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

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## CHAPTER 6

# Unregistered Marriage and the Search of State Recognition

### 1. Introduction

Abdulloh (44 years) is the husband of Jamilah (40 years). They have been married for twenty-one years. However, their marriage was only concluded traditionally and, hence, not registered at the KUA, a practice locally referred to as *nikah sirri*. Therefore, they do not have a marriage certificate. Nevertheless, Abdulloh has somehow been registered as the *kepala keluarga* (head of household) and Jamilah as the *istri* (wife) on their Kartu Keluarga (KK, family card). Normally, this would not have been possible because they are not legally a couple. When I asked him how this could happen, Abdulloh replied, “I just received it from the village official (*pamong*). He organized everything.”<sup>101</sup> In possession of this KK, they are accordingly recognized as a legal couple in the civil administration.<sup>102</sup> Similarly, on their Kartu Tanda Penduduk (KTP, identity card), their marital status is listed as *kawin* (married).

Although their status is recognized as *kawin*, Abdulloh and Jamilah encountered a problem when they wanted to go on the *hajj* (pilgrimage). The KK or the KTP, which confirmed their status as

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<sup>101</sup> Interview with Abdulloh, November 2017.

<sup>102</sup> It is worth noting that, in the old KK version, the date of marriage was not mentioned.

*kawin*, did not suffice as a requisite document for the *hajj* visa application. Under state law they had to submit a marriage certificate to prove that they are in a lawful marital relationship. Their predicament was that they were not qualified to apply for it. The 1991 Compilation of Islamic law (*Kompilasi Hukum Islam*, KHI), which acts as the reference of Islamic judges, stipulates that Muslims can legalize their unregistered marriages through a judicial procedure called retrospective marriage legalization (*isbat nikah*). Although this legal norm was formulated to accommodate marriages concluded before 1974 when the legal obligation of marriage registration came into force, nowadays judicial practice in the religious courts will legalize unregistered marriage whenever it has been concluded as long as it can be proven that the wedding ceremony complied with Islamic precepts.<sup>103</sup>

Given this choice, instead of proposing an *isbat nikah*, Abdulloh opted to apply for marriage registration at the KUA. This meant that he would have a newly registered date of marriage, erasing any prior marital relationship between him and his wife. Abdulloh had no concerns or the least objection to the new date of marriage, although it would give consequences particularly on the legal position of their children. The children cannot state the names of both parents on their birth certificates because; as far as the bureaucracy is concerned, they were born before the registration of their parent's marriage. Welchman remarks that one distinct manifestation of the bureaucratization and the centralization of the state authority against what the Sharia postulates in marriage is the validity or otherwise of acts performed in accordance with traditional law but in violation of state law. Registration serves several objectives, principally extending state control over the private affairs of citizens.<sup>104</sup>

Abdulloh's experience illuminates the array of problems plaguing the state-citizen relationship in contemporary Indonesia. Their

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<sup>103</sup> Nurlaelawati, *Modernization, Tradition and Identity: The Kompilasi Hukum Islam and Legal Practice in the Indonesian Religious Courts*, pp. 202–3.

<sup>104</sup> See Welchman, *Women and Muslim Family Laws in Arab States: A Comparative Overview of Textual Development and Advocacy*, p. 53.

possession of a KK allows Abdulloh's family to enjoy certain benefits from the state. However, the legal status as husband and wife on the KK was not suffice to meet the requirements for *hajj* documentation. Harbitz and Boekle-Giuffrida remark that "every day in any given country around the world, individuals are denied access to fundamental services and rights because they cannot present positive proof of identity".<sup>105</sup>

In short, Abdulloh needed a marriage certificate from the KUA to obtain a *hajj* visa. It was actually not Abdulloh who was in need of a marriage certificate, because he could have applied for a *hajj* visa on his own. However, since he wanted to go together with his wife, it was actually his wife who needed a legal marriage certificate. According to Saudi Arabian regulations any woman under the age of 45 who wants to apply for a *hajj* visa needs to indicate by whom she will be accompanied (*yurāfiqhā*) as her male guardian (*maḥram*).<sup>106</sup> In this case this role was obviously to be assumed by Abdulloh, but since he was not officially registered as her husband, this was impossible.

One interesting point emerging from this story is that Abdulloh used the KK - showing his status as married - to apply for marriage registration. The responsible authority at the KUA was aware of this anomalous situation, yet proceeded with the registration. I shared this case with a close friend of mine who is a *penghulu* in another town and he responded spontaneously "*harus ditegur itu KUA nya*" (The KUA should be rebuked). His argument was that the KUA was obliged to reject Abdulloh's application and should have encouraged him to go to the Islamic court to request an *isbat nikah*.<sup>107</sup> I also tried to obtain clarification on this decision with a person from the KUA, who said: "We just wanted to help him. It was a pity that he should have to go to the court, because this takes money and time. Abdulloh only needed an official marriage certificate".<sup>108</sup> For Abdulloh, the expedient of

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<sup>105</sup> Mia Harbitz and Bettina Boekle-Giuffrida, *Democratic Governance, Citizenship, and Legal Identity* (New York, 2009), p. 5.

<sup>106</sup> Saudia.com, *Hajj Visa*, [https://www.saudia.com/before-flying/travel-information/hajj-and-umrah/hajj-visa?sv\\_lang=en&sv\\_cn=ID](https://www.saudia.com/before-flying/travel-information/hajj-and-umrah/hajj-visa?sv_lang=en&sv_cn=ID)

<sup>107</sup> Interview with Pak Multazam, a *penghulu* in Jember.

<sup>108</sup> Interview with Pak Zaki, a KUA official in Summersari.

registering his marriage at the KUA meant having to spend less money and being assisted more efficiently than if he had gone to the Islamic court.

## **2. Why Legalising an Unregistered Marriage?**

There has been a widespread public assumption that assuring the legal status of marriage is important to the protection of rights to state services for family members and, more widely, to ensuring public order. Marriage registration means that women and their children are entitled to state services and protected by law against the disadvantageous consequences of a divorce or a husband's death, such as being unable to claim alimony and maintenance. However, it appears that Abdulloh was not interested in the legal validity of marriage. All he wanted was state recognition of his marriage, in the form of a marriage certificate, purely and simply to be able to go to Mecca.

In his case, marriage registration sounds as if it is a purely administrative affair. Nonetheless, it has a wider dimension. A marriage certificate is part of a person's legal identity. In Abdulloh's case, possession of a marriage certificate was the solution he needed so that he and his wife could go on the *hajj*. However, from the state perspective, when he registered his marriage Abdulloh clearly (re)negotiated his sense of self as a citizen.<sup>109</sup> In day-to-day reality, the absence of proof of legal identity can disqualify a citizen from access to rights or state protection. Legal identity is as much about being a citizen as about one's sense of belonging and ability to exercise his or her rights and obligations.<sup>110</sup> Consequently, legal identity influences citizenship. Following Van Klinken, I wish to emphasize that

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<sup>109</sup> Deepta Chopra, Philippa Williams, and Bhaskar Vira, 'Politics of citizenship: Experiencing state-society relations from the margins', *Contemporary South Asia*, vol. 19, no. 3 (2011), p. 243.

<sup>110</sup> Harbitz and Boekle-Giuffrida, *Democratic Governance, Citizenship, and Legal Identity*, p. 5.

citizenship develops in relation to the specific way the state and local societies reshape each other.<sup>111</sup>

For Abdulloh, and many other Indonesians, religious legitimacy which constitutes the social acceptance of a marriage is more important than state recognition.<sup>112</sup> Sonneveld has remarked that, from a legal point of view, it is not difficult to differentiate between formal marriages and informal marriages.<sup>113</sup> However, from a social perspective, the difference is hardly visible. Platt confirms this statement when she argues that, where the reach of the state is limited, marriage remains largely a community-based affair.<sup>114</sup> Bedner and Huis also claim that, in West Java, state recognition of a marriage is considered unimportant from a social perspective.<sup>115</sup>

On the law-making level, debates about family law in Muslim majority countries have paid great attention to the matter of how the state should deal with religious norms. By contrast, when it comes to marriage registration, my observation on the grassroots level in Pasuruan villages shows that these issues revolve around the significance of the state recognition of marriages which have been accorded social recognition based on community-based legal norms, which in turn are grounded in religion. This begs the question of in what ways is the legal validity of marriage relevant? This is core to this chapter. I argue that state recognition of a marriage cannot entirely substitute community-based legal norms. The state's ideas of recognition and protection might diverge quite sharply from what people imagine. For Abdulloh, registration served a legitimate proof which he could use to claim certain rights. This reflects an emic point

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<sup>111</sup> Gerry van Klinken, 'Citizenship and local practices of rule in Indonesia', *Citizenship Studies*, vol. 22, no. 2 (2018), p. 114.

<sup>112</sup> In Java, and in Indonesia in general, marriage is performed according to the social norm which in practice involves informal religious leaders. Living together outside wedlock is a taboo. The local belief is that the extent to which a marriage is valid merely depends on whether it has been concluded in conformity with Islamic law.

<sup>113</sup> Sonneveld, 'Rethinking the Difference Between Formal and Informal Marriages in Egypt'.

<sup>114</sup> Platt, *Marriage, Gender and Islam in Indonesia: Women Negotiating Informal Marriage, Divorce and Desire*, p. 5.

<sup>115</sup> Bedner and Huis, 'Plurality of marriage law and marriage registration for Muslims in Indonesia: a plea for pragmatism', p. 187.

of view in which the local people of Summersari, Pasuruan, refer to the notions of *keperluan* (necessity) or *sedang butuh* (in need).

Nowadays Indonesia offers an array of mechanisms to which people can resort to be able to adjust their situation so that it dovetails with the state framework. When it issues legal documents, the state is aiming to protect certain rights, in particular those of women. However, providing certain people with a legal document is only possible if state marriage functionaries are sympathetic to and flexible in implementing the regulation.<sup>116</sup> To a certain degree, they have to come up with discretionary policies and are prepared to commit legal transgressions. When they do this, these functionaries feel privileged to be able help people obtain their due right to state services. This explains why Abdulloh's submission for marriage registration was accepted. This situation necessarily relates to the 1980 work by Michael Lipsky. His book *Street-level bureaucracy: Dilemmas of the individual in public services* is meaningful as it examines the behaviour of frontline workers in policy delivery agencies. He refers to these frontline workers as 'street-level bureaucrats'. They are public employees whose job is to cope directly with citizens and they are permitted considerable discretion in the implementation of their work.<sup>117</sup> Certainly their job is to implement public policies but, at the same time, they have to respond to citizen's requirements on the basis of a limited amount of information or time in which to make a decision.

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The attitudes adopted by state agencies are of necessity based on the local situation. In an interview, Haji Hamim, a village religious official, said, "*di sini belum tertib, masih kocar-kacir*" (documentation here is not yet well organized, it is still a mess).<sup>119</sup> While the head of the KUA said, "*di sini sulit, karena (mohon maaf) SDM [sumber daya manusia] masyarakat sini kurang*" (It is not easy here because (I do

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<sup>116</sup> Lipsky, *Street-Level Bureaucracy: Dilemmas of the Individual in Public Services*, p. 105.

<sup>117</sup> *Ibid.*, p. 3.

<sup>118</sup> Lars Tummars and Victor Bekkers, 'Policy Implementation, Street-level Bureaucracy, and the Importance of Discretion', *Public Management Review*, vol. 16, no. 4 (2014), pp. 527–47.

<sup>119</sup> Interview with Haji Hamim, a *modin* in Summersari, February 2017.



apologize) local human resources are not yet up to scratch). The variety of problems which arise from legal documents have had to have been subject to discretion and negotiation. This negotiation has also turned out to be a means by which informal marriage-functionaries can maintain their vital position. In these sorts of situations, citizens' rights are somehow constituted by the intervention of these informal leaders. In their work, Berenschot and Van Klinken have underlined the importance of informal connections in the shaping of state-citizen interactions.<sup>120</sup> Bedner and Van Huis have dealt with this issue too.<sup>121</sup> They have emphasized the pragmatism which inevitably underlies a situation in which state officials prioritize the interests of the weaker party.

This chapter demonstrates how state recognition of a marriage works. It will address the different ways people strategize to obtain state recognition of their marriage and examine the ways the state accords the recognition they crave. Through extensive observation at the KUA and a close reading of marriage registration documents, I have managed to identify the kind of administrative transgressions to which a marriage registrar resorts. In addition, my investigations at the KUA, I have analysed conversations in Islamic courtrooms and the legal reasoning used by Islamic judges in the cases of marriage legalization and the legitimation of children.

The following section deals with the theoretical framework of this chapter. Legal identity and citizens' rights are especially relevant in approaching the issues arising from marriage registration. Section 4 is concerned with administrative matters and the discretion used by the KUA in marriage registration. Section 5 examines the ways Islamic court handles cases of marriage legalization. Sections 6 elucidates the roles of Islamic courts in the case of the legitimation of children. Section 7 concludes.

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<sup>120</sup> Ward Berenschot and Gerry van Klinken, 'Informality and Citizenship: The Everyday State in Indonesia', *Citizenship Studies*, vol. 22, no. 2 (Routledge, 2018), pp. 95–111.

<sup>121</sup> Bedner and Huis, 'Plurality of marriage law and marriage registration for Muslims in Indonesia: a plea for pragmatism'.

### 3. Legal Identity and Citizens' Rights

Legal identity has become an important issue over the last years. There is no single definition of what it really involves. However, referring to the Institute on Statelessness and Inclusion, legal identity is defined as: "A set of elements and characteristics, the combination of which is unique to every person, which defines each person and governs their relationship, obligations and rights under both private and public law."<sup>122</sup> In simple terms it refers to the recognition of an individual as a person before the law. Recognition of legal identity often depends on individual possession of valid legal identity documentation or other forms of proof of legal identity. The United Nations has incorporated legal identity into the Sustainable Development Goal (SDG). Goal 16 emphasizes the promotion of peaceful and inclusive societies which will encourage sustainable development and the providing of access to justice for all.

Because legal identity is an important starting point in realizing personal rights, human rights activists pay great attention to the term of legal identity. In Indonesia, a number of human rights and international donor organizations have launched a campaign to bring home the importance of legal identity. One is the Australia Indonesia Partnership for Justice (AIPJ). For a couple of years now, the AIPJ has been focusing on the problem of absence of legal identity documents which can limit access to civil rights and services. Some of their contributions were incorporated in the law of Population Administration 23/2006. Hence for the last fourteen years, the state has had a national reference for population administration and civil registration.

Studies about legal identity are closely connected to the problem of statelessness. This is a problem worldwide. Millions of people are stateless and an estimated 1.1 billion lack legal identity

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<sup>122</sup> Institute on Statelessness and Inclusion, *Sustainable Development Goal 16.9: 'Legal Identity', Nationality & Statelessness* (London: Institute on Statelessness and Inclusion, 2018), p. 7.

documentation. Having to live undocumented lives or without effective citizenship prevents them from reaching their full human potential as they are cut off from access to healthcare, education and other services. Making sure that every individual is recognized as belonging and capable of accessing the documents to prove their legal status is important, multifaceted work. Documents like birth certificates definitely serve as foundational proof of citizenship. Marriage certificates are another inseparable proof of legal identity.

Although marriage registration and citizenship are two distinct concerns and represent different fields of enquiry, they are fundamentally related to one another. Both are about recognition of a particular status of its subject by the state. Citizenship concerns the relationship between the state and its citizens. It is of utmost importance because it provides citizens with a sense of identity which enables them to exercise a wide range of basic social, economic and political rights. Without a doubt, people's participation in acquiring legal identity has been important in enhancing the quality of citizenship in post-*reformasi* Indonesia.

An abundance of scholarly works has underlined the rise in citizens' rights in the wake of the collapse of the Soeharto regime in 1998. Its fall paved the way for democratization and a series of decentralization reforms which extended greater autonomy to local governments and introduced bureaucratic reform. This change seemed to offer great opportunities to transform the public administration and public service. The issuance of a series of laws such as the Presidential Regulation 81/2010 on bureaucratic reform and Law 25/2009 on public service has marked this transformation. However, we know that citizenship in Indonesia was, and is, being challenged by the rise of a wave of religious, ethnic and regional identity politics.<sup>123</sup> *Reformasi* in 1998 has allegedly intensified these fragmented identities.

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<sup>123</sup> Henk Schulte Nordholt, 'Identity Politics, Citizenship and the Soft State in Indonesia: an Essay', *Journal of Indonesian Social Sciences and Humanities*, vol. 1 (2008), pp. 1–21.

I should argue that the desire of the state to be able to protect its citizens' rights has made marriage registration increasingly effective. The insistence by the state that possession of proof of legal identity defines certain rights which give people with limited choices a chance. People can argue that the state validity of a marriage does not necessarily improve the validity and social acceptability of a religious marriage. However, the current problem does not lie in whether or not the marriage is valid, but the extent to which a citizen can claim rights from a marriage. The absence of legal identity could disqualify a citizen from access to rights. Here, linking in with my argument in Chapter 1, a rights-to-obtain-the-state-services approach has been effective in changing people's ideas about accepting the state's orientation. Importantly, this approach circumvents the necessity for the state to speak out on religious issues concerning marriage, in which it might have to challenge religious authorities.

#### **4. Administrative Transgressions in Marriage Registration**

Besides demonstrating the insoluble relationship between legal identity and citizenship, Abdulloh's case also reflects the degree of pragmatism practised in the field. My close reading of marriage registration documents has uncovered what can be called a kind of administrative transgression resorted to by *penghulu*. The importance of administrative transgression was apparent in the everyday functioning of the marriage bureaucracy at the KUA.

In order to understand how administrative transgression works at the KUA, it is helpful to have a picture of marriage registration procedure. In 1990, the Minister issued a regulation setting out the obligations of marriage registrar.<sup>124</sup> This regulation maintained the requirement that an oral application for a marriage to be made. More than a decade later, KMA No. 298 of 2003 signified major changes as it re-standardized the documents for marriage registration previously required. This KMA can be considered the first regulation

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<sup>124</sup> PMA No. 2/1990 tentang Kewajiban Pegawai Pencatat Nikah (the obligations of marriage registrar).

to use the term *pencatatan nikah* (marriage registration), although it was amended a year later by KMA No. 477 of 2004.<sup>125</sup> Currently, marriage registration is undertaken on the basis of PMA No. 11 on marriage registration of 2007. The regulations of 2004 and 2007 stipulated that an application for marriage must be submitted in a written form. It set out the requisite documents as follows:

- Letters from the village administration which give the personal details of the bride (*keterangan untuk nikah* or Model N1), the bride's and the groom's origin (*keterangan asal usul* or Model N2) and the details of the parents (*keterangan orang tua* or Model N4).
- Application for marriage submitted in a letter (Model N7)
- Letters confirming the spouses' consent (*persetujuan mempelai* or model N3).
- A letter of permission from the parents if the ages of the bride and groom are under 21 (Model N5).
- If the bride is a widow (or the groom is a widower), she (or he) has to submit a death certificate (Model N6).

In Summersari society, as I mentioned in the previous chapter, the administrative side of marriage registration is handled by a *modin*. He takes all the documents to the KUA; rarely do the ordinary people come to the KUA themselves. They attend only if the KUA invites them. This invitation is extended after the KUA official has verified their documents. Sometimes, a complication arising from the verification process means that the couples have to personally attend the KUA office. According to PMA No. 11 of 2007, marriage registration generally requires five steps: submission of a proposal for marriage registration, document assessment, announcement of the marriage ceremony, marriage ceremony (*akad nikah*) and the signing of the marriage certificate (*penandatanganan akta nikah*). The second step, the process known locally as *rafak* (*pemeriksanaan*, observation) is crucial. The *rafak* is conducted to examine the conformity of the data written on the forms with the documents enclosed. This term is

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<sup>125</sup> KMA No. 477/2004 tentang Pencatatan Nikah (marriage registration).

understood and used differently in other areas in Java. In Central Java, *rafak* means a divorce initiated by wife.<sup>126</sup>

To support the validity of all the forms, the bride has to enclose certain documents, namely: an identity card and a birth certificate or a diploma. In Summersari, not all the brides have a birth certificate, among other reasons because of the legal status of their parents' marriage. In this case, a birth certificate can be replaced by a diploma. So, a diploma can substitute other missing documents.

At this point it is worth mentioning that the number of marriage registrations in Summersari has escalated dramatically since 2010. It is safe to assume that, before that year, numerous marriages went unregistered. The limited number of documents available for examination made it hard to determine who was qualified to act as the *wali* (marriage guardian). In interviews, the head of KUA Summersari complained about the validity of the *wali* as written on the form. He pointed out that in some cases the *modin* had been slapdash about this. He was worried about how it was possible to know if someone was a proper *wali* according to Islamic law, saying:

If someone else were to take over my position, he might not be acquainted with the area. Imagine you are the head of the KUA and you do not know that a particular person is the proper *wali* of the bride? A birth certificate is no guarantee. The only document you can refer to is the copy of the parents' marriage certificate. This cannot lie. The N2 form of the parents is noted on it; as well as on the N4 form. But, how can this be proved? In Surabaya, the marriage certificate of the parents must be handed in.

The problem of the *wali* is one which often arises. Let me explain the first case to unravel the problem. Aisya is a daughter of Muhdor and Maimunah, born of a marriage which was not registered. The marriage, which took place in early 2000, was not her first marriage for Maimunah because she was a widow. Aisya attached her family's KK and a diploma in her application for marriage registration. The KK had been issued years ago. In the KK, Muhdor was listed as the head of

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<sup>126</sup> Hisako Nakamura, *Perceraian Orang Jawa: Studi tentang Pemutusan Perkawinan di Kalangan Orang Islam Jawa* (Yogyakarta: Gadjah Mada University Press, 1990), p. 66.

household and Maimunah as his wife. Since the government has changed its policy, nowadays, this confusion is unlikely to happen: if a family cannot present a marriage certificate at the civil registration office, the legal status of the parents must be registered as *belum kawin* (unmarried). The mother appears as the head of the household and the husband appears in the bottom row as *lainnya* (the other). Therefore, the status of Muhdor as the head of household does not automatically guarantee his position as Aisya's biological father in the KK because of the absence of the marriage certificate. According to the KK, Aisya is fatherless. Her diploma also mentions only the name of her mother.<sup>127</sup>

In the marriage application forms submitted to the KUA, she was required to mention her father who would also serve as her *wali*. On account of the ambiguous position of her father, Aisya was invited to come to the KUA to have *rafak*. As Aisya did not have a marriage certificate for her parents, the *modin* provided Aisya with two letters from the village administration. The first was a letter declaring the marital relationship between her father and her mother was valid according to Islamic law. The second, a letter which declared that Muhdor was her biological father who had the right to marry her off. These letters did the trick. At this point, we see how an administrative transgression proved an important element in coping with cases which fell outside the box. As a street-level bureaucrat, the *penghulu's* position is critical, as he plays a crucial role in settling problems arising from these citizen entitlements. He either directly provides public benefits through the services he offers or mediates between citizens.<sup>128</sup> The immediacy of a change in policy in his interaction with citizens and its impact on people's lives is of vital importance.<sup>129</sup> The head of the KUA went ahead with the marriage registration on the basis of letters which should not have existed according to the standard procedure. Bedner and Van Huis have remarked that the

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<sup>127</sup> It is interesting to note that the newest version of the KK now includes the date of the marriage ceremony. It would be impossible for couples in an unregistered marriage to manipulate the data in the KK as happened in the solution to Muhdor's problem.

<sup>128</sup> Lipsky, *Street-Level Bureaucracy: Dilemmas of the Individual in Public Services*, p. 6.

<sup>129</sup> *Ibid.*, p. 8.

bureaucrats on the lowest levels of state administration play crucial roles in providing documentation for those who do not qualify.<sup>130</sup>

Administrative transgression also came into play in Abdulloh's case. As I claimed earlier, according to Indonesian law, the KUA has no authority to legalize a marriage which had been concluded earlier but had not been registered. This authority is the prerogative of the Islamic court. Although he must have been aware of this, the head of the KUA chose to exercise his discretion and agreed to register the marriage. At the time, because the KK had their status as *kawin* (married), the KUA asked Abdulloh to declare on paper that he had never registered his marriage before. Abdulloh asked the village administration to issue the required letter. The letter declared that Abdulloh had never registered his marriage at any KUA office and, therefore, under the provisions of the marriage law, his legal status was *perjaka* (unmarried). Of course, this letter contradicts the legal status written in the KK.

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<sup>130</sup> Bedner and Huis, 'Plurality of marriage law and marriage registration for Muslims in Indonesia: a plea for pragmatism', p. 187.



SURAT PERNYATAAN BELUM PERNAH MENCATATKAN PERNIKAHAN

Yang bertanda tangan di bawah ini saya :

1. Nama lengkap dan alias : \_\_\_\_\_
2. Bin : \_\_\_\_\_
3. Tempat dan tanggal lahir : Pasuruan, 15 April 1974
4. Nomor Induk Kependudukan : \_\_\_\_\_
5. Warga Negara : Indonesia
6. Agama : Islam
7. Pekerjaan : Wiraswasta
8. Tempat tinggal : \_\_\_\_\_

Bersama ini menyatakan dengan sebenarnya bahwa saya sampai saat ini benar benar belum pernah mencatatkan pernikahan saya di kantor urusan agama manapun, dan menurut undang undang perkawinan saya masih berstatus : Jejaka

Apabila di kemudian hari ada pihak lain maupun keluarga yang mempermasalahkan pencatatan pernikahan saya, maka saya akan mempertanggung jawabkannya sendiri serta akan menanggung segala akibatnya dan tidak akan melibatkan pihak lain maupun pejabat terkait/instansi manapun.

Demikian Surat pernyataan ini saya buat dengan sebenarnya dan tanpa ada paksaan dari pihak manapun, dan apabila dikemudian hari ternyata tidak benar maka saya bersedia di tuntutan sesuai Hukum yang berlaku

Pasuruan, 13 April 2017  
Yang Menyatakan

Mengetahui  
Kepala Desa

\_\_\_\_\_

Figure 7.1. A letter from village administration declaring that a person is not legally married

Yet another transgression was committed in case of Syamsul. Syamsul's problem arose from his divergent birthdates. The *penghulu* ensured a synchronization of dates. Interestingly, these dates were not necessarily based on the real situation. When there is a conflict of data, the validity of the data is usually based on other data obtained from a diploma. The argument was that it is uncommon to change the data on a diploma, but it is not that difficult to change the data in the civil registration documents as long as another legal proof can be produced. Since the government implemented the NIK (Nomor Induk

Kependudukan, single identity number) policy, the validity of the data has become a crucial issue. To give an example, now a parent cannot easily change the birthdate of their son or daughter to obfuscate child marriage ensure qualification for marriage registration, because a KUA official will check his/her birthdate in the civil administration office database. So, if he wants to pursue his nefarious purpose, he has to make the change at the civil administration office by presenting reasonable arguments and adequate evidence to convince the officials there to do so. For this reason, since 2015, the NIK of a couple and the *wali* is written on the marriage certificate and the KK also mentions the marriage date. Below is empirical evidence of this practice.

Syamsul was born in 1993. However, the KK and his diploma gave different versions of his birthdate. I clarified this with the *modin* and he said that neither versions was legally valid. The birthdate on the diploma had been noted by the teacher at primary school because Syamsul's parents had not submitted a birth certificate when he was first registered; the birthdate in the KK had been entered by the parents. When he wanted to marry, Syamsul referred the birthdate on his diploma. This case suggests that a citizen can use marriage registration as an opportunity to synchronize all his or her personal details. This attitude is quite common among villagers. They usually come to the civil administration office to affirm their marital status as 'married', and take the opportunity to adjust the names and the birthdates according to the marriage certificate.

This section has shown the importance of a marriage certificate as a means to prove legal identity. However, because of the complexity of the documents required to obtain a marriage certificate, from time to time a *penghulu* has to commit an administrative transgression and turn a judicious blind eye. This transgression is an impromptu solution to a particular situation which has escaped the regulations. *Penghulu* execute a degree of autonomy and transform it into policy. In the following section, we turn to the way in which marriage registration is dealt with in religious courts. Does transgression take place there too?

### 5. *Isbat Nikah* by Islamic Courts

In the previous section, I paid attention to the roles played by *penghulu* and the KUA in marriage registration. We have seen how transgression is important in dealing with anomalies in the documentation required for marriage registration. Without this transgression, marriage registration would not be possible. Regardless of this solution, as I mentioned earlier, people in marriages which have not been sanctioned by state legality can request retrospective legitimization by applying for *isbat nikah* from the religious court. This section will elucidate how *isbat nikah* works. In the Bangil Religious Court, *isbat nikah* appears to be a very workable solution for people who need to declare the legal status of the children but it is not the only solution. In the case of Abdulloh above, he did manage to register his unregistered marriage at the KUA. If he had just wanted to have state recognition for his children, he could have opted for the the judicial instrument known as legalization of children's status (*asal usul anak*). An explanation of this child legitimation follows.

There are varied reasons people might have not registered their marriage. Any correlations with economic or other factors such as access to the office are not very convincing. No one would that dispute that marriage registration is not affordable. In Summersari, the KUA is located at the heart of the sub-district and it is not that difficult to access the office. As far as I could see, almost all first marriages are registered because they are handled by *modin*. Most of the time, non-registration arises in cases of remarriage. If we look at the data in Summersari in 2015, 77.58 percent of all marriages were first marriages, while 22.42 percent were remarriages for either for one or both spouses. In 2016, the data indicates pretty much the same number. First marriages made up 77.07 person of all marriages, while 22.93 percent were remarriages. My materials indicate that 67.47 percent in 2016 and 76.65 percent in 2017 of all remarriages were between people who had been divorced. In 2017 32.53 percent in 2016

and 23.46 percent in 2017 were of people whose previous spouse was deceased.<sup>131</sup>

The Marriage Law stipulates that women cannot register a remarriage as long as their divorce from their first husband has not been processed by the court. Although people now often register their first marriage, they fail to go through the relatively complicated process of judicial divorce when they break up. Consequently, under state law, they are still married to the spouse from whom they have divorced in a socially accepted manner. On this basis, we can conclude that unregistered marriage is influenced by two factors. Firstly, if one of the spouses has a legal reason not to register, this will almost certainly be the absence of a divorce decree. Secondly, local norms pertaining to the legality of marriage, derive predominantly from religious doctrine, and this clearly contributes to the reason certain marriages are not registered. It seems that there is no urgency to register a remarriage as long as it has conformed to Islamic principles and, hence, is socially acceptable.

The KHI regards marriage registration merely as an administrative obligation but does emphasize the solid legal status of marriage when it is registered. The legal draftsmen have included an article on *isbat nikah*. This article was included to help those who had not yet registered their marriage as required by the marriage law when it came into force.<sup>132</sup> In practice, however, because the formulation of the provision in the KHI is ambiguous, judges also apply this legal norm legalize marriages which occurred after 1974 retrospectively. Article 7 (2) of the KHI states “In the context of marriages that do not have a marriage certificate, one can ask for an *isbat nikah*.” The KHI then explains the types of marriages eligible for *isbat nikah*. These conditions are: a) a marriage in which the spouses are seeking a divorce; b) the loss of a marriage certificate; c) doubts about whether or not a marriage is valid; d) a marriage concluded prior to the 1974 Marriage Law; and e) a marriage concluded by those

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<sup>131</sup> This data is collected from SIMKAH KUA Summersari

<sup>132</sup> Bedner and Huis, ‘Plurality of marriage law and marriage registration for Muslims in Indonesia: a plea for pragmatism’, p. 187.

who have no legal impediment according to the Marriage Law. Nurlaelawati has noted that these provisions are phrased ambiguously and are indecisive about who is qualified for registration by the Islamic court. She argues that the loose implementation of the marriage registration provisions contradicts the stated goal of marriage registration itself because non-registration can easily be registered retroactively.<sup>133</sup>

### 5.1. Polygynous Marriage

In the Bangil Religious Court, there is an irrefutable correlation between *isbat nikah* and legal identity. *Isbat nikah* appears to present a workable solution for those wishing to claim legal identity for their children. Almost all *isbat nikah* cases are driven by the need to obtain children's birth certificates. This is what happened to Pak Salim. He works as an official in the village administration. Pak Salim was married to Samsia in June 1990 but the marriage was not performed by a marriage registrar. It was actually not the first marriage for Pak Salim who was already married to another woman. In short, this was unregistered polygyny. Pak Salim, who has a son with Samsia, wanted to claim a legal status for his child as he thought that his son had the potential to make a good career. In fact, he was planning to apply for the military and needed a birth certificate mentioning the names of both his parents (*asal usul*). In the absence of the marriage certificate of his parents, the son could actually apply for a birth certificate, but it would only mention the name of his mother. This is definitely not enough for the requirements demanded when applying for a position as a civil servant or to join the military.

In his hour of need, Pak Salim turned to a *modin* to help him. The *modin* suggested he request an *isbat nikah* from the religious court. Of course, this contravened the conditions enshrined in the KHI. The purpose of *isbat nikah* is not to legalize a polygynous marriage. Nevertheless, the *modin* went ahead with all the necessary arrangements to make this mission possible. A letter of application

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<sup>133</sup> Nurlaelawati, *Modernization, Tradition and Identity: The Kompilasi Hukum Islam and Legal Practice in the Indonesian Religious Courts*, pp. 202–3.

(*surat permohonan*) was drawn up to expedite this purpose. In the letter, the status of both Salim and Samsia is declared to be unmarried (*perjaka* or *perawan*). The letter clearly states that the applicants need a marriage certificate to have the legal certainty (*kepastian hukum*) that they could use it to apply for the birth certificate of their son. Pak Salim also included a letter from the village head declaring that their marriage had never been registered before.

I asked the *modin* who assisted Pak Salim why he had acted as he did as the matter involved a polygynous marriage. The *modin* argued that proposing to obtain an *isbat nikah* of the marriage would serve the bigger *maṣlaḥa* (common good). He backed up his statement by associating *isbat nikah* with an Islamic legal maxim: If many *maṣlaḥa* contradict one another, the one offering the greatest benefits should be prioritized. If many wrongs contradict each other, the lesser of these evils should be given priority.<sup>134</sup> The legal status of polygyny should be accorded less significance because legalizing the marriage would bring a bigger benefit. He was well aware that Pak Salim's son required his parents' marriage certificate so that he could have a birth certificate mentioning the names of both his parents.

Most court hearings are usually quite short, around 15-20 minutes, and the judgement is read out directly at the end of the hearing. However, perhaps because I was attending the hearing, the judges tended to stick to the procedure more strictly. The hearing was then adjourned for a week before being reconvened to hear the result of the *musyawarah majlis* (judge deliberation). This hearing was presided over by three judges, one of whom was female. In the court hearing, the judges asked Pak Salim about how the marriage had been concluded. He explained that it had been conducted by Ustad Syafi'i in the presence of Samsia's father, the *wali* and two witnesses. The judges also asked about Pak Salim's relationship with Samsia, specifically if they had a degree of consanguinity which made it unlawful for them to have sexual intercourse. In Islamic law, this relationship is known as *mahram*. It delineates the prohibited degrees of consanguinity within

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<sup>134</sup> Interview with Haji Misbah, January 2019.

which marriage or sexual intercourse would be considered illegal. Pak Salim replied that they did not. The judges also asked them if the marriage would have no social consequences and that no one would have any objection if their marriage were legalized. Again, Pak Salim answered that the marriage was fine as far as the local people were concerned

Pak Salim presented two witnesses to support his claim. The night before, the *modin* had coached them in potential questions and the answers they needed to give. The judges invited them to enter the courtroom one by one. After they had taken the oath, the judges asked for their identity and about their relationship with the applicants. After this, the judges asked if they had known about and attended the marriage at the time it was concluded. They answered in the affirmative. The judges moved on to the next stage which was asking them if they thought the marriage would cause any social problems. They also verified if there was no close kinship relationship between the applicants. This was followed by questions about the religious status of the applicants; whether or not they were converts to Islam. Although the legal status of the applicants had been registered as unmarried, the judges still questioned them about their marital status. The witnesses said that both Pak Salim and Samsia were unmarried. This prevarication meant that the witnesses were hiding the fact that it was a second marriage for Pak Salim. Eventually, both witnesses convinced the judges that the right decision was to legalize Pak Salim's marriage because he needed the marriage certificate to acquire a birth certificate of his son.

This application was finally accepted.<sup>135</sup> A week later, the judges declared that there was no conflict between all the information given by the applicants and the witnesses. The decision asserted that the marriage had been conducted according to both Islamic law and national law, had no relationship with other marriages and had not been concluded within the period of *'iddah* (waiting period). It then affirmed that the family led a harmonious existence and that a son had

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<sup>135</sup> Verdict no. 0091/Pdt.P/2018/PA.Bgl.

been born. As its legal basis, the decision mentions Article 2 of the Marriage Law which states a marriage is valid when it has been concluded according to the religious requirements of the parties involved. It also referred to Article 14 of the KHI on the conditions of marriage in order to declare that the marriage had met all the requisite conditions. To strengthen its legitimacy, the decision also referred to the Shafi'i classical treatise on *fiqh*.<sup>136</sup> It quotes a statement from the well-known Habib Muhammad al-Masyhur's *Bughyat al-Mustarshidīn* which says "*faidhā shahadat lahā bayyinah 'alā waqfi al-da'wā, thaabat al-zawjiyya*" (if the witnesses have supported the claim, then the marriage should remain as it is).

An important point is the judges pragmatically used of Article 7 (3) Point e of the KHI to approve the claim. In most *isbat nikah* verdicts, the role played by Point e is quite critical. As long as the marriage is proved to have been concluded between people who have no legal impediment to their matrimony, the judges must accept it. Indonesian legal scholars have problematized this point because they see it as conflicting.<sup>137</sup> Point d clearly sets the limits for *isbat nikah* at marriages concluded prior to the legal obligation of marriage registration came into force. The Law on Religious Courts also limits *isbat nikah* to marriages before 1974. However, in this case, the verdict ignored this limitation and sought confirmation by citing Point e Article 7 of the KHI. Point e opens the door for all marriages, without any restrictions, to request an *isbat nikah*. The judges used this 'ambiguous' point to legitimate their decision.

The verdict also argues that unregistered marriages cause severe problems in society. Interestingly, the decision also relates the claim to

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<sup>136</sup> This fact confirms Nurlaelawati's finding that, in the judicial practice of Islamic courts, a *fiqh* book is important in the decision making. She claims that some judges argue that, because the KHI has not been accorded statutory status, its legal position is the same as that of the *fiqh* books. In this reference to the *fiqh* books, the judges seem to have elevated the KHI to the status of an unwritten source, like that of the *fiqh* books, and they feel that the *fiqh* books embrace a more certain legal position. Nurlaelawati, *Modernization, Tradition and Identity: The Kompilasi Hukum Islam and Legal Practice in the Indonesian Religious Courts*, p. 163.

<sup>137</sup> Euis Nurlaelawati, 'Pernikahan Tanpa Pencatatan: Isbat nikah Sebuah Solusi?', *Musāwa*, vol. 12, no. 2 (2013), pp. 261–77.



the problems of citizenship and child protection. In this particular instance, the judges also used the Law No. 23 of 2002 on Child Protection to legitimate their decision. The elucidation to this law states that parents, family and society are responsible for protecting children and providing facilities for them. It was drawn up with the idea of ensuring the best life for children so as to make them potentially, capable citizens whose nationalism is based on good behaviour. The judges concurred with the reason submitted by the applicant that the *isbat nikah* was required in order to seek a birth certificate, presented as a guarantee of the protection of a child. Quite clearly, the judges incorporated citizens' rights into their judicial practice.

The accommodation of citizens' rights in the judicial decision has been a matter of heated debate among scholars. Judicial practice in religious courts in Indonesia has undergone significant changes. Although Van Huis looks at the decline of the *fiqh* tradition, that is *khul'*, in the legal practice of divorce in religious courts,<sup>138</sup> he does not overlook the fact that *fiqh*-based divorce mechanisms can still play a significant role. This finding is quite similar to Nurlaelawati's study in which she found the judges are committed to *fiqh* as the right and proper means to secure religious identity. Nevertheless, Van Huis suggests that most of the elements in current wife-petitioned judicial divorces have their roots in the *syiqaq* divorce mechanism, not in *khul'* as practised in the past. Both the Supreme Court and the 1989 Law on the Islamic Courts interpret the meaning of the phrase 'continuous and irreconcilable marital discord' in a manner close to that of *syiqaq*.

In the Bangil Religious Court, *isbat nikah* cases are few and far between. There were six cases in 2016, none in 2017 and seven in 2018. In interviews, the head of Bangil Religious Court said: "*Kebutuhan masyarakat dilayani saja*" (we just there to serve the people's needs).<sup>139</sup> He qualifies *isbat nikah* as one of these. He expounded on his view by saying that in principle the court cannot

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<sup>138</sup> Stijn van Huis, *Khul' over the Longue Durée: The Decline of Traditional Fiqh-Based Divorce Mechanisms in Indonesian Legal Practice*, vol. 25 (2018), pp. 1–25.

<sup>139</sup> Interview with Pak Purnomo, the head of Bangil religious court, January 2019.

reject applications submitted by members of the society. This attitude raises the problem of whether or not the application is based on sound legal proof and this is, if it can be proved that a marriage had met the conditions of marriage stipulated by Islamic law. This solution conforms to Rosen's concept which argues that the concept of law is a manifestation of a larger socio-cultural reality, simply referred to as law as a culture.<sup>140</sup> Studying the local Sharia court records (*sijill*) in the city of Sefrou, Morocco, he found that neither the oaths sworn nor the use of professional witnesses were not truly objective, but the outcome of the *qadi's* construction and the result of a process of negotiation which allows him to make convenient decisions.<sup>141</sup> His finding therefore situated the *qadi* in a wider cultural dimension in the city. In Bangil, the judges were perfectly well aware that unregistered marriages are a common practice. The state has no choice but to accord them legal recognition when it is requested. Any application of a strict interpretation of the conditions of *isbat nikah* does not address problems in society. The judges pragmatically implemented Point e of Article 7 of the KHI in order to accommodate the applicant's wishes.

### 5.2. Underage Marriage

*Isbat nikah* appears to be a legitimate solution to the legalization of unregistered marriages. The above case demonstrates how *isbat nikah* was used to legitimize a polygynous marriage. In the following case, we see *isbat nikah* was also an effective instrument in legalizing a marriage which contravened the law because the groom was underage. This was a marriage between Hasan (17 years) and Jamilatul (17 years) which took place in January 2013. Although the groom was not yet nineteen which is underage according to the state law, his parents did not request a marriage dispensation. Their reason was that the bride was three months pregnant. This pregnancy does not make any sense as a reason, but it is in fact mentioned in the decision. The child was born in June 2013. The couples applied for an *isbat nikah* in early 2014 because they needed to raise the legal status

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<sup>140</sup> Lawrence Rosen, *Law as Culture: An Invitation* (Princeton: Princeton University Press, 2006).

<sup>141</sup> Rosen, *The Anthropology of Justice: Law as Culture in Islamic Society*.

of their daughter. The judges eventually granted a legalization of their marriage. They seemed to ignore the fact that, at the time, Hasan was still underage and not legally eligible to enter into a marriage.<sup>142</sup>

Article 7 of the Marriage Law provides leeway for those who entered into underage marriages to request marriage dispensation. However, there is a tendency in Islamic courts not to make this dispensation too easy to acquire. In my interview with Wahyu Widiana, the former Director-General of Religious Courts under the Supreme Court, he expressly stated that he suggested judges should be stricter in their acceptance of petitions for marriage dispensation. His argument for taking this stance was that, in a normal situation, such a marriage was undesirable. However, as he saw it, besides dispensing justice, religious courts should also educate people in legal matters. If for some reason a delay of the marriage is unavoidable, they still have the option to ask for an *isbat nikah*.<sup>143</sup> This view was confirmed by Pak Purnomo, the head of Bangil Religious Court. He argues that religious courts are put on the horns of a dilemma when a petition for marriage dispensation is submitted. Nevertheless, the judges are still inundated by complaints from women activists who say that they are far too ready to grant the dispensation. In his view, marriage dispensation should only be granted if the bride has been proven to be pregnant on the basis of a letter from a doctor.<sup>144</sup>

The verdict in this case also problematizes whether or not the marriage deserved an *isbat nikah* (retrospective legalization) because it was concluded in 2013. The verdict begins by emphasizing that only marriages conducted before the issuance of the 1974 Marriage Law are eligible for retrospective legalization, but then proceeds to clarify that Article 7 (3) Point e in the KHI does open the possibility legalizing of all marriages submitted for their consideration. In a nutshell, the verdict declares that such a marriage is eligible for state legal protection. Furthermore, it also confirms that the Law on the Age of Marriage is intended to protect the rights of children as stated in

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<sup>142</sup> Verdict no. 33/Pdt.P/2014/PA.Bgl.

<sup>143</sup> Interview with Wahyu Widiana, November 2018.

<sup>144</sup> Interview with Pak Purnomo, January 2019.

Article 3 of Law 3/2002 on Child Protection. The judges were perfectly well aware that legalizing a marriage in which the bride is underage violates the law. However, they thought that prioritizing the rights of the son was even more important.

Even more interestingly, the judges argued that the absence of an affirmation of a legal age for marriage in classical Islamic law is not an omission. They consider marriage a biological need of humanity, concluded not only on the basis of maturity and logic but to constrain the biological urges of the individual which can be observed from the biological signs of physical maturity. Nevertheless, the fulfilment of the sacred and noble objectives of marriage is a necessity. In this argument, the judges seem to be tending towards ambivalence. On the one hand, they are definitely adhering to the state law but, on the other, they are ignoring the marriageable age enshrined in the Marriage Law by proposing arguments from viewpoint of Islamic law. In the end, the judges did accept the application and granted legalization of the marriage.

Legal anthropologists emphasize the multiplicity of legal bases and institutions which co-determine the structure, norms and interpretations of the law.<sup>145</sup> *Isbat nikah* provides a space in which judges can exploit the plurality of legal orders.<sup>146</sup> The judges examined 'the dialectic, mutually constitutive relation between state law and other normative orders'.<sup>147</sup> Legal pluralism is justified on pragmatic grounds as a technique of governance.<sup>148</sup> From the decision handed down, we see that the law offers a legitimate frame of reference in which political, economic and legal interests can be defended.<sup>149</sup> The judges also found it important to be able to consult a different legal

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<sup>145</sup> Fernanda Pirie, *The Anthropology of Law* (Oxford: Oxford University Press, 2013).

<sup>146</sup> Arskal Salim, 'Dynamic Legal Pluralism in Indonesia: Contested Legal Orders in Contemporary Aceh', *Journal of Legal Pluralism and Unofficial Law*, vol. 42, no. 61 (2010), pp. 1–29.

<sup>147</sup> Sally Merry, 'Legal pluralism', *Law and Society Review*, vol. 22 (1988), pp. 869–896.

<sup>148</sup> John Griffiths, 'What is Legal Pluralism?', *The Journal of Legal Pluralism and Unofficial Law*, vol. 24 (1986), p. 5.

<sup>149</sup> Keebet Von Benda-Beckmann, 'Transnational Dimensions of Legal Pluralism', in *Begegnung und Konflikt – Eine kulturanthropologische Bestandsaufnahme*, ed. by Wolfgang Fikentscher (Munich: C. H. Beck, 2001), p. 44.

norm, that is, traditional *fiqh* or theological doctrines. However, this is not to say that the judges were ultra conservative as they interpreted these sources liberally to support their judgement.

## 6. Child Legitimation

Is it possible for Abdulloh's children who were born before their father's registered marriage to acquire legal status as a 'legitimate' child? The answer is definitely yes. As I have mentioned earlier, spouses in a marriage which has lately been registered at the KUA can still make an application to have the status of the children legalized. This is pursued through a legal procedure called legitimation of children (*asal usul anak*). I have observed that this tendency has become an alternative solution for those who do not petition for an *isbat nikah* or do so only to have it rejected. The Indonesian judicial system grants the religious court the judicial authority to examine and declare the legitimacy of children.<sup>150</sup> In most cases, these children are born in an unregistered marriage. In the Bangil Religious Court, the number of the case of *asal usul anak* does not differ much that of *isbat nikah* cases. There were six cases in 2016, eight in 2017 and six in 2018.

In this section, I would like to analyse the legal reasoning applied by judges of religious courts in granting a decision in an *asal usul anak* case. In this analysis I turn to Verdict No. 230/Pdt.P/2016/Pa.Bgl. The application was submitted by Nizar and Jubaidah.<sup>151</sup> They were married religiously on 30 April 2003 and later had two children. The first child was born in 2005, while the second was born in 2007. On 9 December 2016 they applied for a registered marriage at their local KUA. Bringing with them their children's birth certificates (*surat keterangan kelahiran*) issued by the village administration, they submitted a request for the children to be legitimated by the Bangil religious court.

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<sup>150</sup> See the Elucidation of the Law No. 3/2006 on Religious Courts Number 37 Point (a).

<sup>151</sup> Verdict No. 230/Pdt.P/2016/Pa.Bgl.

At the time he married Jubaidah, Nizar was informally divorced. Because it was an informal divorce, his marriage to his first wife was still legal according to state law. His first wife petitioned the religious court for a divorce some months after his remarriage. Some months later, Nizar submitted a request for *isbat nikah* to validate his remarriage to the Bangil Islamic Court. The court rejected his request because he could not be recognized as legally divorced. The judges considered his marriage to Jubaidah was not a remarriage, but a polygynous marriage. The judges took only written legal proofs into consideration. Their decision meant that Nizar could be married to Jubaidah only if he had permission to enter into a polygynous marriage from the religious court. The absence of this permission invalidated his marriage according to the statutory law.

It is worth noting that, before the 1974 Marriage Law was implemented, polygynous marriages did not require the permission of an Islamic court. Marriages and polygynous marriages had to be registered, but this registration was just considered an administrative obligation, not a requirement for a valid marriage. In my interviews, one of the judges argued that he and his colleagues often rejected a request for *isbat nikah* because the marriage had been concluded prior to the issuance of a divorce certificate terminating the previous marriage.<sup>152</sup> He acknowledged that this was tricky situation, especially when it happens to the woman, because a wife cannot have two husbands at the same time.

Although *nikah sirri* is not legally recognized in the Indonesian legal system, the judges still thought it important to examine the religious validity of this marriage, to discover whether or not it has been in accordance with Islamic law. The judges asked the parents, Nizar and Jubaidah, about who had acted as the marriage guardian, the witnesses and who had attended the marriage ceremony. The trouble they took shows that an unregistered marriage is considered valid by

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<sup>152</sup> Interview with Pak Rasid, a judge of Bangil Religious Court, January 2018.

Islamic courts.<sup>153</sup> This examination was undertaken because, despite this case being *voluntair* (petition, *gugatan permohonan*), which did not demand other parties rebut it, the judges were still required to examine whether or not the parties had an adequate reason to petition. Therefore, the judges examined the unregistered marriage and, on the basis of their conclusions, validated it. They did not assess the (second) registered marriage. Van Huis has found that marriage legalization can be rejected by an Islamic court if the said marriage fails to meet the religious requirements.<sup>154</sup>

The judges also asked them the reason they wanted this legitimation of their children. Their verdict states that they wanted to acquire the birth certificates of their children. This reason was more than enough for judges to go ahead with the hearing. The judges referred to Article 49 in the Law 3/2006 on Religious Courts and its elucidation which states that a religious court is authorized to adjudicate on this case. The parties presented proofs which included the letters from the village head declaring the birth of their children. As part of legal reasoning, the judges referred to a Prophetic tradition which asserts “children born are to a man who has a wife (*al-waladu li al-firāsh*) and death by stoning is for indulging in extramarital relations (*wa al-ḥajaru li al-āhir*).” The judges also considered the common good (*maṣlaḥa*) as well as the harm (*mudarat*) which might ensue in the future if they did not accept this petition.

The judges confirmed the legal status of the children with a reference to Article 99 in the KHI which stipulates “a legal child is who is born within or as a consequence of a valid marriage”. In another case, the judges also referred to Article 103 of the KHI. This article is specifically about *asal usul anak* (the legal origin of the child). It says that *asal usul anak* is proved by a birth certificate. However, in the absence of a birth certificate, the religious court might be able to issue

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<sup>153</sup> van Huis and Wirastris, ‘Muslim Marriage Registration in Indonesia: Revised Marriage Registration Laws Cannot Overcome Compliance Flaws’; van Huis, ‘Islamic Courts and Women’s Divorce Rights in Indonesia: The Cases of Cianjur and Bulukumba’, p. 97.

<sup>154</sup> van Huis, ‘Islamic Courts and Women’s Divorce Rights in Indonesia: The Cases of Cianjur and Bulukumba’, p. 228.

a declaration confirming the legal status of a child after carrying out an examination of relevant proofs. On the basis of the declaration of the religious court, the civil administration can issue a birth certificate.

In this section, I have argued that the legitimation of children is the last resort for a family. The decision made by religious courts is essential as it serves as a legitimate basis for the issuance of a birth certificate. No necessary judicial discretion is exercised by the judges during the hearing. They just accept both the letter of birth issued by the village administration and the marriage certificate issued by the KUA as the legal evidence on which to base their decision. In addition, these suggestion put us on safe ground to suggest that the Islamic court has interpreted the 1974 Marriage Law and the 1991 KHI in a relatively liberal way. This progressive stance is believed to have considerable influence on their legal reasoning. It is relevant to relate this situation to Bowen's remarks that gender equality, fairness and consensus-seeking are an integral part of legal reasoning in Indonesia.<sup>155</sup>

## 7. Conclusion

In this chapter, I have shown some of the different paths villagers can take in order to legalize their unregistered marriages and their children. It seems that they are not concerned about whether or not their marriages are legally valid according to the national laws. As long as the marriage is socially accepted, they feel content. Scholars have emphasized how much more heavily the significance of social acceptance weighs than considerations of state legality.<sup>156</sup> However, they are brought back down to earth about the need for a legalization of marriage when their children require a birth certificate which cannot be issued without the marriage certificate of their parents. Several paths are open to them.

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<sup>155</sup> Bowen, *Islam, Law, and Equality in Indonesia: An Anthropology of Public Reasoning*, p. 257.

<sup>156</sup> Sonneveld, 'Rethinking the Difference Between Formal and Informal Marriages in Egypt'; Bedner and Huis, 'Plurality of marriage law and marriage registration for Muslims in Indonesia: a plea for pragmatism'.



The first is to have a 'new' marriage ceremony at the KUA in the presence of a *penghulu*. This marriage is usually undertaken solely for the sake of obtaining the marriage certificate and is, of course, meaningless as far as the legal status of the children is concerned. A number of issues pertaining to transgressions are inevitably part and parcel of this process. As a street-level bureaucrat, a *penghulu* needs to exercise his autonomy in drawing up policy in each individual case to enable a particular marriage to be legally recognized. The second path is that of to seek legalization by submitting a petition for an *isbat nikah* to the Islamic court. In fact, *isbat nikah* is an important construct to legalize a marriage, a process which would be otherwise impossible according to standard procedure set out in state law. This category includes polygynous and underage marriages. Of course, such matters require the utmost discretion of the judges, who tend to work pretty much in line with the procedural law. However, the decision to approve a legalization is principally based upon whether or not a marriage has been concluded in line with Sharia law coupled with considerations about the extent to which the marriage impinges on social relationships. This still leaves the problem of the legal status of the children. Parents who opt for the first choice and safely navigated it, will then be in the position to take yet another step to legalize their children. With their new marriage certificate as proof, they can submit a request to the religious court asking that their children be legally recognized.

The registration is the responsibility of the KUA while the legalization procedure can be carried out by the Islamic court. This shows that it is often the lowest level of the state administration which is crucial to providing a legal identity to those who would otherwise not qualify.<sup>157</sup> Moreover, these observations show that the way *isbat nikah* works is closely interwoven with Nurlaelawati's finding. She remarks that, in many cases judges find it hard to apply the rules which they should formally abide by. Because these judges do not have the power to force society to adhere to the state law, they show the

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<sup>157</sup> Bedner and Huis, 'Plurality of marriage law and marriage registration for Muslims in Indonesia: a plea for pragmatism', p. 187.

tendency to go along with the temporal interests of those seeking justice in the courts, although they do so in contravention of the rules as interpreted by the state.<sup>158</sup> In this instance, the judges prioritize the public good rather than applying the letter of the law.

These different paths should be understood as the district-level bureaucracy's strategy to regulate marriage and family. Those administering government on a lower level are aware that the strict imposition of a legal norm on the legal obligation to register a marriage has been far from successful. Nevertheless, it is impossible to leave unregistered marriage as it is. Therefore, in order to protect citizens' rights, these different solutions have been made available. Furthermore, checking on a marriage by the state is a tricky task in a country like Indonesia in which there is a wealth of perception of both the national law and Islamic law current in Muslim society. In response, the Indonesian legal system provides a wide playing-field of ample legal and judicial opportunities to solve the problems which arise as long as these support its effort to control. When it is set in motion, these opportunities lead not only to administrative transgressions and the exercise of judicial discretion, but also to overlapping authorities. Both the judges of Islamic courts and the *penghulu* of the KUA are street-level bureaucrats who, according to Lipsky, are "the focus of citizen reactions because their discretion opens up the possibility that they will respond favourably on behalf of people."<sup>159</sup> The discretion is not only the outcome of the absence and the vagueness of the legal norms, it is also a deliberate interpretation made by public officials and judges.

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<sup>158</sup> Nurlaelawati, *Modernization, Tradition and Identity: The Kompilasi Hukum Islam and Legal Practice in the Indonesian Religious Courts*, p. 224.

<sup>159</sup> Lipsky, *Street-Level Bureaucracy: Dilemmas of the Individual in Public Services*, p. 9.