John Bowen,[64] Stijn van Huis[65] and Euis Nurlaelawati[66] have indicated the important role played by Islamic courts in protecting the rights of women. Bowen notes "…but judges on Islamic and civil courts alike have tried to balance claims made in the name of Islam against those made in the name of *adat*…".[67] Studying legal cases in the Isak community in Aceh, Bowen arrived at the conclusion that judges in both public and Islamic

[64] Bowen, *Islam, Law, and Equality in Indonesia: An Anthropology of Public Reasoning*, p. 6.
[65] van Huis, 'Islamic Courts and Women's Divorce Rights in Indonesia: The Cases of Cianjur and Bulukumba'.
[66] Nurlaelawati, 'Muslim Women in Indonesian Religious Courts: Reform, Strategies, and Pronouncement of Divorce'; Nurlaelawati, *Modernization, Tradition and Identity: The Kompilasi Hukum Islam and Legal Practice in the Indonesian Religious Courts*.
[67] Bowen, *Islam, Law, and Equality in Indonesia: An Anthropology of Public Reasoning*, p. 6.

courts have translated cultural ideas of fairness and agreement, namely social consensus, into their justification of gender equality.

Furthermore, focusing on the functioning of Islamic courts in West Java and South Sulawesi, Stijn van Huis has argued that, despite the different political landscapes in these two areas, Islamic courts demonstrate the same tendency towards granting a divorce on the concept of a 'no-fault divorce', in which the judges adopt a lenient approach towards divorce. This change means that women now have an equal position in divorce proceedings irrespective of their social position. Even more importantly, Islamic courts now have enough room to create legal changes through reinterpretations of Islamic concepts in judicial processes.[68] Nevertheless, this positive development does not necessarily determine the future of legal reform. Any legal reforms still need to maintain certain normative boundaries in the judicial tradition of Islamic courts if they are to be accepted. Nurlaelawati, who studied the use of the KHI by judges in Islamic courts, found that the judges are often inclined to go along with the interests of those seeking justice in the courts and their attitude means that transgressions against the rules interpreted by the State are unavoidable.[69]

The key role played by Islamic courts is evident in other Muslim countries too. In the context of 'progressive' Tunisian family law, Maaike Voorhoeve has argued that the state-promoted family law is relative, since there is a wide diversity in its application. Judicial discretion also still exists on different levels.[70] In the Egyptian context, Lindbekk has suggested that judicial practice in divorce shows a move towards an increased standardization in the implementation of family law because of a closer unity between state law and religious morality and this is advantageous to the interests of women. What I can

[68] van Huis, 'Islamic Courts and Women's Divorce Rights in Indonesia: The Cases of Cianjur and Bulukumba', p. 263.
[69] Nurlaelawati, *Modernization, Tradition and Identity: The Kompilasi Hukum Islam and Legal Practice in the Indonesian Religious Courts*, p. 224.
[70] Maaike Voorhoeve, 'Judicial Discretion in Tunisian Personal Status Law', in *Family Law in Islam: Divorce, Marriage and Women in the Muslim World*, ed. by Maaike Voorhoeve (London: I.B. Tauris, 2012), pp. 199–229.

pinpoint from these studies is the increasing roles played by the state agencies in protecting the legal status and the rights of women. My study also confirms these findings when it examines the quest for the state recognition of unregistered marriages (Chapter 6).

By contrast, O'Shaughnessy, who studied divorce cases in Indonesia from 1974 to 2005 on the basis of court reports and printed sources, arrived at very different conclusions. She argues that the Marriage Law was designed to discourage divorces, by making not only the terms for acceptance in courts but also their administration more complicated. O'Shaughnessy has concluded that women's divorces during and post-Soeharto era could be construed as a threat to the state power's ideology of marriage and family. She said "divorce was publicly and legally constructed as a menace to local and national stability".[71] I do agree with Bowen's, van Huis' and Nurlaelawati's arguments on the roles of Islamic courts in protecting women's rights. By contrast, I find O'Shaughnessy's conclusion is a bit exaggerated. My findings suggest that judicial divorce is not a danger to social stability. Instead, by seeking judicial divorces women are able to define their legal status and to claim citizens' rights and obtain proper access to state services.

Researchers have also paid attention to the question of the extent to which a Muslim marriage is linked up to people's orientations on the understanding of what constitutes a proper marriage, especially on the micro-Muslim community level. In social practice, religious laws have been given priority, while local cultures (*adat*) are also often entangled with Islamic tenets.[72] Many studies on child marriage,[73] marriage and

[71] O'Shaughnessy, *Gender, State and Social Power in Contemporary Indonesia: Divorce and Marriage Law*, p. 199.

[72] Harry J. Benda, 'The Structure of Southeast Asian History: Some Preliminary Observations', *Journal of Southeast Asian History*, vol. 3, no. 1 (1962), p. 120; M.B. Hooker, *Islamic Law in Southeast Asia* (Singapore: Oxford University Press, 1984), pp. 8–15; Kristine Kalanges, *Religious Liberty in Western and Islamic law: Toward a World Legal Tradition* (Oxford: Oxford University Press, 2012), p. 4.

[73] Grijns and Horii, 'Child Marriage in a Village in West Java (Indonesia): Compromises between Legal Obligations and Religious Concerns'.

religion,[74] marriage among educated urban Muslim teenagers[75] and informal marriage and gender[76] have proposed the centrality of religious law. Summing up their study of child marriage, Grijns and Horii concluded that the continuing practice of child marriage is sustained by religious interpretations made by conservative Muslim groups in their efforts to deal with adolescent sexuality. In line with this argument, Nisa emphasizes that religious piety and religious homogamy continue to be important factors which shape marriage in certain Muslim communities. Bianca Smith, who studied divorce among women who live in *pesantren,* remarked that these women possess religious capital which allows them to avoid the state law on marriage.[77] In this *pesantren*, these women petitioned divorce informally and remarried in an Islamic manner, outside the formal procedure.

Moreover, Platt has explored the reasons the Marriage Law as a project of modernity has failed to make an impact in the Indonesian island of Lombok. The variety of women's experiences she has come across indicates the centrality of community-based law in shaping the marital trajectories for women.[78] Her finding of the centrality of community-based law is very relevant to my study. In terms of the everyday practice of marriage in the community I am studying, I found a similar tendency to accord religious norms and the fundamental roles played by informal actors, namely *kyai* and *pengarep* (Chapter 4).

[74] Eva F. Nisa, 'Marriage and Divorce for the Sake of Religion: The Marital Life of Cadari in Indonesia', *Asian Journal of Social Science*, vol. 39, no. 6 (2011), pp. 797–820; Myengkyo Seo, 'Falling in Love and Changing Gods: Inter-religious marriage and religious conversion in Java, Indonesia', *Indonesia and the Malay World*, vol. 41, no. 119 (2013), pp. 76–96.
[75] Smith-Hefner, 'The New Muslim Romance: Changing Patterns of Courtship and Marriage Among Educated Javanese Youth'.
[76] Platt, *Marriage, Gender and Islam in Indonesia: Women Negotiating Informal Marriage, Divorce and Desire*.
[77] Bianca J. Smith, 'Sexual desire, piety, and law in a Javanese pesantren: Interpreting varieties of secret divorce and polygamy', *Anthropological Forum*, vol. 24, no. 3 (2014), pp. 37–41.
[78] Platt, *Marriage, Gender and Islam in Indonesia: Women Negotiating Informal Marriage, Divorce and Desire*, p. 148.

2.3. The Bureaucratization of Muslim Marriage

The bureaucratization of Muslim marriage by requiring its registration should be looked at as one of the ways in which the state is implementing its ideas of legal validity. Undeniably, the government's intervention in marriage through this push towards bureaucratization has been regarded by women's groups as a significant move to emancipate family law.[79] Nisa has argued that the issue of legal marriage has consistently presented a major problem for the government[80] and the frequency of unregistered marriage "has been the real test of the bureaucratization of religion in Indonesia."[81] In its efforts to achieve a balance, the government's efforts to accommodate people's understandings of Islam has led it to occupy an ambiguous position on the issue of unregistered marriages.

Numerous scholars have delved into this issue. Dominik Muller has defined the bureaucratization of religion (Islam) as the ways "state actors have empowered state-funded 'administrative' bodies in diverse ways to guide and influence Islamic discourses and regulate matters of religion and morality in the public sphere in accordance with their political interests."[82] Researching religious education in Egypt, anthropologist Gregory Starrett argues that, when it imposes bureaucratic categories, the state not only objectifies religion, it also functionalizes religion. This functionalization refers to "processes of translation in which intellectual objects from one discourse come to serve the strategic or utilitarian ends of another discourse".[83] Of course, this begs the question of what purposes and whose interests

[79] June S. Katz and Ronald S. Katz, 'The New Indonesian Marriage Law: A Mirror of Indonesia's Political, Cultural, and Legal Systems', *American Journal of Comparative Law*, vol. 23, no. 4 (1975), pp. 653–81; Siti Musdah Mulia and Mark Cammack, 'Toward a Just Marriage Law: Empowering Indonesian Women through a Counter Legal Draft to the Indonesian Compilation of Islamic Law', in *Islamic Law in Contemporary Indonesia: Ideas and Institutions* (Cambridge, MA: Harvard University Press, 2007), pp. 129–145.

[80] Nisa, 'The Bureaucratization of Muslim Marriage in Indonesia', p. 309.

[81] *Ibid.*, p. 291.

[82] Dominik M. Müller, *The Bureaucratization of Islam and its Socio-Legal Dimensions in Southeast Asia: conceptual contours of a research project*, no. 187 (Halle, 2017), p. 2.

[83] Gregory Starrett, *Putting Islam to Work: Education, Politics, and Religious Transformation in Egypt* (Berkeley: University of California Press, 1998), p. 9.

the bureaucratization of Islam serves.[84] For their part, Sezgin and Künkler argue that governments are interested in managing religion for socio-economic and social-engineering purposes.[85] These ideas about the bureaucratization of Islam are helpful in understanding the political dimension of actors involved in marriage registration whom I present in Chapter 5.

In the end, the bureaucratization of Muslim marriage is invariably concerned with how the state interacts with *ulama* in a given setting. We know from Stijn van Huis's study that, in West Java in the mid-nineteenth century, a symbiotic relationship between the colonial state, the indigenous *priyayi* (social elite) rulers and the landowning class of *kyai* (traditional religious leaders) came to an end when the colonial government tried to increase its control of the autonomous *kyai*. This inevitably led to a tense relationship between the *kyai* on the one hand and the colonial government and the *priyayi*, including the *penghulu*, on the other.[86] Despite their predicament, the *kyai* managed to maintain their position, lived in rural areas and continued to enjoy their status as the social elite. They commenced a social process of making a distinct community and of producing a certain type of Islamic understanding. After Indonesia declared its Independence, the Ministry of Religious Affairs tried to incorporate *kyai* into its ranks, but it did not manage to change their autonomous behaviour in their dealings with everyday religious matters significantly, since many of them still viewed the state institutions as competition to their religious authority.

Examining this relationship has led Nurlaelawati to a different conclusion, namely: that state *penghulu* and their KUA (Kantor Urusan Agama, Office of Religious Affairs), an office on a sub-district level which deals with Muslim marriage registration, have been an agency

[84] Mirjam Künkler, 'The Bureaucratization of Religion in Southeast Asia: Expanding or Restricting Religious Freedom?', *Journal of Law and Religion*, vol. 33, no. 2 (2018), p. 193.
[85] Yüksel Sezgin and Mirjam Künkler, 'Regulation of Religion and the Religious: The Politics of Judicialization and Bureaucratization in India and Indonesia', *Comparative Studies in Society and History*, vol. 56, no. 2 (2014), p. 472.
[86] Read chapter 5 of van Huis, 'Islamic Courts and Women's Divorce Rights in Indonesia: The Cases of Cianjur and Bulukumba'.

which intermediates the relationship between *ulama* and the Islamic courts. The KUA officials, she argues, consider themselves the guardians of Sharia and of the interpretations of *ulama* rather than as state officials. The upshot has been that the KUA's views on marital problems are rooted in local society.[87] However, my study seems to confirm van Huis's remarks. Rather than taking sides with the *kyai*, *penghulu* stands firmly on the side of the state and does not act as the bridge between *ulama* and the Islamic court. As a result, some *kyai* have still preserved their own perception of religion and have challenged the state law when they consider that it has interfered too much in people's religious life (Chapter 4 and Chapter 5).

In this study, my goal is to understand how the state agencies interpret and implement the state laws on marriage. Therefore, I look at the roles played by *penghulu* and the whole everyday bureaucracy of the KUA. Besides my interest in the state *penghulu*, I also analysed the position of *modin* (village religious officials dealing with Muslim marriage) who, in my opinion, act as the fundamental informal actors. I use street-level bureaucrats to represent both *penghulu* and *modin*. In terms of Muslim marriage, they are frontline officials who interact directly with Muslim citizens and function as an essential link between the government and the people.[88]

Modin are responsible for intermediating for people with both the state law and religious law. In other words, *modin* assist in adjusting people's religious orientation towards the state law. In terms of marriage administration, *modin*, who were appointed by village head used to work as PPPN or P3N (Pembantu Petugas Pencatat Nikah, assistant to the marriage registrar). Their main task was to assist the work of PPN or P2N (Petugas Pencatat Nikah, marriage registrar) who is the head of the KUA. In the last few years, the position of the *modin* as P3N has been discharged by the government (Chapter 2). However,

[87] Nurlaelawati, *Modernization, Tradition and Identity: The Kompilasi Hukum Islam and Legal Practice in the Indonesian Religious Courts*, p. 189.
[88] Michael Lipsky, *Street-Level Bureaucracy: Dilemmas of the Individual in Public Services* (New York: Russell Sage Foundation, 2010), p. 3.

the loss of their legal status as P3N has not really affected their socially acknowledged roles in the marriage ceremony (Chapter 5).

Furthermore, I also look at the judicial practices in the local Islamic court and examine how judges deal with a socially disruptive problem like *isbat nikah* (retrospective authentication of marriage) for unregistered or informal marriages. *Isbat nikah* is a judicial procedure introduced by the KHI which allows people to legalize their unregistered marriages retroactively. Upon the approval of *isbat nikah*, unregistered marriages turn into legal marriages (*nikah resmi*).

The relationship between legal norms and agencies in a Muslim marriage on different levels of society is visualized in the following diagram:

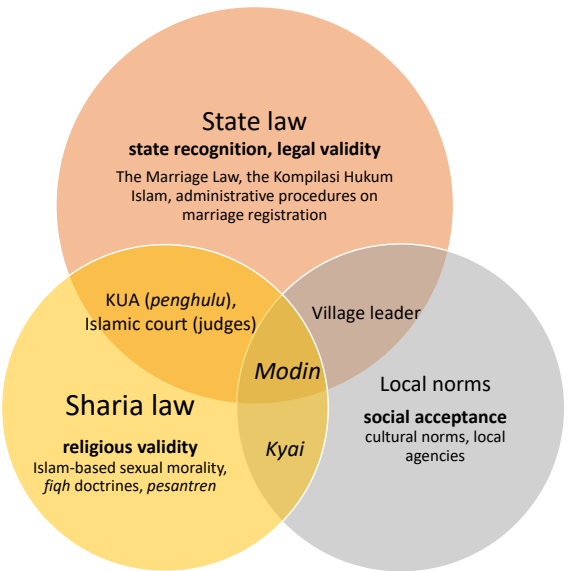

Figure 0.1. The relationship between legal norms and agencies in Muslim marriage in Indonesia

3. Research Focus

This study deals first and foremost with the practical dimensions of Muslim marriage and their bureaucratization. Before launching into it, it is important to explain how I have approached Islamic law on

marriage. This thesis regards Islamic law on marriage as a system of norms constructed and transformed over historical time by the activities of individuals as well as by larger social processes. This approach follows Dupret's assertion that Islamic law is found not only in the diverse legacy of Sharia and *fiqh* treatises, but also in what people, Muslims in particular, think about Islamic law. The task of researchers, in his view, is not to make a claim about whether or not people's conception and practices are in compliance with the pristine religious teachings, but describing in what ways they conceptualize Islamic law.[89]

Besides focusing on the debate on legal reform, this study investigates the practices and the negotiations which are an integral part of Muslim marriage. The second question guiding this research, as already stated earlier in this Introduction, can be developed into: *how do local people on the northern coast of rural eastern Java practise and negotiate state regulations on Muslim marriage in their everyday life?* Here, I use 'everyday' to give an emphasis to what Schielke and Debevec have called "the openness of practices and experiences",[90] so as to attain a better understanding of the daily practice of Sharia. The term 'everyday' guides our attention towards the ways in which Muslims produce their own modernity[91] in everyday life.[92] Applying this framework, the practice of Muslim marriage, the core object of this study, is placed at the intersection of social, cultural, legal and economic practices.[93]

[89] Baudouin Dupret, 'What is Islamic law? A praxiological answer And an Egyptian Case Study', *Theory, Culture & Society*, vol. 24, no. 2 (2007), pp. 79–100.
[90] Samuli Schielke and Liza Debevec (eds), *Ordinary lives and grand schemes: an anthropology of everyday religion* (New York and Oxford: Berghahn Books, 2012).
[91] Modernity is understood as an age that began with the emergence and expansion of capitalism, industrialisation, scientific rationalism, nationalism and state claims to military power and the surveillance of citizens. Anthony Giddens, *The Consequences of Modernity* (Chicester: Polity Press, 1991).
[92] Armando Salvatore and Dale F. Eickelman, 'Muslim publics', in *Public Islam and the Common Good*, ed. by Armando Salvatore and Dale F. Eickelman (Leiden: Brill, 2004), pp. 3–27.
[93] Benjamin Soares and Filippo Osella, 'Islam, Politics, Anthropology', in *Islam, politics, anthropology*, ed. by Benjamin Soares and Filippo Osella (London: Royal Anthropological Institute, 2010), pp. 1–22.

First of all, the discussion on 'how the state governs centres on the more detailed enquiries into the process of law-making and the implementation of laws on marriage and charts the bureaucratization of marriage. Secondly, the term 'practise' refers to how marriage is perceived and performed in the everyday life of a Muslim community in Pasuruan. It tries to capture the role and influence of Sharia and those of local norms in the shaping of marriage practice. To achieve this research goal, I have focused on the roles played by religious leaders (*kyai*) and *pengarep* (a voluntary broker who mediates the communication between the families of the bride and the groom). Thirdly, the term 'negotiate' refers to the interaction between the state and society within the parameters of the state norms. This thesis investigates the legitimacy of the *penghulu* who are the key official actor in marriage registration, the position of *modin* and how local people deal with them. 'Negotiate' also refers to the ways in which villagers seek legalization of their unregistered marriages, either in the KUA or in the Islamic court.

This thesis is conceptually indebted to Bowen's idea of "public reasoning", a theoretical concept which provides the basis for an inclusive public dialogue in pluralistic societies,[94] in the sense that it attempts to discover a sphere of overlapping discourses and shared ideals on marriage, both vertically upwards from the village level to the national scene and horizontally across between different normative systems. This idea leads me to ask a more theoretical question: *What can we learn from the practices and the negotiations in such a given society?* By posing this question, I expect to be able to relate the issue of Muslim marriage to a wider debate about Sharia and the nation-state as well as the bureaucratization of marriage.

At this point, I need to clarify the important distinction between 'Islam' and 'Muslim' as I have used these terms in this book. In Indonesia, Islam is expressed in different forms. Diverse kinds of Islam are (re)produced in society and there is no single 'essentialist' Islam

[94] Bowen, *Islam, Law, and Equality in Indonesia: An Anthropology of Public Reasoning*.

based on religious texts and Islamic history.[95] This is why I prefer the term 'Muslim marriage' instead of 'Islamic marriage'. The community I have studied practises a variant of Islam which is close to so-called traditionalist Islam. It is an Islam which encourages the observance of one of the four schools in Sunni Islamic jurisprudence, while at the same time greatly respects religious leaders (*kyai*) and the traditional Islamic schools (*pesantren*) they run as centres of learning. However, in the social realm, their religious activities are quite accommodating towards local traditions. Secondly, the word 'Muslim' has been chosen to emphasize the diversity in practices of marriage. This is because, according to Benjamin Soares, by focusing on local culture, Islam as an object of study seems to become a plural phenomenon.[96]

4. Research Site

I opted for Pasuruan as the site of my research. Pasuruan is a regency in East Java province the majority of whose inhabitants live in Muslim communities and generally show a strong orientation towards practising so-called traditional Islam,[97] especially that associated with Nahdlatul Ulama (NU), an Islamic organization established in Surabaya in 1926. This religious orientation is supported by the fact that many Pasuruan residents' roots lie in the island of Madura, where the NU is also very influential.[98] However, my research focuses on Sumbersari (a fictitious name), a sub-district in Pasuruan. The majority of the people who live here are pious believers (*santri*). Culturally this community has developed into be what is popularly known as a *pendhalungan* society. The people speak Madurese and Javanese or a mixture of these and Indonesian with Madurese accent. Only the younger generation who were born in the 1980s and thereafter can speak Javanese.

[95] Michael Gilsenan, *Recognizing Islam: Religion and Society in the Modern Middle East* (London: I.B. Tauris, 1982).
[96] Benjamin F. Soares, 'Notes on the anthropological study of Islam and Muslim societies in Africa', *Culture and Religion*, vol. 1, no. 2 (2000), pp. 277–85.
[97] Zamakhsyari Dhofier, *The Pesantren Tradition: The Role of the Kyai in the Maintenance of Traditional Islam in Java* (Tempe: Arizona State University, 1999), p. xix.
[98] Yanwar Pribadi, *Islam, State and Society in Indonesia: Local Politics in Madura* (London and New York: Routledge, 2018).

One specific feature of this community is the importance of maintaining patron-client ties. The patron is a *kyai* and his clients are the people in general. *Kyai* are traditional religious leaders who are paid the greatest respect by the community for their religious learnedness. Most of them lead *pesantren* (traditional Islamic schools). *Kyai* are not only invested with religious authority but, referring to Geertz, also play the roles of cultural broker. The existence of both *kyai* and *pesantren* has contributed to the continuation of adherence to traditional Islam, which is also supported by the presence of *madrasah diniyah* (informal Islamic schools). Children attend this *madrasah* in the afternoon after they have finished formal school in the morning. In this *madrasah*, they are taught the Quran and other Islamic subjects. In Pasuruan, the Regent has issued a decree which obliges children at primary and secondary schools, who do not board in *pesantren*, to attend this *madrasah*. A more detailed explanation of the research setting comes in Chapter 3.

5. Research Method

In order to make a good anthropological (or social-legal) examination of marriage practices in a Muslim community, this study was carried out with open, lived and dialogical fieldwork which has ensured the depth of people's personal experiences. This choice has everything to do with doing justice to the people with whom I have been working. For this reason, this study employs a number of methods, ranging from participant observation, open interviews and case studies. I also used life-history to describe the informant's experiences in concluding marriages.

I conducted my fieldworks in separate periods, namely seven months in 2017 (January to July), four months in 2017 and 2018 (November to February) and two months in 2019 (January to February). In order to understand people's everyday practices, I lived in a village, interacted with local people and participated in social activities. I interviewed my interlocutors whom I have divided into three hierarchal categories:

a. Village level which includes women (unmarried, married, widows and divorcées), children, parents, men, religious leaders (*kyai*), village religious officials (*modin*), village officials (*lurah* and *carik*), heads of neighbourhoods and marriage brokers (*pengarep*);
b. Sub-district level, which includes the Kantor Urusan Agama (KUA, the Office of Religious Affairs), the state body whose function is to register and legalize Muslim marriage. I conducted a host of interviews with *penghulu* (marriage functionaries) and the officials of the KUA of Sumbersari in Pasuruan district, collected data on marriage practices in 2015 and 2016 on the basis of official records, made categorizations, highlighted cases remarkable in an administrative sense and traced their context in society. One central question addressed is the extent to which the KUA plays a role in interpreting and performing the state rules on marriage and negotiates with the variety of religious and cultural norms in society. On order to make a comparison with Sumbersari, I also studied other KUAs in different districts such as in Jember, Surabaya and Yogyakarta.
c. District and upper level, includes state institutions (the Central and District Department of Religious Affairs and the Office of Civil Registration), the judiciary (the local Islamic court) and religious institutions. My questions dealt with their decisions, *fatwas* and guidance pertaining to Muslim marriage.

Pasuruan regency was not really new to me, but Sumbersari was. My fieldwork began through my acquaintance with a lady, Umi, a graduate of an Islamic university in Surabaya whose bachelor's thesis dealt with the incidence of *nikah sirri* in Sumbersari. With the assistance of Umi, I managed to interact with local people. This process became easier as numerous young women of Sumbersari were Umi's friends when they studied in *pesantren* years earlier. With their help, I conducted interviews with ordinary villagers about their experiences in marriage. I also made a contact with Ali Sadikin, an NGO activist who

has focused on women's issues in the area. Ali Sadikin introduced me to a number of 'active' women. From their information, I was able to understand how the social structure works in practice and to what extent personal agency contributes.

Researching a government institution like the KUA is not always easy. In my efforts, I applied a structural approach. First of all, I made contact with my senior who acted as the manager of the KUA in the town of Pasuruan. He introduced me to his fellow-co-ordinator in the Pasuruan regency. This contact gave me access to the local KUA in Sumbersari. I used informal interaction when dealing with the head of the KUA and his staff. On the basis of informal interaction, I managed to obtain the information I needed. This fieldwork was quite effective because sometimes I was allowed to lodge in the KUA enabling me to extend my interaction and have satisfactory talks with its officials. Doing fieldwork in the KUA also enabled me to get to know *modin*. I also attended several monthly religious gatherings (*pengajian*) which they held.

It is worth noting that I used different identities depending on what kind of institution I was addressing. When visiting *kyai* or *pesantren*, I had to use a religious identity. My status as a member of the NU in the Netherlands gave me advantages. At least, I was not treated as a 'different' person because the majority of them are also affiliated with the NU. When doing fieldwork in the Islamic court, I used a more formal approach, as was expected of me. My position as a lecturer in the Sharia faculty of an Islamic university in Central Java was an advantage to me. In general, the relationship between Sharia faculties and Islamic courts is close because it is the faculty which produces judges and clerks of the court.

In addition to the interviews, I also did participant observation in social activities, prior to and during a marriage ceremony (*akad nikah*), which took place either in the KUA office or at a location outside it. I focused on the process of registration, the verification of documents (*rafak*), the actors involved and the handling of the marriage contract (the position of *penghulu* and *modin*).

Recording and making notes are important in ethnographic work. However, in my fieldwork, the use of each of them has been entirely dependent upon the situation; but the second is more preferable. I had to reconsider whether or not to make recordings of interviews with ordinary people as it was possible that introducing this note of formality might make them feel uncomfortable and interrogated. Even making notes could destroy the interview process. In this situation, instead of making notes in detail, I jotted down some key ideas and worked up the notes afterwards.

6. Structure of the Thesis

This thesis begins with an introductory chapter. It contains an explanation of the background to this study, a general overview of key concepts relevant to it, research questions, methodological notes and the structure of the thesis.

The six chapters in this thesis are divided into two parts, each of which focuses on a different level of society. The first part is concerned with law and institutions. It investigates public debates about the norms expected in Islamic marriage on the national level and issues arising from the bureaucratic reform of the administration of Muslim marriage. The first part consists of two chapters.

Chapter 1 centres on continuity and change in the shaping of legal norms on Muslim marriage. This chapter seeks to elucidate the current developments by which the state simultaneously deals with the issues of religious-legal validity of a marriage and the protection of citizens' rights. In the Indonesian context, the public discourse about *nikah sirri* (unregistered marriage) has epitomized the dichotomy between the religious validity and the legal validity of an Islamic marriage. This chapter argues that the state-led modernization of Islamic marriage in Indonesia has moved away from the public debate about the dual validity of a marriage, religiously and legally, to a public debate about legal identity and citizens' rights. The state has not necessarily made attempts at legal reform by modernizing traditional *fiqh* norms on marriage by passing of legislation. Instead, it has chosen to endorse its

bureaucracy in encouraging the possession of civil documents such as marriage or birth certificates which protect citizens' rights. In this process, the question of the legal validity of a marriage becomes irrelevant. However, an unprecedented consequence of this development is conflict between state legal norms.

Chapter 2 is concerned with the modernization of the bureaucracy in charge of organizing Muslim marriage, a task carried out by the KUA under the supervision of the Ministry of Religious Affairs (MoRA). In this chapter, I look at the influence of the shifting public discourse on the regulation of Islamic marriage to the bureaucracy supervising Muslim marriage. It is worth noting that there have been series of efforts made by the MoRA to reform the KUA so as to introduce more efficient management. In the spirit of good governance, the government has eradicated the informal administration fee and standardized the disparities in administration fees. Marriage registration has been integrated into the civil administration system. The MoRA sanctions *penghulu*, a bureaucratized religious leader, the only official eligible to head the KUA, to solemnize an Islamic marriage.

The second part, consisting of four chapters, focuses more on the functioning of the state law and how local society responds to it. On a practical level, it elucidates the ways the state agency interprets and implements the relevant legal norms in its everyday bureaucracy and tries to understand how it deals with people's orientations towards Islamic marriage. In this part, I seek to present 'plentiful pictures' of the people's individual orientations towards marriage as well as examine the roles of the state authorities and non-state authorities in dealing with marriage practice.

Chapter 3 offers an introduction that can assist in understanding the socio-economic history, the religious and cultural life and the development of Islam in Pasuruan. It first sets the scene by delineating the historical development of Pasuruan, including the history of Madurese migration and the historical development of Islam. Secondly, it addresses current cultural, religious and political life. The

last section centres on specific elements of the community in which I did my fieldwork.

Chapter 4 is concerned with the interaction between the legal and social norms affecting marriage and how the actors involved negotiate marriage in a patrimonial social setting. In this chapter, I elucidate the roles played by religious leaders and social actors such as *pengarep*. This chapter suggests that marriage remains a religious concern, a sacred ceremony which sets a higher value on the involvement of religious authorities than those of the state. Despite the homogenous tradition of Islam in the area, this chapter has discovered an internal heterogeneity in the relationship between the agency of the actors involved, cultural norms and the social structure in the selection of whom to marry.

However, in all classes, ideas about an ideal spouse are closely related to the discourses circulating within traditional Islam, as *pesantren* (traditional Islamic school) are the centres of knowledge production. We see that, while *pesantren* have been an important institution in maintaining the *fiqh*-based orientation of marriage, being a *santri* (student of *pesantren*) is a guarantee signifying the purity of a girl and that she is of unimpeachable morals. Marriage practices in Sumbersari show that the accomplishment of the ideals of marriage depends heavily on the role of the *pelantar* (traditional marriage broker). Entrusted with a major role in mediating the communications between the two families concerned, *pelantar* are very important to families of the religiously respected class as well as families whose girls have been educated in *pesantren*. Another key actor in a marriage is definitely a religious leader (*kyai*). The everyday practice of marriage in Sumbersari shows the on-going centrality of the roles of *kyai* in the production of an Islam-based legal norm to control sexual morality which sometimes conflicts with the state legal norm.

Chapter 5 analyses the interaction between the state and society in marriage registration. It deals with the position of the KUA and the roles of street-level bureaucrats, *penghulu* and *modin* in marriage registration. In this chapter, I argue that the KUA, as the state agency in charge of Muslim marriage registration, needs to maintain its image

as a body capable of maintaining the proper balance between marriage, religious tradition and modern administration. In the meantime, there has been a tendency for the state to override and terminate the roles of *modin* as informal intermediaries on the grounds of public service and good governance. In line with this tendency, a new policy has been drawn up: marriage in the office is free, while out-of-office costs some money. This bureaucratic reform had led to a dilemma as people have had to try to negotiate it to fit their own interests. People still differentiate between marriage registration as a religious process in which religious leaders are involved and the marriage ceremony as opposed to an administrative process in which *penghulu* play a role. The *modin* are central to mediating these two processes. On the other hand, *penghulu* are still struggling to extend their influence. A *penghulu* does not pretend to perceive himself as an *ulama*, although his identity as a religious authority remains important. In order to maintain his legitimacy, he is consistent in advocating the state recognition of a marriage which contributes to the protection of citizens' rights.

Chapter 6 deals with unregistered marriage and the search for state recognition. This chapter focuses on cases of participants in unregistered marriages who have sought state recognition by registering their marriage at the KUA or obtaining an authentication (*isbat nikah*) from an Islamic court. These cases have enabled me to think critically about the relationship between civil documents, state recognition and citizens' rights from the perspective not only of the people, but also from that of the other side: the state apparatus and the judges. Because some of the cases involve problems arising from lack of documents, they suggest another aspect might be to take a look at administrative transgressions and judicial discretion. This chapter argues that people are not really concerned about the legality of marriage. They request legalization in order to define the legal status of their marital relationship because there is a need for them to do so. They are concerned with the benefits which accrue from the possession of civil documents.

This thesis ends with Concluding chapter in which I summarize and discuss my research finding.