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

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Part One

LAW AND INSTITUTION

CHAPTER 1

Regulating Muslim Marriage in Indonesia

1. Introduction

For many years the legal and religious validity of Muslim marriages and the relationship between these two aspects have been subject to debate in Indonesia. This chapter addresses a number of questions arising from this issue to do with actors, discourse and process. They are the following: *Who have been involved in the debates*? *What language has been used*? *How does the state deal with the different interpretations produced by Muslim leaders*? In essence, these questions replicate the insistence common among Muslims in Indonesia that, despite the codification of Islamic marriage law by the state, marriage should still include a religious component. This is an important requirement for the majority of Muslims for whom the Sharia is the frame of reference they believe should be their guide to morality and human relations. Their concern is not unfounded since the legal transformation from uncodified Sharia law to the codified form of Islamic law has occasionally unquestionably expunged religious norms.[1] The elephant in the room is that Muslim majority countries cannot escape the need to systematize uncodified Sharia into

[1] Peters, 'From Jurists' Law to Statute Law or What Happens When the Shari'a is Codified', p. 90.

Islamic state law to be able to deal with the various problems thrown up by modern development.

An important part of this chapter looks at the continuity and change in the formulation of the legal norms on Muslim marriage in Indonesia, particularly since the fall of Soeharto in 1998. Its principal focus is the roles of the state and Islamic authorities in their struggle to define what defines an appropriate Islamic marriage in Indonesia on both national and sub-national levels. In this chapter, I wish to present an analysis of laws, political processes, local regulations and religious opinions.

As many have suggested, articulations of Sharia laws on marriage and their embodiment in a legal code continue to feature largely in negotiations between the state and religious authorities about different legal norms. Although this is a persistent problem in numerous Muslim majority countries, the Indonesian experience offers some interesting unique features. I have found that, while the process of legal reform has involved the secularization of religion in the state law, the post-New Order era has witnessed the increasing application of religion-inspired ideas in national and sub-national laws. Unquestionably, the government has faced a steep learning curve in its pursuit of legal reform through legislation because of the resistance from certain Islamic authorities. In this predicament, in line with the outgrowth of the human rights movement and bureaucratic reform, the judiciary and government bureaucracy have been important agents in facilitating reform without causing a confrontation with religious norms.

This chapter is divided into five stages. The first section provides a theoretical framework by presenting a general overview of the transformation of Sharia into state Islamic law throughout the Muslim world. The second section sketches how the Indonesian state deals with Muslim marriage. The third section focuses on the post-New Order development. In this section, I problematize the use of Islam as identity politics and how this choice has influenced legal reform on matrimonial matters on national and sub-national levels. The fourth section deals with the contestation of *maṣlaḥa* in legal discourses in

the form of *fatwas* on marriage registration produced by Islamic organizations in Indonesia. The fifth section analyses the reforms introduced by the executive power in response to insistence on the protection of citizens' rights.

2. A Legally Valid Marriage: Dilemmas and Compromises

In the course of nineteenth-century colonialism, within the compass of the establishment of nation-states and the implementation of the European legal framework, the political rulers of numerous Muslim countries, for instance, in Egypt and the Ottoman heartlands intervened in the application of Sharia.[2] This political action resulted in the transposition of Sharia norms, predominantly those relevant to personal status, into a state-legal framework.[3] At first glance, the formation of a state Islamic personal status looks simple,[4] because it elicited great respect from Muslim groups. For the majority of Muslims, the legal reform of Islamic personal status meant the preservation of Sharia law.[5] In fact, the legal reform generated a high degree of complexities. Throughout the history of Islam, Sharia law had never been codified. *Fiqh* has never been a law code ratified by legislative authority. Therefore, in order to achieve unified rules and legal uniformity, governments have to transform Sharia from scattered, locally administered sets of substantive laws into state-centred Islamic legal codes. In other words, the codification has transformed what are divine norms in Muslim societies into positive law.[6]

[2] Hallaq, *Shari'a: Theory, Practice, Transformations*, p. 2.
[3] Hussin, *The Politics of Islamic Law: Local Elites, Colonial Authority, and the Making of the Muslim State*.
[4] Paolo Sartori and Ido Shahar, 'Legal Pluralism in Muslim-Majority Colonies: Mapping the Terrain', *Journal of the Economic and Social History of the Orient*, vol. 55, nos. 4–5 (2012), pp. 637–63.
[5] Mir-Hosseini, *Marriage on Trial: Islamic Family Law in Iran and Morocco*, p. 12; Welchman, *Women and Muslim Family Laws in Arab States: A Comparative Overview of Textual Development and Advocacy*.
[6] Buskens and Dupret, *The Invention of Islamic Law: A History of Western Studies of Islamic Normativity and Their Spread in the Orient*, p. 36.

For centuries, Muslims in Indonesia have had to negotiate Sharia with the pre-existing practices, customs[7] and local rulers. The present Indonesian *taklik talak* (conditional divorce) formula, [8] signed by a husband at the time of marriage and enclosed on the last page of a marriage certificate, is one outcome in the long historical development of Islamic law, in progress since the end of the sixteenth century.[9] In the pre-colonial period, under the Islamic kingdom of Mataram in seventeenth-century Java, this legal procedure was found in a slightly different context. The earliest form of this conditional divorce agreement was called *janji dalem* or *janjining ratu* (the royal promise).[10] The word '*dalem*' represented the relationship between the ruler and the groom. The *penghulu*, a religious official appointed by the ruler with an authority to regulate marriage and divorce, read out the promise and asked whether or not the groom acquiesced in the aforesaid. The groom only needed to answer 'yes' or 'no' and only rarely did the groom refuse.[11]

Since the end of the nineteenth century, Sharia pronouncements related to marriage and divorce were officially the domain of the *penghulu*. The *penghulu* was an official religious authority who performed the same function as the Islamic judicial authority (*qadi* or *kadi*) and was vested with the authority to handle not only religious but also diplomatic matters. On the highest (regency, *kabupaten*) level was *penghulu ageng* (great *penghulu*), who also presided over judicial sessions in the *surambi* (forecourt) of the mosque. On the sub-district (*kecamatan*) level, a *naib* (deputy) performed this religious function,

[7] C.A.O. van Nieuwenhuijze, 'The Legacy of Islam in Indonesia', *The Muslim World*, vol. 59, nos. 3–4 (1969), pp. 210–9.

[8] Scholars argued *taklik talak* was inspired by the sixteenth-century Shafi'ite book, *Tahrīr*, by Zakariyyā al-Ansārī (d. 926/1520) and subsequently elaborated by the Egyptian scholar al-Sharqāwī (1737-1812) in his book *Ḥāshiya al-Sharqāwī*. See Azyumardi Azra, 'The Indonesian Marriage Law of 1974: An Institutionalization of the Shari'a for Social Changes', in *Shari'a and politics in modern Indonesia*, ed. by Arskal Salim and Azyumardi Azra (Singapore: Institute for Southeast Asian Studies, 2003), pp. 76–95.

[9] Cammack, Donovan, and Heaton, 'Islamic Divorce Law and Practice in Indonesia'.

[10] Hisako Nakamura, *Conditional Divorce in Java* (Harvard: Islamic Legal Studies Program Harvard Law School, 2006).

[11] Different regional versions of *janji dalem* can be found in A.H. van Ophuijsen, *De Huwelijksordonnantie en Hare Uitvoering* (Leiden: Firma P.W.M. Trap, 1907).

while on the lowest (village) level it was the duty of the *modin* or *kaum* or *amil*. The substantive laws applied in court were derived from a number of prominent Shafi'i *fiqh* treatises. This *penghulu* institution exemplifies the close relationship between Islam and Javanese custom.[12] In view of the long-established political and religious power of the *penghulu*, in 1835 the *penghulu*'s jurisdiction in family law reinforced by a legal mechanism to enforce the *penghulu*'s decision was formally recognized.[13] Later, in the 1880s, the office was absorbed into the Dutch colonial administration, irrespective of unexpected stereotypes and dilemmas.[14]

It was decided that the principle of 'to each his own law'[15] should prevail. This means Muslims were subject exclusively to Islamic personal status, with the exception of law cases concerning maintenance (*nafkah*) and the division of property upon divorce and inheritance. Europeans were governed by Dutch law, while *adat* law was for those considered Natives. The Natives were fragmented into various groups with various requirements. Christians requested assimilation into Dutch law, the local aristocracies and elites claimed a privileged procedure and the legal classification of non-Natives and non-Europeans was indistinct.[16] The *adat* and Islamic judicial systems remained under the control of the colonial regulation, although they enjoyed judicial autonomy.

[12] R. Abdoelkadir Widjojoatmojo, 'Islam in the Netherlands East-Indies', *The Far Eastern Quarterly*, vol. 2, no. 1 (1942), pp. 48–57.
[13] van Huis, 'Islamic Courts and Women's Divorce Rights in Indonesia: The Cases of Cianjur and Bulukumba', p. 34.
[14] *Penghulu* were challenged by three competing situations. Holding two identities, as devout Muslims and state *qadi*, they were bound (1) by the religious obligation to ensure the proper application of the Sharia; (2) with administrative matters as they worked under the colonial government; and (3) with a set of moral standards derived from their status as social leaders. Muslim organizations in the early-twentieth century stereotyped the *penghulu* as colonial-sponsored civil servants with less than adequate of the knowledge of Islam. Muhamad Hisyam, *Caught between Three Fires: The Javanese Pangulu under the Dutch Colonial Administration, 1882-1942* (Jakarta: INIS, 2001).
[15] Daniel S. Lev, 'Colonial Law and the Genesis of the Indonesian State', *Indonesia*, vol. 40, no. October (1985), p. 61.
[16] *Ibid.*, p. 62.

The demands for the institutionalization of Islam assumed increasingly important proportions in the late colonial administration. In 1937, the colonial state acquiesced in such demands by the establishment of the *Penghulu* Court with the jurisdiction to settle marital disputes, but its competence still did not extend to inheritance and endowment. Some years earlier, with the publication of *Staatsblad* 1929 No. 348, the Dutch introduced the appointment of marriage registrars to reinforce marriage registration as a legal obligation for Muslims in Java and Madura. This was actually the second attempt by the Dutch colonial government to control Muslim marriage affairs. The first ordinance on the same matter came into force in 1896 in the form of *Staatsblad* 1895 No. 198. This ordinance stipulated the general guidelines of marriage registration and emphasized that only those registrars appointed by the Dutch had to authority to register a marriage, a divorce and the reconciliation of a marriage. The registrars were permitted to receive an administrative fee from their clients.[17] In practice, these laws were pretty ineffectual.

The establishment of the Ministry of Religious Affairs in 1946, a few months after the proclamation of independence in Indonesia, was a significant event for Muslim groups. Its existence inevitably produced the appeal for a unitary organization to administer Islamic affairs.[18] Non-Muslim Nationalists opposed this initiative. Hence, Lev has remarked that "the very existence of a Ministry of Religious Affairs seemed to justify and lend permanence to a state that was patently not Islamic in form and substance".[19] Although it was conceived as a body which would take care of the interests of all religious groups, the Ministry was largely staffed by Muslims.[20] It offered wide employment opportunities to members of Muslim organizations, the majority of

[17] Stijn van Huis and Theresia Dyah Wirastri, 'Muslim Marriage Registration in Indonesia: Revised Marriage Registration Laws Cannot Overcome Compliance Flaws', *Australian Journal of Asian Law*, vol. 13, no. 1 (2012), p. 7.
[18] Deliar Noer, *Administrasi Islam di Indonesia* (Jakarta: Rajawali, 1983).
[19] Daniel S. Lev, *Islamic Courts in Indonesia: A Study in the Political Bases of Legal Institutions* (Berkeley: University of California Press, 1972), p. 47.
[20] Nieuwenhuijze, 'The Legacy of Islam in Indonesia', p. 212.

whom came from religiously devout and non-privileged groups.[21] In legal practice, the Ministry does play a role in mediating the lacunae between national law and Islamic law.[22] Moreover, despite its clinging to the Islamic tradition affiliated with the Shafi'ite *madhhab*, the Ministry has initiated small reforms acceptable to the majority of Muslim organizations.[23] The best example of this could be seen when the administration of Muslim private affairs, particularly in Java and Madura, was accorded government priority and placed under the administrative jurisdiction of the Ministry. The government even applied a legal sanction to people who performed a marriage ceremony without a state official in attendance.[24]

As a consequence, in recognition of the plurality of legal orders, Law 22/1946 on the registration of marriage, divorce, and reconciliation (*nikah*, *talak*, *dan rujuk*) was passed as the first government regulation after Indonesian Independence. The application of the law was restrictedly to Muslims in Java and Madura, but was later supplemented by Law 32/1954 extending it to all Muslims throughout the nation. The law was an important step for the Ministry to take, as under its aegis it unified the registration of Muslim marriage and divorce. By backing this law and insisting on official registration, the purpose of the Ministry was to assure the legal certainty and stability of Muslim marriages.[25]

Since 1946, the task of registration has been delegated to what is now the Kantor Urusan Agama (KUA, the Office of Religious Affairs) a body established on sub-district level. After its inception, the district administrations (*regentschappen*) were no longer responsible for

[21] Cammack, Bedner, and van Huis, 'Democracy, Human Rights, and Islamic Family Law in Post-Soeharto Indonesia', p. 5.
[22] Otto, 'Sharia and national law in Indonesia', p. 444.
[23] Lev, *Islamic Courts in Indonesia: A Study in the Political Bases of Legal Institutions*, pp. 50–3.
[24] See Article 3 of Law No. 22/1946 on the registration of Muslim marriage, divorce and reconciliation.
[25] Nurlaelawati, *Modernization, Tradition and Identity: The Kompilasi Hukum Islam and Legal Practice in the Indonesian Religious Courts*, p. 51.

appointing registrars and managing the administration fees.[26] During the 1950s, attempts were also made to reform substantive marriage law. Bowing to the pressure exerted by Indonesian female activists, in the 1960s, the courts made important strides in strengthening the position of women in the family. In 1968, the Supreme Court handed down a judgement which gave Indonesians the right to divorce on the grounds of irreconcilable incompatibility. These grounds had formerly only been applicable in the law on Christian marriages.

An intense debate about the unification or the diversity of substantive marriage laws continued to rage in the early years of the New Order administration. One group demanded one law for all different religious groups, while its opponents insisted on different laws which would be consistent with the requirements of the different religious groups. Religious political parties endorsed the latter.[27] Convincing all the conflicting groups to reach a consensus seemed a virtually impossible task. Consequently, despite the myriad proposals for marriage law reform up to 1973, none of them actually reached the statute books.[28] It was only with the full support from the Soeharto government was it possible to introduce a bill before the House of Representative on 31 July 1973. Among the fundamental issues which the government sought to control through unified legislation on marriage was population growth.[29] Cammack argues that the draft of the marriage law gave the Islamic courts an advantage. Firstly, these courts were now given firmer control over the administration of marriage and divorce. Secondly, the draft included provisions regulating substantive areas not previously stipulated as being under

[26] van Huis and Wirastri, 'Muslim Marriage Registration in Indonesia: Revised Marriage Registration Laws Cannot Overcome Compliance Flaws', p. 9.
[27] Soewondo, 'The Indonesian Marriage Law and its Implementing Regulation'.
[28] Katz and Katz, 'The New Indonesian Marriage Law: A Mirror of Indonesia's Political, Cultural, and Legal Systems'.
[29] Adriaan W. Bedner and Stijn van Huis, 'Plurality of marriage law and marriage registration for Muslims in Indonesia: a plea for pragmatism', *Utrecht Law Review*, vol. 6, no. 2 (2010), p. 178.

the jurisdiction of Islamic courts. These areas include marital property, spousal support and child custody.[30]

June Katz and Ronald Katz have stated that it was not clear who had drafted the bill before the President endorsed it.[31] However, as O'Shaughnessy has argued, although President Soeharto certainly did instruct the Ministry of Justice to draft the bill on the basis of the state philosophy (*Pancasila*),[32] from the outset the Ministry of Religious Affairs was excluded from participation in preparing the draft bill.[33] Furthermore, it is fair to say that unquestionably Muslim leaders felt disappointed they had been sidelined from the process. This is probably the reason that some of the Articles proposed in the Bill were perceived to be in contravention of Islamic doctrine, a clash which elicited formidable opposition from Islamic parties and younger Muslims.[34] Their strongly-worded criticism made the government aware that it would have to make some delicate compromises.[35] The upshot was that the eventual new Marriage Law ushered in some essential changes which helped to maintain political stability and to set in train social reform in Indonesia.[36]

The law was passed in 1974 and came into force a year later. By its accommodation of the ideas of reformist Muslims, the new Marriage Law strengthened state authority to regulate and control family affairs. In a nutshell, the state had staked its claim to place its officials in a vital position as guardians of socio-religious changes, obstructing

[30] Mark Cammack, 'Islamic Law in Indonesia's New Order', *International and Comparative Law Quarterly*, vol. 38, no. 1 (1989), p. 58.
[31] Katz and Katz, 'The New Indonesian Marriage Law: A Mirror of Indonesia's Political, Cultural, and Legal Systems', p. 660.
[32] O'Shaughnessy, *Gender, State and Social Power in Contemporary Indonesia: Divorce and Marriage Law*, p. 30.
[33] Katz and Katz, 'The New Indonesian Marriage Law: A Mirror of Indonesia's Political, Cultural, and Legal Systems', p. 659.
[34] Soewondo, 'The Indonesian Marriage Law and its Implementing Regulation', p. 285.
[35] Katz and Katz, 'The New Indonesian Marriage Law: A Mirror of Indonesia's Political, Cultural, and Legal Systems'.
[36] Katz and Katz, 'Legislating Social Change in a Developing Country: The New Indonesian Marriage Law Revisited'.

the possibility of resorting to existing non-state agencies.[37] This also means that substantive issues relating to marriage are addressed by the state in the language of unified state law[38] obviating the problems of the entrenched pluralities in the legal system, religious affiliations, and local ethnic attachments.[39] The law covers a wide range of matters arising from the dissolution of marriage. One important step was the abolition of the husband's right to unilateral repudiation (*talak*) and the provision that divorce had to be subject to court review, and granting both husband and wife an equal right to petition for a divorce. In spite of these changes, Muslims were fairly satisfied with the degree of the influence of Islamic law in the law.

Nobody would deny the fact that the government's marriage legislation has led to a dramatic shift in perceptions and patterns of marriage.[40] The Marriage Law defines a marriage contract as a religious ceremony, not a civil marriage. Article 2 decrees that a marriage can only be valid if it has been performed religiously. Conformity with religious prescription is, therefore, a must and unavoidable. However, in addition to religious solemnization, marriage also needs to be authorized by the state through registration.[41] Instead registration being integrated into the legal conditions of a marriage, it is a legal complement to it. Non-compliance with state administration renders a marriage null and void both civilly or officially and, consequently, married couples are not entitled to apply for or be issued with a marriage certificate. Nevertheless, failure to register a marriage does not influence its validity in religious terms.

[37] Katz and Katz, 'The New Indonesian Marriage Law: A Mirror of Indonesia's Political, Cultural, and Legal Systems'; Ratno Lukito, 'Sacred and Secular Laws: A Study of Conflict and Resolution in Indonesia' (PhD Dissertation. McGill University, 2006), pp. 244–5.
[38] M.B. Hooker, 'State and Syarî'ah in Indonesia, 1945 – 1995', in *Indonesia: Law and Society*, ed. by Timothy Lindsey (Sydney: Federation Press, 1999), pp. 97–110.
[39] Cammack, 'Islamic Law in Indonesia's New Order', p. 61.
[40] O'Shaughnessy, *Gender, State and Social Power in Contemporary Indonesia: Divorce and Marriage Law*; Smith-Hefner, 'The New Muslim Romance: Changing Patterns of Courtship and Marriage Among Educated Javanese Youth'.
[41] Soewondo, 'The Indonesian Marriage Law and its Implementing Regulation'.

In other words, the Marriage Law conceptualizes marriage at the intersection of religious precepts and state administration.[42]

Although an unregistered marriage is considered not legally binding (*tidak memiliki kekuatan hukum tetap*), it is not necessarily void. State officials and religious leaders frequently express this in a set formula 'a marriage is religiously valid, but not legally'. This phrase suggests that religious validation takes priority over state legalization. In other words, it is religious law that determines the validity of a marriage, not the registration. Bowen regards this as 'dual validity'.[43] This ambiguity means that, as far as the marriage contract is concerned, both religious and legal debates have frequently been framed as an arena in which religious validity and legal validity are seen as being in opposition.[44] On the one hand, the state demands that its own norms be used to determine the legality of a religiously civil contract. On the other hand, the *fiqh* doctrine offers the consideration that, should there be no validation by a religious contract, sexual relationships beyond some romance and superficial intimacy fall into the category *haram* (unlawful). Nevertheless, what was clarified was that, under the terms of the marriage law, the state is able to secure its interest in regulating marriage and controlling the family.[45]

Politically, the passing of this law has influenced the subsequent direction of the relationship between Islam and the state. It is noticeable that the earlier attempts to impose a secular, unified marriage law to be enforced in a general court failed. Therefore, instead of curtailing Islamic law and courts, the government decided to support Muslims in their desire to manage their own family affairs.[46] Nonetheless, from the mid-1980s, there was an apparently radical shift in the New Order government policy towards Islam on various

[42] Cammack, Young, and Heaton, 'Legislating Social Change in an Islamic Aociety: Indonesia's Marriage Law'; Katz and Katz, 'Legislating Social Change in a Developing Country: The New Indonesian Marriage Law Revisited'.
[43] Bowen, *Shari`a, State, and Social Norms in France and Indonesia*, p. 10.
[44] Nurlaelawati, 'Muslim Women in Indonesian Religious Courts: Reform, Strategies, and Pronouncement of Divorce', p. 22.
[45] O'Shaughnessy, *Gender, State and Social Power in Contemporary Indonesia: Divorce and Marriage Law*.
[46] Cammack, 'Islam, Nationalism and the State in Suharto's Indonesia'.

issues.[47] This changing attitude crystallized in the enactment of Law No. 7/1989 on Islamic Courts and now serves as the legal basis for the independence of Islamic courts.[48] The law places the religious courts on the same footing as the other courts. In the context of its substance, the law is also perceived to have made significant progress in the application of Islamic law.

With the significant backing they were given by the central government, the confidence of Muslim elites to submit other proposals for legal reform increased. The Ministry of Religious Affairs applied for the drafting of a family law code which would specifically regulate Islamic courts. This idea was first voiced by Bustanul Arifin, the chairman of the Special Chamber of Islamic Law of the Supreme Court, in 1985. Armed with the approval of Muslim judges and the officials of Islamic courts, the government agreed to work on this compilation of Islamic jurisprudence, officially called the Kompilasi Hukum Islam.[49] The proposal was approved by President Soeharto in 1991.[50] Covering the laws relating to marriage, inheritance and endowment, this compilation enjoins all relevant state institutions to refer to it in the resolution of the issues it covers.

The promulgation of the KHI was definitely the outcome of a long process of conversations and negotiations between the representatives of Islam and the state. It would seem that the New Order government reasoned taking a more accommodating approach

[47] R. William Liddle, 'The Islamic Turn in Indonesia: A Political Explanation', *Journal of Asian Studies*, vol. 55, no. 3 (1996), pp. 613–34.

[48] Nurlaelawati, *Modernization, Tradition and Identity: The Kompilasi Hukum Islam and Legal Practice in the Indonesian Religious Courts*, p. 57.

[49] Abdurrahman, *Kompilasi Hukum Islam di Indonesia* (Jakarta: Akademika Pressindo, 1992); Cik Hasan Bisri (ed.), *Kompilasi Hukum Islam dan Peradilan Agama dalam Sistem Hukum Nasional* (Jakarta: Logos, 1999).

[50] Generally speaking, there are two main steps in undertaking this legal formation: collecting relevant data and legal drafting. The data were collected not only by researching literature, but also in the field in which the team divided the research activities into a number of stages: studying thirty-eight *fiqh* texts of inter-*madhhab*, predominantly the Shafi'ite school, covering issues of family law, the *fatwa*s of various Islamic organizations in Indonesia. Furthermore, with the assistance of a number of scholars from some State Institutes of Islamic Studies (IAIN, Institut Agama Islam Negeri*)*, the team interviewed hundreds of *ulama* from ten areas in which an Appeals Court had been established. The team also made a comparative study of the Islamic family laws which had been applied in other Muslim countries.

to reforming marriage could be an instrument to reduce resistance from Islamic circles in the future.[51] Nurlaelawati remarked that Soeharto's personal desire to secure political support from Muslim circles featured among the most important arguments.[52] In all the stages of the drafting of the KHI, the interaction between the perspective of Indonesian *ulama* on Islamic jurisprudence and the political will of the state was obvious. The result of this interaction can be considered the extent of the political intervention of the state in Islamic jurisprudence in Indonesia as from a political point of view, the KHI is substantive Islamic jurisprudence which has been legitimated by the state.[53] Another implication is that the authorization of the KHI is that the state has publicly demonstrated not only its cordial relationship with Islam but also its support the process of Islamization in its political domain.

Examining the substance of the KHI, quite clearly some provisions sustain the legal norms of the Marriage Law but others have required the invention of a new legal norm. Interestingly, the accommodation of *adat* is also apparent in several provisions. Of particular interest is the heir's rights to inherit grandparent's property in the case of an orphaned grandchild whose parents have predeceased his/her parents and its solution of the issue of joint property (*harta bersama*, *gono gini*), which decrees that both a husband and a wife have rights to marital property when their marriage ends. Despite such nods to state and *adat* law, the KHI has indubitably defined marriage in the light of classical *fiqh* doctrine, that is, as a solemn agreement which serves as a manifestation of obedience to God's commands and thereby qualifies as an act of worship (see Article 2).

The KHI makes a reference to and reinforces Article 2 of the Marriage Law which states that a marriage must be registered as a guarantee of social and legal order (Articles 5 and 6). This means that

[51] Bedner and Huis, 'Plurality of marriage law and marriage registration for Muslims in Indonesia: a plea for pragmatism', p. 180.
[52] Nurlaelawati, *Modernization, Tradition and Identity: The Kompilasi Hukum Islam and Legal Practice in the Indonesian Religious Courts*, p. 91.
[53] *Ibid.*, p. 89.

the KHI also preserves dual validity, in the sense that the absence of marriage registration does not affect its religious validity. In fact, the KHI goes a step further offers a new form of unregistered marriage (*nikah sirri*). As long as it has been concluded in conformity with Islamic doctrines, an unregistered marriage can be legalized retrospectively by the marriage registrar upon receipt of an authorization from the Islamic court. Through *isbat nikah* (Article 7 Point 2), this procedure is a state compromise on *nikah sirri*. *Isbat nikah* gives the couples in a *nikah sirri*, and their children, an opportunity to claim important identity documents which will allow them access to state programmes and formal education.[54]

Sumner and Lindsey have reported that more than 13,000 marriages were filed for *isbat nikah* in Islamic courts in 2009.[55] In 2012, this number rose to 31,927 cases (7.8%). Of course, we cannot make a judgement about whether or not this number is high, because we need to compare it with the never proven exact figures of unregistered marriages. My materials from a regional Islamic court in East Java show that the number of *isbat nikah* case is extremely low (0-6 cases per year), whereas my observations in some villages in Pasuruan Regency found a quite significant number of marital couples (around 20%) who are not in possession of a marriage certificate. For this reason, towards the end 2016, the Female Civil Servants' Association of Pasuruan arranged a programme of *isbat nikah massal* (mass marriage legitimation). Public participation in the programme held in partnership with the sub-district Muslim marriage registration offices and *modin* was noteworthy. The Bangil Islamic Court legalized approximately 100 unregistered marriages. This approach seems to have been implemented in other regencies during the last few years, as well as in the capital city, Jakarta.[56]

[54] Bedner and Huis, 'Plurality of marriage law and marriage registration for Muslims in Indonesia: a plea for pragmatism'.
[55] Cate Sumner and Tim Lindsey, *Courting Reform: Indonesia's Islamic Courts and Justice for the Poor* (New South Wales: Lowy Institute for International Policy, 2010).
[56] '557 Pasangan Sudah Mendaftar di Acara Nikah Massal dan Isbat Nikah di Malam Tahun Baru', *Tribunnews*, http://www.tribunnews.com/metropolitan/2018/12/31/557-pasangan-

Furthermore, legal historians have taught us that the rules governing familial matters in Indonesia have existed since the pre-colonial period, both before and after the introduction of Islam. Since the advent of Islam to the present day, the *penghulu* have been an important actor in the implementation of these rules. Obviously aware of its value, the colonial government officially incorporated this *penghulu* system into its colonial administration at the end of the nineteenth century. In the early years of Independence, the new state maintained the plurality of legal orders for quite a long period. The winds of change began to blow when the debate about the unification of substantive marriage laws escalated under the New Order. Despite the problems arising from the legal problem of what constitutes a valid marriage, the 1974 Marriage Law proved that unification could be achieved.

The Marriage Law introduced a number of progressive changes, such as the abolition of the husband's right to unilateral repudiation (*talak*) and decreeing that divorce must be subject to a court review. For Muslims in particular, the issue of marriage is centred on the nature of the marriage contract which, under the Marriage Law is recognized as a religious ceremony but not a civil marriage. Therefore, some believe that religious validation takes priority over state legitimation. Even after its enactment, there were still marriages concluded purely on the basis of religious laws and not registered civilly. The issuance of the KHI in 1991 cleared up this discrepancy by introducing the qualification of *isbat nikah*. It is a judicial mechanism which allows people to legalize their unregistered marriages retroactively.

3. Sharia-based Regulations and the Steep Stairway to Legislation

The political transition in 1998, the *Reformasi*, has led to an increasing challenge to the state from conservative Islamic groups which have

sudah-mendaftar-di-acara-nikah-massal-dan-isbat-nikah-di-malam-tahun-baru, accessed 4 Mar 2019.

made Islam increasingly more publicly visible and articulate. Despite the agreed principle of a "state based on the rule-of-law" (*negara hukum*, *rechtsstaat*),[57] the question of whether Indonesia is secular or religious recurs at regular intervals. In the present climate, Islam has increasingly become the most important frame of reference which many Muslims in Indonesia imagine has the competence to bring about justice.[58] It has penetrated to the centre and become a source of identity politics. The rise of 'new Islamic populism'[59] has influenced the relationship between state sovereignty and Islam. This shift has been strengthened by the transnational idea of the *umma* (imagined global Islamic community) which has led to a dramatic alteration in local understandings of what it means to be a true Muslim.[60] This section elucidates how the rise of Islam as a collective identity in the post-Soeharto period has influenced the regulations on marriage on both national and sub-national levels.

Within the new framework of democratization and regional autonomy, the rise of Islam as a collective identity has become concretely apparent in the introduction of Islam-based regulations on the sub-national level. These regulations are claimed to encourage the growth of a better Islamic society. Nonetheless, they do impose additional conditions on those who wish to enter into a marriage. Since 2001, numerous regions like Solok, Payakumbuh (West Sumatra), Bulukumba (South Sulawesi), Kota Banjarmasin (South Kalimantan), have issued a local regulation on the obligation to read the Qur'an. The long and short of this requirement is that students and brides and grooms must be able to read the Qur'an. In Bulukumba, for instance, the proposal that this regulation be adopted was surprisingly voiced by a religious leader who was the incumbent head of the District Office

[57] Daniel S. Lev, 'Judicial Authority and the Struggle for an Indonesian Rechtsstaat', *Law & Society Review*, vol. 13, no. 1 (1978), pp. 43–4.
[58] Noorhaidi Hasan, 'The Making of Public Islam: Piety, agency, and Commodification on the Landscape of the Indonesian Public Sphere', *Contemporary Islam*, vol. 3, no. 3 (2009), pp. 229–50.
[59] Vedi R. Hadiz, 'A New Islamic Populism and the Contradictions of Development', *Journal of Contemporary Asia*, vol. 44, no. 1 (2013).
[60] Delmus Puneri Salim, *The Transnational and the Local in the Politics of Islam: The Case of West Sumatra, Indonesia* (Cham: Springer International Publishing, 2015).

of Religious Affairs.[61] The certified ability to read the Qur'an as a new condition for the conclusion of an official marriage was indeed a new interpretation of certain aspects of Sharia. Extending beyond being a sign of religious piety, it has demonstrated the ongoing complicated social and political negotiations.[62] Buehler argues that the implementation of Sharia-based regulations is a by-product of the simmering conflict over control of resources between state elites and local economic elites.[63]

Be that as it may, it is important to note that the post-New Order legal reform has also fuelled debates and conversations between Muslim groups. A legal draft called the Counter Legal Draft Kompilasi Hukum Islam (CLD KHI), which was proposed by a working group consisting of young Muslims in 2004, signalled a progressive shift. It was meant to complement the government's efforts to raise the status of KHI to that of a law. The draft was controversial, drawing harsh reactions from conservative Muslim groups. One of the many controversies in the CLD KHI was its conception of Islamic marriage as a purely a civil contract, not a religious agreement.[64] Subsequently, it was proposed that marriage registration would be a compulsory condition and its omission would affect the validity of a marriage. Another interesting interaction was that between the 'liberals' and the 'conservatives' in their discussions about such issues as interreligious marriage.[65] Their conversations suggest that contestation of religious authority is still a work-in-progress.

[61] Elsam, *Monitoring Perda Syariat Islam di Bulukumba: Perda Nomor 06 tahun 2003 tentang Pandai Baca Tulis Al-Qur'an bagi Siswa dan Calon Pengantin* (Jakarta, 2008).

[62] Michael Buehler, 'The Rise of Shari'a by-Laws in Indonesian Districts: An Indication for Changing Patterns of Power Accumulation and Political Corruption', *South East Asia Research*, vol. 16, no. 2 (2008), pp. 255–85.

[63] Michael Buehler, 'Elite Competition and Changing State–Society Relations: Shari'a Policymaking in Indonesia', in *Beyond oligarchy: Wealth, power, and contemporary Indonesian politics*, ed. by Michele Ford and Thomas B. Pepinsky (Ithaca, New York: Cornell Southeast Asia Program Publications, 2014), p. 174.

[64] Muhammad Latif Fauzi, 'Islamic Law in Indonesia: Recent Debates on Islamic Family Law in the Reformasi Era (1998-2007)' (Leiden University, 2008).

[65] R. Michael Feener, *Muslim Legal Thought in Modern Indonesia* (Cambridge: Cambridge University Press, 2007).

In 2010, the government proposed the Bill on the Material Law on Marriage in Islamic Courts (*Rancangan Undang-undang Hukum Materiil Pengadilan Agama Bidang Perkawinan,* RUU HMPA). It was claimed that this law, to be applied exclusively in the Islamic courts, would replace the two-decade-old KHI and its legal status would be raised from a Presidential Instruction to a statutory law. It was argued that it would end the controversies about the legal position of the Bill in relation to the 1974 Marriage Law. Generally speaking, for the most part, the RUU HMPA sustained the norms already stipulated in the KHI, but put forward new rulings (Articles 143-153) pertaining to unregistered marriage, temporary marriage, polygyny, out-of-court divorce, and some other unresolved issues. These issues were all still considered to be unlawful. In its definitions, the law used two terms, a misdemeanour (*pelanggaran*) and a crime (*kejahatan*), to categorize them. The former is sanctioned by either a fine or imprisonment, while the latter carries a sentence of a long prison term.

More details of the two categories are found in the following table:

Misdemeanours	Crimes
A marriage not concluded in the presence of a marriage registrar (Article 143)	Entering into a temporary marriage (*mut'ah*) (Article 144)
A marriage to a second, third, or fourth wife without the official permission of a (Islamic) court (Article 145)	Conducting an extramarital relationship with an unmarried woman which has led to a pregnancy and refusal to marry her (Article 147)
A husband's unilateral repudiation out of court (Article 146)	Performing a marriage and acting as an official marriage registrar and/or magistrate guardian without due authorization (Article 149)
A marriage registrar who infringes on his obligations (Article 148)	Acting intentionally as a marriage guardian, even though not legally entitled to do so (Article 150)

Table 1.1. Categories of Misdemeanours and Crimes in the RUU HMPA

Some argued the criminalization approach was taking the easy way out (*langkah malas*) by the legal draftsman. It was a repetition of the content of previous marriage laws. The 1946 Law on Marriage introduced the concept of financial penalties for women who enter into an illegal marriage and imprisonment for those marry them off illegally. Furthermore, Government Regulation No. 9/1975 stipulates that failure to register a marriage is punishable by a Rp7,500 fine. Likewise, Law 23/2006 on Civil Administration introduced a civil penalty, a maximum of Rp 1,000,000, for those who fail to report their marriage within sixty days of its conclusion. Despite these legal penalties, there is still a fundamental problem that no very strict legal implementation of the law has ever been attempted.[66]

This section reviews the legal reforms in the post-*Reformasi* era and the drafting of a number of sub-national laws which support religious-based ideas but have not been recognized in national law. In this period, conservative Muslim groups emerged as the public face of Islam and under these circumstances, these sub-national laws could be interpreted as a real threat to attempts to reform family law which have displayed a tendency to secularize legislation. Attempts to introduce such legal reform were made in 2010. However, there were some major stumbling-blocks which stood in the way of the government passing it, specifically in the form of the imposition of financial penalties for actions which are permissible under Sharia law. The draft law was rejected by the general public.

4. Contesting *Maṣlaḥa*

The legal reform of Islamic Family Law has always been an arena in which the voices of the *ulama* are distinctly audible. They have applied *ijtihād* to ensure that their involvement was, and still is, visible in the provision of both the material for and the religious legitimacy of a legal

[66] van Huis and Wirastri, 'Muslim Marriage Registration in Indonesia: Revised Marriage Registration Laws Cannot Overcome Compliance Flaws'.

code. Although there is a growing tendency to promote the notion of the common good (*maṣlaḥa*),[67] the result of *ijtihād* is not always supportive of, indeed can even be in opposition to, the state way of thinking. By exerting their influence on Islamic legal matters, particular Muslim groups wish to make their position in the relationship between Islam and state authority explicit.

Analysing the proposed bill, this section investigates three *fatwas* (non-binding Islamic legal opinions) on marriage registration in an attempt to understand the diverse opinions among Islamic authorities. These *fatwas* were issued by major Islamic organizations, namely the Majelis Ulama Indonesia (MUI, the Indonesian ulama council), the Muhammadiyah and the NU. My selection of these organizations as a case study is premised on the variations in terms of their relationship with the state, the constituents, and their methods of legal reasoning. Each of them has a special body of *iftā'* (producing *fatwas*), respectively the *Komisi Fatwa* of the MUI, *Majelis Tarjih* of Muhammadiyah, and *Bahtsul Masail* of NU.

4.1. The MUI *Fatwa*

The MUI was established by the government in 1975 as a forum which would encompass the diversity of Islamic organizations, Muslim leaders and scholars. It has remained important in the sense that it has to maintain the balance by accommodating the interests of the political regime and the Muslim communities.[68] Its *fatwas* are supposed to be 'intermediary'. It was in the *Ijtima' Ulama* (Ulama Assembly) held in the Pesantren of Gontor, East Java in May 2006, that the issue of unregistered marriage was discussed. Two years later, the legal conclusion was publicly announced with the issuance *of Fatwa* No. 10/2008. In order to avoid ambiguities, the MUI was very careful in selecting its term by which to designate an unregistered marriage. Despite the familiarity of the term *nikah sirri*, the *fatwa* introduced the

[67] Felicitas Opwis, 'Maṣlaḥa in Contemporary Islamic Legal Theory', *Islamic Law and Society*, vol. 12, no. 2 (2005), pp. 182–223; Hefner, 'Sharia Law and Muslim Ethical Imaginaries in Modern Indonesia'.

[68] Syafiq Hasyim, 'Majelis Ulama Indonesia and Pluralism in Indonesia', *Philosophy & Social Criticism*, vol. 41, nos. 4–5 (2015), pp. 487–95.

notion of *nikah di bawah tangan* (unofficial marriage). The MUI argues that, in everyday practice, *nikah sirri* is sometimes interpreted in irregular terms. Instead of indicating a marriage which is just not registered, *nikah sirri* can mean a marriage which has deliberately been concluded in secret, without the presence of witnesses (*shahīd*). This kind of marriage is, according to the MUI, qualified as invalid (*tidak sah*). It cites that, in the classical *fiqh* treatises, the majority of Sunni schools are in agreement that the presence of witnesses is as a requisite for the legality of marriage. Only the Maliki School say that the publication (*i'lān*) is sufficient, as a substitute for a witness.

Although the *fatwa* did confirm the legal norm stipulated in the state law, it embraced 'dual validity' in a different sense. It states that an unofficial marriage is (religiously) valid (*sah*), in regard to its compliance with the conditions (*syarat*, *rukun*) laid down in Islam, but shall fall into the category of *haram* (unlawful) if it causes *mudharat* (harm). The *fatwa* interpreted harm as matters related to the husband's obligation to fulfil the rights of wives and children. Despite this stipulation, the MUI did not openly declare any unofficial marriages either harmful or immoral. Discussing the status of *haram*, Ma'ruf Amin, the General Chairman of the MUI at the time, indicated that, if a husband neglects his responsibilities, he will (only) be regarded as sinful. In its legal reasoning, the *fatwa* adopted the method of *sadd al-dharī'a* (blocking the means to unexpected evil). Consequently it infers that marriage registration is strongly recommended so as to protect Muslims from harm. The *fatwa* also refers to a statement by the nineteenth-century Javanese *ulama*, Nawawi al-Bantani, saying that, "if a ruler issues an obligatory command (*wājib*), it must be taken to be absolutely compulsory (*ta'akkada wujūbuhū*); if he gives a recommendation (*mustaḥabb*), it must be taken as compulsory; if he gives a permission (*jā'iz*), as long as it involves the common good (*maṣlaḥa*), it must be perceived it as compulsory." According to the MUI *fatwa*, marriage registration is covered by the first category which is absolutely obligatory.

4.2. The *Majelis Tarjih Fatwa*

The second *fatwa* was handed down by the *Majelis Tarjih* of the Muhammadiyah, well known as a modernist movement which, under the banner of reform (*tajdīd*) and purification, approaches the basic sources of Islam by means of independent rational investigation. In addition to the principle of "the return to the Qur'an and Sunnah of the Prophet" as advocated by the Egyptian scholar Muhammad 'Abduh, the use of reasoning is encouraged. In the context of Sharia law, this orientation is epitomized by the approach called *tarjīḥ*, which is an examination of the opinions of various Muslim jurists in order to determine which is most apposite to the original Sharia source.[69] Like the MUI, in 2007 the *Majelis Tarjih* of the Muhammadiyah issued a *fatwa* on *nikah sirri* which reinforced the state's legal norm on official marriage. Interestingly, this *fatwa* did not contain a clear-cut statement on the legal status of *nikah sirri*. Instead, it states that the function of marriage registration is a preventive measure to eliminate possible deviations from the required conditions in a marriage contract and to avoid the forgery of the identity and documents of the bride. Marriage registration is pronounced compulsory, on the basis of the analogy (*qiyās*) of the obligation of the administration of debts (*mudāyana*). A marriage contract is said to occupy a more prominent position, *mīthāqan ghalīẓan* (solid agreement), than other contracts. The *fatwa*s of the MUI and Muhammadiyah are both good examples of the use of the *maṣlaḥa* approach to deal with modern developments.

4.3. The *Bahtsul Masail Fatwa*

This brings us to the third *fatwa* issued by the NU. It is important to note that the NU is an Islamic organization which promotes a traditionalist view of Islam. Traditional religious leaders (*kyai*) are vested with the authority to undertake legal reasoning. Its adherence to classical traditions is evident in its references to the four Sunni classical schools of Islamic jurisprudence, most importantly the Shafi'i. In the field of legal issues, the NU's *Bahtsul Masail* upholds the text-

[69] Syamsul Anwar, 'Fatwā, Purification and Dynamization: A Study of Tarjīh in Muhammadiyah', *Islamic Law and Society*, vol. 12, no. 1 (2005), pp. 27–44.

based reference (*madzhab qauli*) to legitimate books (*kutub mu'tabara*) and draw an analogy (*ilḥāq*) from existing cases in the books (precedents). Later it also added precedents set by pious ancestors (*madzhab manhaji*).[70] This method affects the way in which contemporary issues are understood. Following the widespread introduction of the Bill on Islamic Marriage, the Pesantren Deliberation Forums from throughout Java and Madura (*Forum Musyawarah Pondok Pesantren se Jawa dan Madura*) held a *Bahtsul Masail* meeting in Pesantren Lirboyo, East Java, in mid-2010. *Nikah sirri* and unofficial polygyny were the subjects of the most heated debates. The question raised in the forum was: "Is it justifiable to consider these crimes?"

The *fatwa* cites the opinion of the distinguished contemporary Syrian scholar, Wahbah az-Zuḥailī (1931-2015), recorded in his seminal work, *al-Fiqh al-Islāmī wa Adillatuh*. This opinion comes up in the discussion of polygyny, under the heading "requests for judge's permission (*idhn al-qāḍī*)". Az-Zuḥailī remarks that polygyny is subject to the permission of judges. The judge plays a significant role in authenticating whether or not a man who wishes to enter into a polygynous marriage has fulfilled the legal requirements, namely: justice between wives and the ability to provide equality of maintenance. This is a necessary step because, as Az-Zuḥailī argues, people are prone to make mistakes in their notions of concession (*rukhsah*).[71] In a nutshell, Az-Zuḥailī urges the importance of the court's permission.

Significantly the *fatwa* does not seem to emphasize the core point Az-Zuḥailī made. Instead, it seems more concerned about another matter, that is, Az-Zuḥailī's point about the judge's exaggerated control (*ishrāf*) over a personal relationship. Az-Zuḥailī notes:

> "The exaggerated control of the judge over personal status is futile. He might not be aware of the real reason, as people usually hide

[70] Ahmad Zahro, *Tradisi Intelektual NU: Lajnah Bahtsul Masa'il, 1926-1999* (Yogyakarta: LKiS, 2004).
[71] Wahbah Az-Zuḥailī, *al-Fiqh al-Islāmī wa Adillatuh*, vol. 7 edition (Beirut: Dār al-fikr, 1985), p. 172.

> this reason. Knowledge of the facts is supposed to expose the secrets of marital life and intervention in the personal freedom of people and a curb on the will of a human being. Marriage is a purely personal matter, which is agreed between the man and the guardian of the woman. No one can change his intention and stand in the way of his values. The secrets of a household are known only to the couple."

Relying on this premise, the *fatwa* perceives the personal affairs of a family to be an aspect which should be respected without any further intervention by a judge. Viewed in the context of the criminal provisions in the bill, it seems obvious that the *fatwa* pronounces an analogy (*ilḥāq*) between the administration of a legal sanction to punish an unregistered marriage and exaggerated control of marital life. Here, the *fatwa* interprets *maṣlaḥa* in a different manner, namely: the privacy of a married couple. Consequently, the *Bahtsul Masail* concluded that legal (criminal) sanctions exacted on those who enter into a *nikah sirri* or unofficial polygyny violate Sharia.

5. A New Trend: Citizens' Rights Approach

The previous section contains a brief overview of the diverse orientations in Muslim groups towards the legal reform of family law. From a religious perspective, unregistered marriage remains a debatable topic, even though years before the government did attempt to find some ways to deal with this issue by passing the Law on Civil Registration. The law introduced harsh legal sanctions for those who do not report their marriage to the authorized institution. It seems, however, that the problem does not lie in the absence of a strict legal norm, but in its implementation.[72] Despite every effort, the controversies about what makes a proper marriage have not been resolved by different laws. They have continued to surface in local administrative practice and court decisions.[73] The debate about

[72] van Huis and Wirastri, 'Muslim Marriage Registration in Indonesia: Revised Marriage Registration Laws Cannot Overcome Compliance Flaws', p. 15.
[73] Bedner and Huis, 'Plurality of marriage law and marriage registration for Muslims in Indonesia: a plea for pragmatism', p. 182.

Muslim marriage has likewise shifted from a contention over what is an appropriate norm to be applied to Muslims to a debate about civil rights, primarily children's rights to legal identity.

Judges have played a stalwart role in the state's attempts to protect children's rights which derive from the issue of the legal validity of their parents' marriage. Retrospective marriage legalization by recourse to the *isbat nikah* mechanism enshrined in the KHI has proved to be inadequate to accommodate the needs of any child who are born out of legal wedlock in the current legal framework. This issue came to ahead when former *dangdut* singer, Aisyah Mochtar (Machica) claimed to have been married in a traditional Islamic ceremony in 1993 to the prominent Secretary of State, Moerdiono. Because of the 'informal' nature of the marriage, she had problems in having the marriage validated and the son born of that marriage, Muhammad Iqbal Ramadhan, legitimized. A few years earlier, Machicha had attempted to have the marriage legalized. However, she was unable to provide valid proof of the marriage contract when she made her submission for the legalization of the marriage to a religious court. Moerdiono never recognized the son, was not willing to provide maintenance and divorced her in an unofficial Islamic way. In the year 2010, she filed a petition with the Constitutional Court for a judicial review of the constitutionality of the stipulations, Article 2 Point 2 and Article 43 Point 1, of the Marriage Law that state that a child born out of wedlock has a civil relationship only with the mother.

The Constitutional Court decided to amend the wording of Article 43 (1) of Marriage Law on the legal status of a child born out of wedlock. The Article formerly stated "a child born out of legal wedlock has a civil relationship with its mother and the mother's family only".[74] The majority of the judges believed that this provision, based on the principle of equality before the law, contravened the Constitution and hence the Article was believed to curtail children's right to life as guaranteed by the Constitution (Article 28B Point 2). The court made

[74] Simon Butt, *The Constitutional Court and democracy in Indonesia* (Leiden/Boston: Brill Nijhoff, 2015), p. 125.

a decision which stated that paternal recognition must be accorded children born out of legal wedlock provided it can be proven that they have a blood relationship with the father.[75] Despite being welcomed by activists, the decision provoked criticism. Islamic groups believed the legitimation of children out of legal wedlock could be interpreted ambiguously and consequently used to legalize extramarital sex, not just informal religious marriage. Taking a different tack, some feminist groups criticized the decision saying it did not make a differentiation for children conceived as a result of rape.[76] This Constitutional Court decision has offered a promising breakthrough, although it has been not easy to implement. This case also reveals that the Constitutional Court is engaged in giving interpretations of Islamic law.

A couple of years before this judicial process, civil-society organizations had come up with an idea to improve the protection of human rights. Their concern centred on the problem of civil registration. In conjunction with government agencies, they set-up a common platform called *Konsorsium Catatan Sipil* (the Consortium for Civil Registration). The goal for which this movement strove was to help the government provide a national legal framework which would reinforce the right to a legal identity. To this end, they prepared a Civil Registration Bill and presented the draft to the Ministry of Home Affairs (MoHA) in 2005. The bill was passed in 2006. This Law invests the MoHA with the responsibility to co-ordinate, among other matters, inter-agencies in population administration. However, from the government's point of view, legal identity was still perceived to be primarily an administrative and registry affair.

Since then, children's rights to state recognition have become a central issue in Indonesian public debates. On the basis of the 2011 report of the Bureau of Statistics, the Ministry of Women's Empowerment and Child Protection has claimed that around 40

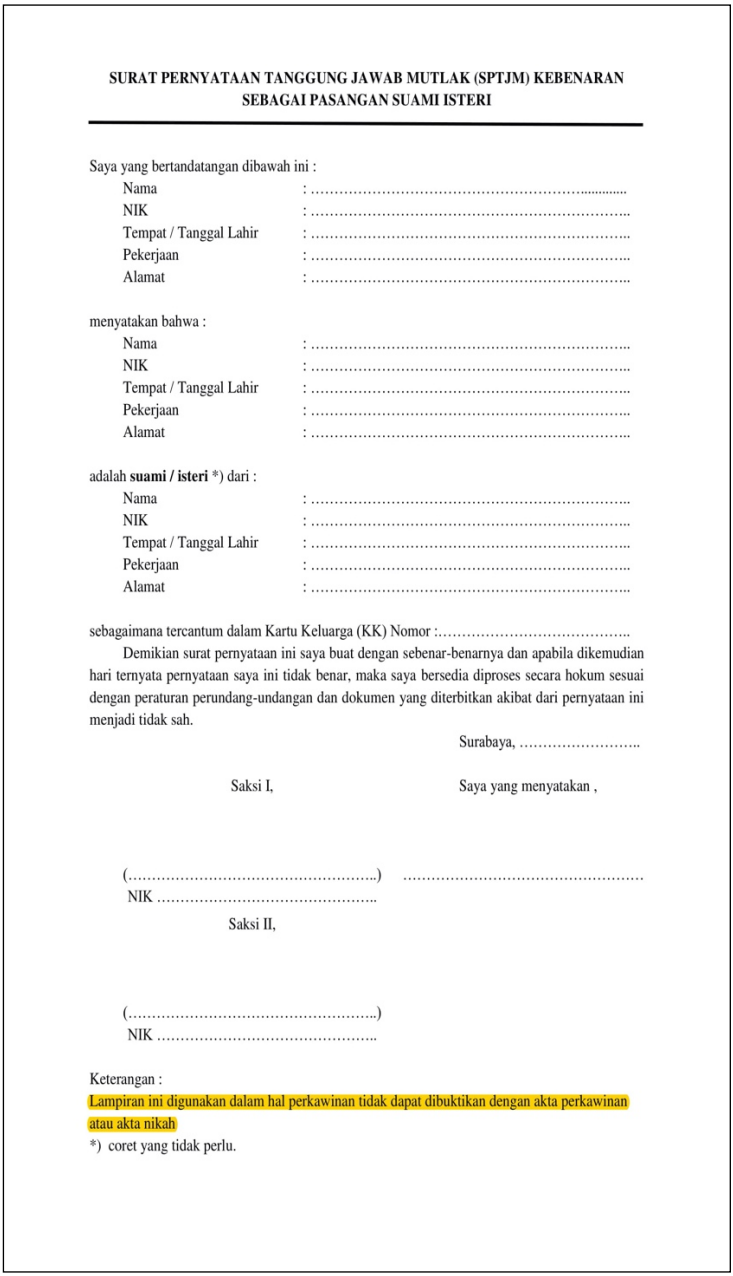
[75] Tutik Hamidah, 'The Rights of Children Born out of Wedlock: Views of Muslim Women's Organizations on Constitutional Court Judgement 46/2010', in *Women and Property Rights in Indonesian Islamic Legal Contexts*, ed. by John Bowen and Arskal Salim (Leiden: Brill, 2018), pp. 47–68.
[76] The Jakarta Post, *Paternity Ruling to Apply in Rape Cases* (7 Apr 2012).

percent of Indonesian children are not formally recognized by the state. Since 2012, the acceleration of the possession of issuing birth certificates for the protection of the child has become a common agenda point on the government's programme. This issue was claimed to be part of the Jokowi's administration vision, Nawa Cita (nine visions), which states that the possession of a birth certificate by children aged 0-18 years should reach 78 percent in 2016 to 90 percent in 2020. In 2015, eight related Ministries were involved in compiling a Memorandum of Understanding (*nota kesepahaman*). whose aim has been to frame a policy to accelerate the government's efforts to protect a child's right to a legal identity. The MoHA, as the body responsible for issuing birth certificates through the Office of Population and Civil Registration (*Kantor Catatan Sipil*) has co-ordinated this partnership. Furthermore, the Commission on Indonesian Child Protection also became actively involved in campaigning for the repeal of laws which obstruct the issuance of birth certificates for children. It criticized the law which obliged people to register a child's birth. It argued that, as the registration of a birth is a right, it is the state which has the obligation to register people's births.[77]

In response to its campaign, the MoHA issued Regulation No. 9/2016 which served as a legal basis for the district-level office of civil administration to enforce this programme. Article 4 of the Regulation states that "if the parents/guardian/rapporteur fail to procure a declaration of the birth from doctor/midwife, they can submit an SPTJM (*Surat Pernyataan Tanggungjawab Mutlak*, letter of absolute responsibility) containing the child's birth data (*data kelahiran*)." This letter allows the parents to obtain their child's birth certificate. In the letter, the biological father declares that the child was born to a mother, his wife, and mentions the name of the midwife. The Regulation also offers parents who do not have a marriage certificate but wish to include their names on the birth certificate a way out. They

[77] KPAI, *Akta Kelahiran Adalah Hak Setiap Anak Indonesia, Batalkan UU yang Persulit Pembuatan Akta Kelahiran!*, http://www.kpai.go.id/tinjauan/akta-kelahiran-adalah-hak-setiap-anak-indonesia-batalkan-uu-yang-persulit-pembuatan-akta-kelahiran, accessed 4 Mar 2019.

are required to have what is known as the SPTJM of the married couples (*suami isteri*). This is another form of SPTJM which should be signed by the guardian of the bride or anyone in the presence of two witnesses. It is clearly stated that this SPTJM can be used as a substitute for a marriage certificate. By submitting this document, the parents are able to receive a birth certificate mentioning the names of the mother and the father. Admittedly, this SPTJM is a highly ambiguous document as it overlaps and overrides both the legal norms of marriage registration and the Islamic court's jurisdiction on marriage legalization. The SPTJM can even be used to recognize a polygynous marriage which represents a fundamental challenge to the court's authority, at least as far as the recognition of the child is concerned. It also undermines the relevance of the decision of the Constitutional Court.



SURAT PERNYATAAN TANGGUNG JAWAB MUTLAK (SPTJM) KEBENARAN SEBAGAI PASANGAN SUAMI ISTERI

Saya yang bertandatangan dibawah ini :

Nama : .....
NIK : .....
Tempat / Tanggal Lahir : .....
Pekerjaan : .....
Alamat : .....

menyatakan bahwa :

Nama : .....
NIK : .....
Tempat / Tanggal Lahir : .....
Pekerjaan : .....
Alamat : .....

adalah **suami / isteri** *) dari :

Nama : .....
NIK : .....
Tempat / Tanggal Lahir : .....
Pekerjaan : .....
Alamat : .....

sebagaimana tercantum dalam Kartu Keluarga (KK) Nomor :.....

Demikian surat pernyataan ini saya buat dengan sebenar-benarnya dan apabila dikemudian hari ternyata pernyataan saya ini tidak benar, maka saya bersedia diproses secara hokum sesuai dengan peraturan perundang-undangan dan dokumen yang diterbitkan akibat dari pernyataan ini menjadi tidak sah.

Surabaya, ...

Saksi I, Saya yang menyatakan ,

(.....) .....
NIK .....

Saksi II,

(.....)
NIK .....

Keterangan :
Lampiran ini digunakan dalam hal perkawinan tidak dapat dibuktikan dengan akta perkawinan atau akta nikah
*) coret yang tidak perlu.

Figure 1.1. SPTJM *Suami Isteri* (SPTJM of husbands and wives)

Following this MoHA regulation on SPTJM, a number of local governments issued similar local regulations. For instance, the mayor of Depok in West Java issued Regulation No. 25/2016 to safeguard the implementation of this MoHA policy. Nevertheless, in practice, in some East Javanese regencies I observed that this SPTJM policy is not in force. The officials who reject it argue that they still consider a marriage certificate the most legitimate proof of the legal status of the offspring's parents. They even oblige the parents to include a marriage certificate when the latter want to update their family card (*kartu keluarga*). If they fail to present the marriage certificate, the legal status of the husband and wife is changed to 'unmarried' (*belum kawin*). While the wife is first on the list with the designated status of head of household, the husband is listed on the bottom row with the status of 'another' (*lainnya*). In one interview, a KUA staff member said that the Regulation on SPTJM seems to infringe on the position of Muslim marriage registration, which falls under the authority of the KUA. He argued that, in spite of the urgent call for children to possess a legal status, as is their constitutional right, the government should not issue regulations which challenge the authority of the KUA to register a Muslim marriage.[78]

6. Conclusion

For the majority of Muslims, marriage constitutes one of the most important aspects of their personal life because, without it, the family, considered the basic element of a Muslim community (*umma*), is not possible. Muslim communities demand that any modern reshaping of Islamic marriage should preserve its religious character as prescribed by Sharia law. However, the nub of the problem is that Sharia is not easy to define. The transformation of a scattered set of Sharia substantive laws into a codified form of Islamic law has been turned into an arena encompassing scholarly, political, and practical dimensions. In other words, the struggles over the state codification of Islamic law have been disrupted by the necessity for negotiations

[78] Interview with Pak Mad, an official at the KUA Sumbersari, East Java

between the state power, religious authorities and authorities within Islam itself. In the Indonesian context, this negotiation inevitably involves the debate about what makes a Muslim marriage valid.

In the late-nineteenth century, Dutch colonial policy was oriented towards producing new Islamic leaders, *penghulu*, who could be incorporated into its colonial administration. In the colonial framework of legal plurality, Sharia began to be transformed into a rigid norm of state law. Muslim marriage was made subject to legalization under the supervision of an official marriage registrar appointed by the Dutch. The regulation on registration was maintained by the post-colonial Indonesian government. The new Indonesian state established the Ministry of Religious Affairs and made the arrangement of Muslim marriage a priority on its agenda of nation-building and subsequently a significant reform was made. The government issued a Law which exclusively regulated Muslim marriage and divorce. Muslim marital matters came under the aegis of the Ministry of Religious Affairs. In 1974 the state unified the substantive legal rules pertaining to marriage in an effort to sort out the problem of the entrenched plurality of legal norms, religious affiliations, and local ethnic attachments.

In order to accommodate the demands of Muslim organizations, the state adopted the principle of 'dual validity'. The Law sanctioned a religious ceremony, but added the legal obligation of registration. Furthermore, the corpus of the KHI, which codified Muslim Family Law, not only endorsed the 'dual validity' principle as applied in the Marriage Law, but offered a new legal norm to deal with unregistered marriage. As one tactic in the battle to attain state recognition, it was decided that an unregistered marriage could have retroactive legalization (*isbat nikah*).

The answers to my question: "*How does the state deal with different religious orientations?*" can be formulated as follows. Despite the call since the political transition in 1998 for the sustained improvement in the status of women, Indonesia has been experiencing the rise of religious-based ideas. Islam has been increasingly emerging as a collective identity as the notions of the *umma* and religious piety have

been commodified by different political interests. As a consequence, since the 2000s, in many areas we have witnessed the emergence of Sharia-based sub-national regulations which have been the outcome of negotiations among political elites. They have championed Sharia-based regulations as a viable solution in their efforts to form a better Muslim society. These sub-national regulations also cover rules on public morality which, in particular aspects, challenge the regulations on Muslim marriage imposed by the national law, for instance, a local regulation on the ability to read the Qur'an, as an obligatory condition before a marriage ceremony can be concluded.

On the other hand, legal reform in the post-New Order era has involved dialogues and conversations between the younger generation, religious leaders, academics and activists. The issuance of the controversial CLD KHI and debates about inter-religious issues are irrefutable evidence of this. These debates have involved prolific interactions between the 'progressives' and the 'conservatives '. The progressives have supported the tendency towards incorporating modern ideas such as human rights and gender equality into marriage regulations; ideas which are challenged absolutely by those taking an old-fashioned approach who cling to traditional orthodoxy.

Marriage registration remains an important issue. The Indonesian public tends to perceive unregistered marriage (*nikah sirri* or *nikah di bawah tangan*) as an infringement of the rights of vulnerable women and children. Aware of this problem, the government attempted a new legal reform to right the matter and to raise the status of the KHI from a Presidential Instruction to a Law. It proposed a Bill on Islamic Marriage which included legal sanctions on certain infringements, for instance, people who do not register a marriage or a polygynous marriage. The Bill has elicited harsh reactions and been rejected by many conservatives. At present, the future of the bill is uncertain.

The debate on legal reform has also involved *ulama*. By issuing *fatwa*s, *ulama* have managed to reclaim their religious authority. Their *fatwa*s reveal a new trend in Islamic Law which sees it as *maṣlaḥa* (common good) and this has become an important legal reasoning underlining the essential position of the state in administering marital

relations. In the framework of *maṣlaḥa*, marriage registration is a viable means to prevent social harm. Nevertheless, this *maṣlaḥa* orientation is challenged by a literal approach to classical Islamic texts. These two religious orientations are locked in a contest to shape the content of the legal reform, but the different interpretations among *ulama* only serve to show that Sharia is not a fixed and complete body of legal prescriptions which have been derived from scriptural texts in a timeless manner.[79] This public debate also has the effect of "producing a degree of openness… that appears to have transformed the country."[80] Differentiating itself other *fatwa*-issuing bodies, through its self-proclaimed identity as a 'civil society' organization, the MUI has sought to provide the country with an agency of 'official national *mufti*.'[81]

The government's effort to improve the position of women in the matrimonial sphere and to protect children's rights is an unceasing endeavour. Developments over the last decade in Indonesia suggest that the judiciary and the civil administration have been making a meaningful contribution. The debate on Muslim marriage has shifted from a debate about the validity of Muslim marriage to a debate about the consequences of marriage registration for citizens' rights, primarily the rights of children to a legal identity. Firstly, the judicial authority provides a legally binding interpretation of the legal status of a child based on the Constitution. This decision grants paternal recognition to children born out of wedlock. Secondly, because the legal status of children has become an important issue, a government body has issued a programme to accelerate the acquisition of birth certificate. The rub is that this policy appears to overlap with the existing rules on marriage registration, because a marriage certificate is no longer important administratively to prove the legal status of a marriage. Despite the conflict between the rules, in my opinion, the existence of this policy can be interpreted as a step forward in the

[79] Hefner, 'Sharia Law and Muslim Ethical Imaginaries in Modern Indonesia', p. 91.
[80] Cammack, Bedner, and van Huis, 'Democracy, Human Rights, and Islamic Family Law in Post-Soeharto Indonesia', p. 13.
[81] Tim Lindsey, *Islam, Law and the State in Southeast Asia*, Vol. I: In edition (London: Tauris, 2012), p. 124.

process of state formation.[82] It enables the state to penetrate deeply into communities and to generate individual rights and obligations based on a national identity rather than membership of a certain arrangement.

In the next chapter, I shall discuss continuity and change in the laws and procedures governing marriage registration. I analyse the bureaucratic reform of the administration of Muslim marriage which falls under the MoRA and investigate how this reform affects the implementation of the marriage registration performed by the KUA on a sub-district level.

[82] Michael G. Peletz, *Islamic Modern: Religious Courts and Cultural Politics in Malaysia* (Princeton: Princeton University Press, 2002).