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

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## Summary

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

This thesis discusses the ways in which local officials deal with the tensions concerning the regulations on Muslim marriage and social practices that emerge as a response to such regulations. In so doing, it addresses these questions: How does the Indonesian state regulate Muslim marriage? How do local people in Pasuruan practice and negotiate the state regulations on Muslim marriage, in the light of the variety of norms imposed on them? How do local officials deal with their practices? What role do intermediaries play in this process in the context of East Javanese society?

The first chapter provides an overview of the political, religious and legal debates about how Muslim marriage in Indonesia should be governed after the 1998 Indonesian *reformasi*. The laws on marriage have increasingly been an arena of contestation between different groups in Islam. On the sub-national level, we come across the politicization of Islamic issues. Several Islam-based regional regulations covering ruling on public morality have been enacted and these have complicated the procedure of Muslim marriage as stipulated by the national law. For instance, a local regulation obliges both the bride and the groom to be able to read the Quran. On the national level, the legal reform of Muslim marriage has been continued through the drafting of the bill on the substantive law of Islamic courts. The purpose of this legal reform has been to introduce legal sanctions on those who do not register their marriage. This reform led to a public

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debate and certain Islamic groups urged people to resist it. The upshot is that the reform ended in a deadlock.

Despite these tensions, the state is still determined to extend its power to control Muslim marriage in order to protect the rights of women and children. Therefore, legal reform is still work in progress. Recent legal reforms reveal that the judiciary and the civil bureaucracy have been busy securing this goal. At this point, the discourse on Muslim marriage no longer hinges on the religious and legal validity of marriage but is about the consequences of marriage registration for citizens' rights. I classify this new direction as a citizens' rights approach. In this approach, both members of the judiciary and the civil service are key actors. One important feature has concerned the judiciary's examination of the legal status under the Constitution of children born out of legal wedlock. Court decisions grant children born out of wedlock paternal recognition as long as there is sufficient proof that they have a blood relationship with the father, a decision which directly contravenes classical Islamic law. The civil bureaucracy has also been seriously addressing the consequences a of unregistered marriage for the registration of the birth of a child. Its efforts have led to the mapping out of a new policy, namely: letters of absolute responsibility (*surat pernyataan tanggungjawab mutlak*) which declare the religious validity of the marital relationship of the parents and hence the legitimacy of the child.

The second set of findings, as discussed in the second chapter, concerns the bureaucratization of marriage by focusing on bureaucratic reforms in the office dealing with Muslim marriage, i.e. Kantor Urusan Agama (KUA, the office of religious affairs). The first reform is related to an incident in East Java in which a *penghulu* was sued for corruption just because he recorded the customary extra-legal payment he collected for conducting a marriage ceremony outside the office (*nikah bedolan*). The Ministry of Religious Affairs (MoRA) introduced the differentiation of tariffs of *nikah kantor* (marriage in the office) and *nikah bedolan*. *Nikah kantor* is free of charge because a marriage certificate is treated in the same way as other civil documents. For *nikah bedolan*, people have to pay Rp. 600,000-, replacing the contested informal payment, to cover the

*penghulu's* expenses. However, the matter of extra-legal payment has not yet been properly solved because it linked to the position of the *modin* who, in the past, acted as the PPPN or P3N (*Pembantu Petugas Pencatat Nikah*, assistant of marriage registrar). The second reform is the elimination of the PPPN or P3N (*Pembantu Petugas Pencatat Nikah*, assistant of marriage registrar). The dismissal of P3N caused no problems in an urban community like in Yogyakarta in which dependence on *modin* was not particularly strong. However, it was less effective in rural contexts like in Pasuruan. By involving *modin* in the process of marriage, people manage to combine the religious aspect of the marriage ceremony and the administrative aspect of the marriage registration.

The last reform is the integration of the marriage registration into the civil administration. This reform has caused new problems. Currently the government officials are unlikely to be prepared to negotiate in a situation where the bride is legally underage because the system uses the data filed under a single identification number (NIK, *Nomor Induk Kependudukan*) to calculate her age. If her age does not comply with the legal requirement, the system will automatically reject the registration. In this case, *modin* are able to alleviate this situation by performing a religious marriage with a delayed registration, meaning that the marriage will be registered as soon as the spouses have reached the required minimum age.

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

Furthermore, the centrality of *modin* and religious leaders in general is reasonable if we observe how Islam extends its influence in

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the Pasuruan social life. The third chapter found out that Pasuruan is inhabited by a majority of Muslim communities which generally show a tendency towards practising the traditional Islam encouraged by the NU. This religious orientation draws strength from the fact that many Pasuruan residents have historical roots in the island of Madura. The migrants have acculturated with the Javanese, a mingling which led to a distinct sub-culture called *pedalungan* or *pendhalungan*. This community has been established on the basis of patron-client relationships in which *kyai* or the leaders of *pesantren* act as the patron. The commitment to practising Islamic traditions and the strongly inculcated obedience to religious leaders (*kyai*) have led to a complicated relationship between religion and the state. This social configuration appears to have infiltrated and influenced political life too.

Additionally, Sumpalsari, the area in Pasuruan in which I have been conducting my fieldwork, as is common in Maduro-Javanese areas, has to contend with an array of social problems, chief among them poverty and a tendency not to participate in formal education. This avoidance of the established formal educational system has made *pesantren* a central institution. *Pesantren* offer an alternative educational institution which is perceived to be adequate to fulfil their needs as it inculcates in students not only the knowledge they require to function in society but also instils religion and character-building in them. However, the winds of change are coming and in the last decade. *Pesantren* have been expanding their curricula to respond to a new aspiration, i.e. providing general knowledge and practical skills. This is coincident with the development on the national level which has shown a growing tendency for Islamic schools to be more open to change.

The fourth set of findings in this study, discussed in the fourth chapter and the fifth chapter, is centred on two issues: the everyday practice of marriage in a rural society and the functioning of the marriage registration bureaucracy - which is not the same as its bureaucratization, which I discussed in the previous chapter.

The fourth chapter found out that in the eyes of the people of Pasuruan, and many others in Indonesia, marriage is a purely religious

affair. It is a sacred ceremony people set tremendous store by the involvement of religious authorities, far more than they are bothered about state involvement. Nevertheless, despite the homogenous tradition of Islam in the area, I encountered internal heterogeneity of the relationship between agency of the actors involved, cultural norms and the social structure in the selection of whom to marry. It is important to note that, in all social classes, the ideas about an ideal spouse have been shaped by the discourses circulating within traditional Islam. These ideas include preserving chastity (*kesucian*) and playing according to the rules (*apik*). *Pesantren* play an important role in maintaining this *fiqh*-based understanding of marriage. Being a *santri* (student of *pesantren*) is taken as a guarantee of the purity and good morals of a girl.

The negotiations of these ideas are dependent on the role the *pengarep* (traditional marriage broker). Entrusted with the principal role of mediating the communication of the two families concerned, the work of *pengarep* is mainly important to those families whose daughters have been educated in *pesantren*. In these families, girls have limited agency and restricted room when it comes to finding a suitable future husband. It is the parents, not always the father, who determine to whom and when they will be married to. The upshot is that arranged marriage is quite common. In this situation, marriage has become a marketplace in which *pengarep* is essential to achieving the expectations of the parents.

Another key actor in marriage is the *kyai*. Marriage practice in Pasuruan shows the on-going centrality of the role of *kyai* in the production of an Islam-based legal norm to safeguard sexual morality. This is a tricky point as a decision based on these norms sometimes conflicts with the state legal norms. "Preventing harm (extramarital sex and unwanted pregnancy) should be the priority" is always the overriding argument presented. Differences of opinions between traditional *fiqh* doctrines are essential to the construction of the *kyai*'s legal reasoning, which should comply with the interests of the people concerned. From a social perspective, religious marriage has been an effective way to tackle the problems caused by religious morality and female sexuality when the state law is difficult to comply with.

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In the fifth chapter, with regard to the functioning of the marriage registration bureaucracy, I found evidence of the continuing intervention of religious leaders in the (re)making of the KUA. Their undiminished authority means that the KUA cannot ignore them but has to reach a compromise with these leaders. *Penghulu* discover it is important to maintain a good relationship with religious leaders and local elites if they want to maintain their power. In addition, non-tenured workers at the KUA, who are local villagers, play a significant role in bridging the distance between *penghulu* and the local population.

In Pasuruan, marriage registration is regarded by the common people as a commercial relationship between the state and society. Their argument is simple: the state provides recognition by the means of a marriage certificate and people have to spend a sum of money to acquire this document. Given this perception, *penghulu* consistently find they run into complications when they try to implement the central government regulation which differentiates between *nikah kantor* and *nikah bedolan*. Before this policy came into force, nearly all marriage ceremonies were concluded at home (*nikah bedolan*). By making *nikah bedolan* much more expensive, the state pressures its citizens have their marriage ceremony performed in the office. The thinking behind the state's insistence was to make people fully dependent on its services. However, undaunted people challenge this policy and negotiate it to fit their interest.

In fact, people do not want to spend much money on conducting a *nikah bedolan*, which is why there has been a tendency to arrange *akad dua kali* (twofold marriage ceremonies). The first marriage ceremony, held at home, is the one in which they can satisfy their religious obligations, while the second is carried out at the KUA solely for the sake of registration. Of course, as the mediator between the state and society, *modin* play an important role in this and they have constructed a religious argumentation to justify this people's choice. Their solution is the idea of a *ta'kid al-nikāḥ* (authenticating a marriage, *pengukuhan pernikahan*) to refer to the second marriage ceremony in the KUA. They have needed to invent such a new legal norm to sustain their intermediating role.



The last set of findings, discussed in the sixth chapter, is connected with the process of legalizing unregistered marriage. It probes into the problem of how people deal with unregistered marriage, that is, a marriage which has been concluded in accordance with the religious requirements but has not been registered at the KUA. The reason they want to legalize an unregistered marriage usually revolves around an emic account of the necessity (*kebutuhan*) of obtaining requisite legal documents, such as marriage or birth certificates mentioning the names of both the parents. The KHI decrees that unregistered marriage can be legalized retrospectively by following the process of *isbat nikah* in Islamic courts. Consequently, *isbat nikah* is the only judicial procedure available to people to legalize unregistered marriages retrospectively and is the only possible legal way to cope with unregistered marriages.

In practice, people have yet another way to have their unregistered marriages legalized. Instead of going to the Islamic court, they approach *penghulu* to register it at the KUA office. In other words, the choice between *isbat nikah* in Islamic courts or registering unregistered marriage in the KUA is dependent on the needs of particular people. *Isbat nikah* is meaningful only to people who seek the legalization of unregistered marriages to obtain a birth certificate for children born out of legal wedlock. If their interest is obtaining a marriage certificate only, they do not go to Islamic courts but solicit the help of *penghulu*. The *penghulu* at the KUA acquiesce in the legalization although they know it is a violation of the law.

In regards to the above findings, we see that the frontier agencies of marriage, the judges of the Islamic courts and the *penghulu* at the KUA, seem aware that the judicial norm requiring the legal obligation of marriage registration has not been entirely successful. Many Indonesian still prioritize religious validity and are not particularly bothered about the legal validity of marriage. They are willing to comply with the state law only when they are in need of state services. The state has devised the *isbat nikah* procedure to cope with this situation. Judges of the Islamic courts have to exercise their judicial discretion and the *penghulu* at the KUA deliberately transgress the law in order to help citizens comply with the requirements of the state

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legal framework. The implementation of these procedures is an important leverage in edging people towards the state.

Based on the above findings, this study suggests that the legal reform introduced in the marriage laws was intended to facilitate state control of marriage practice and reinforce state authority, one part of which was eradicating informality. The central government assumes that the lower levels of government are capable of building a direct relationship with ordinary people without necessarily involving intermediaries. However, in practice, it does not work that way. Effective marriage registration needs these intermediaries, particularly in communities in which religious leaders command great respect. Nevertheless, the Marriage Law still defines marriage as a religious ceremony. In these communities, marriage registration includes two inseparable dimensions. Firstly, it is just an administrative matter. The second dimension has to do with aspects related to the religious validity of a marriage and the proper conclusion of a marriage ceremony. Some state *penghulu* are considered to lack the religious legitimacy to be able to perform the second dimension. Traditionally *modin* do have such legitimacy. This is why informality has survived.

While these findings might seem to indicate a competition between state and local religious leaders, I want to underline that the relationship between the state and religion in Muslim marriage – at least in the cases I examined - is actually a matter of mutual adjustment. Religious authorities do indeed accept the state's intervention in marriage law, if this is limited to marriage registration. Simultaneously, local people are increasingly eager to register marriages as this makes them eligible to have access to the state services. Of course, there is a small segment of religious leaders who oppose the state law, especially those who do not accept the democratic foundation of the nation-state and propagate the idea of a so-called Islamic state. However, the large majority can accept some level of intervention of the nation-state in Muslim marriage if two conditions are met. Firstly, the state law cannot challenge the fundamental principles of Sharia law or introduce something impermissible according to classical understanding of Sharia law, such

as allowing same-sex marriage or totally prohibiting polygyny. However, this is hardly ever the case in Indonesia as to a large extent the legal reforms have taken into account what is permissible and impermissible according to the common understanding of Sharia law. Secondly, when the state law is too rigid to deal with some particular practices which are socially and religiously acceptable, when religious law is applied. To local people, religious law is a more responsive instrument for handling problems of sexual morality such as *zina* (extra-marital sexual relations) and teenage pregnancy. They prioritize the religious validity of marriage rather than its legal validity.

In addition, what we have witnessed is a continuing process of the penetration of state law into Indonesian society. Instead of reforming the substance of the marriage law, which would only stir up controversy and debates, the government has used a citizens' rights approach to control marriage practice. This citizens' rights approach is helpful in guiding people towards compliance with the state legal framework. In order to obtain requisite legal documents, people have no option but to legalize their marriages. However, as long as the dualism of religious validity and legal validity remains an issue, many marriages will remain unregistered. Furthermore, the central state is also endeavouring to remove all forms of informality from the procedures involved. Nevertheless, although the government has officially removed the authority to act informally from marriage functionaries, in practice it seems it is an uphill battle to reduce the latter's intervention. Similarly, we have also witnessed the decision by judges of Islamic courts and *penghulu* at the KUA to adopt a lenient approach towards the rules governing marriage. In certain cases, *penghulu* are willing to turn a blind eye to the rules, while the judges are ready to exercise judicial discretion to enable them to grant state recognition to a marriage. This situation has led to continuing legal plurality within the state. The willingness of the state officials to give a less than strict interpretation of legal rules is key to guaranteeing the functioning of the state law and will be good for the legal development of Indonesia in the future.

