Matrilineal Islam: State Islamic Law and everyday practices of marriage and divorce among people of Mukomuko-Bengkulu, Sumatra, Indonesia

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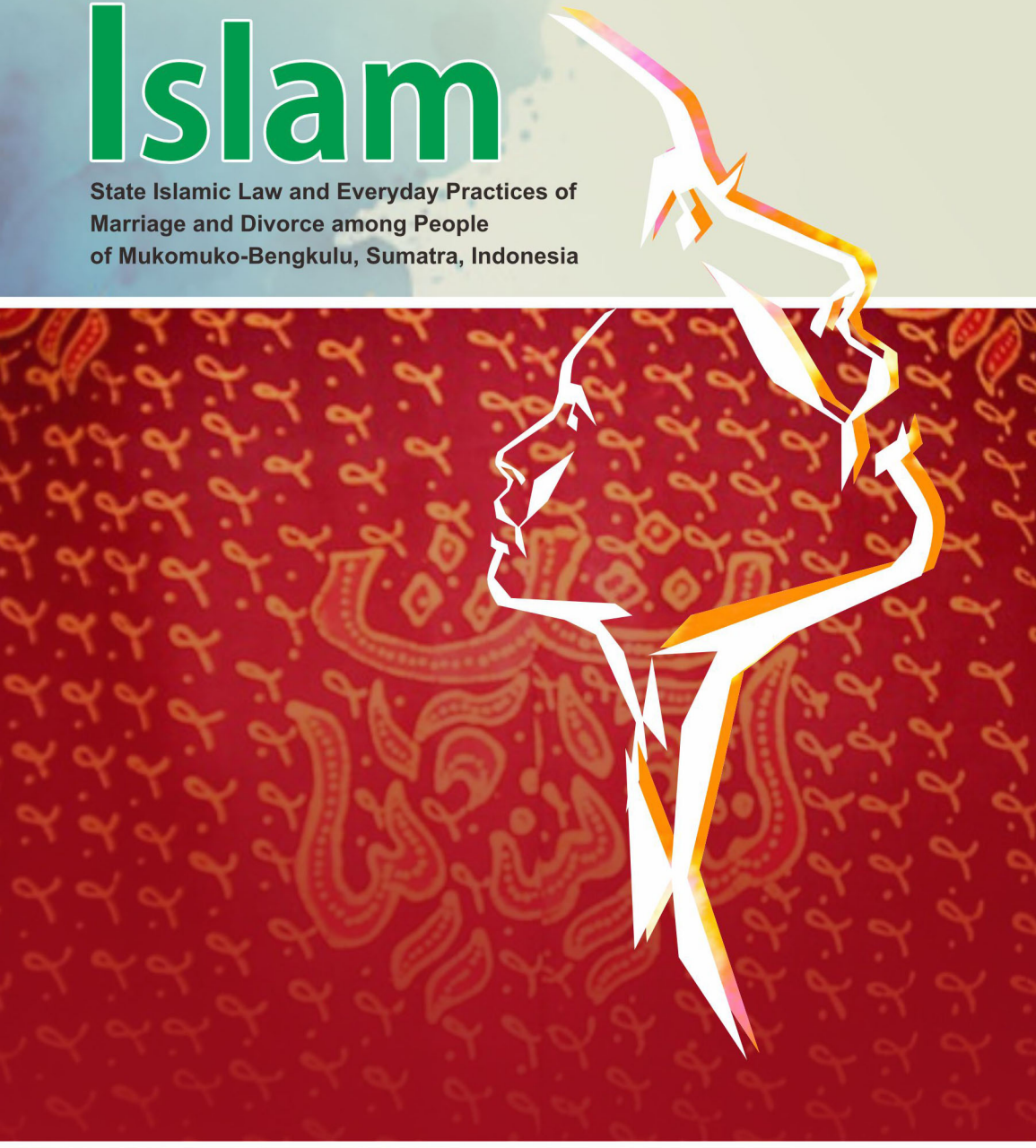

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Lay-out: Imam Syahirul Alim
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For my mother and in loving memory of my father,
M. Nazir bin Sata (1954 – 2018)

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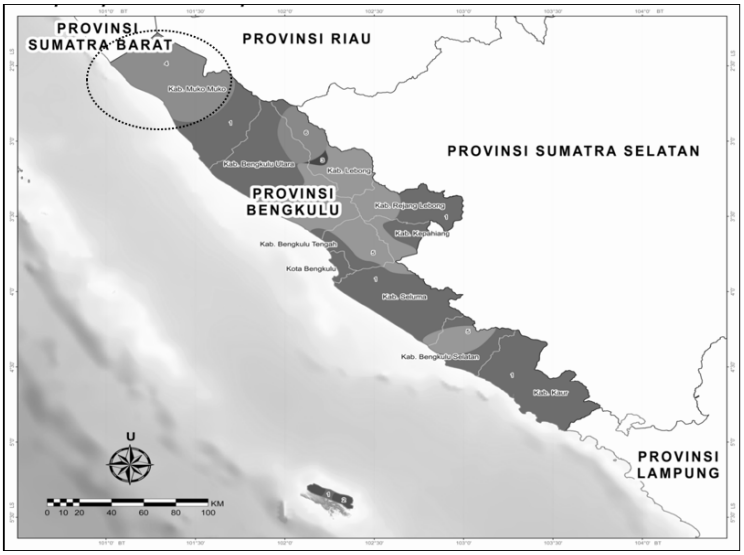
Note of Transliteration

Indonesian and Mukomuko words are written as they are used in these languages. The writing of Islamic terms follows "Brill's simple Arabic transliteration system" as in the table below. This system has been departed from in cases where specific transcriptions have come into general use or have been absorbed into Bahasa Indonesia (KBBI). Words such as Qur'an and *Fikih*, for instance, are written as they are, instead of *Qur'ān* and *Fiqh.* Names of persons, organisations and foundations, as well as titles of books, journals and articles are rendered according to locally applied spellings and transliterations. All non-English words are written in italics, like *dusun* (Indonesian), *ulama* (Arabic), and *peroatin* (Mukomuko). The plural forms of these non-English words are indicated by adding an 's' to the word in the singular, as in *dusuns*, *ulamas* and *peroatins.*

Arabic	sAts	Arabic	sAts	Arabic	sAts
ا	a, ā	ط	ṭ	ى	ā
ب	b	ظ	ẓ	ي	ī
ت	t	ع	‘	و	ū
ث	ṯ	غ	ġ	◌َ	a
ج	ǧ	ف	f	◌ِ	i
ح	ḥ	ق	q	◌ُ	u
خ	ḫ	ك	k	◌َيْ	ai
د	d	ل	l	◌َوْ	au
ذ	ḏ	م	m	◌ِيّ	īy
ر	r	ن	n	◌ُوّ	ūw
ز	z	ه	h	ة	a, ah, āh, at, āt
س	s	و	w, ū		
ش	š	ي	y, ī		
ص	ṣ	ء	’		
ض	ḍ				

Maps

Sumatera (Source: *CartoGIS* ANU)



Mukomuko (Source: *Peta Bahasa*)

1
Introduction

1.2 State, Islam, and Matrilineal Traditions

In 2017, I encountered an ongoing dispute over joint marital property (*harta-sepencarian*) at the Arga Makmur Islamic court. The dispute involved Syahril and Yati, an ex-husband and wife from Mukomuko, on the west coast of Sumatra. A couple of months earlier, the court judges had granted permission for Syahril to divorce his wife on the ground of broken marriage. This permission put an end to their marriage, which despite its unhappiness had survived for 23 years. Syahril had been involved in extra-marital affairs several times, culminating in an informal polygamy or unregistered second marriage with a divorced woman in 2013. Since then, the couple had been living separately. Yati continued to take care of their three children and their family business: a confectionary shop. Without the presence of her husband, she expanded the business by investing in palm oil plantations and properties, and in 2017 the business had a net worth of 3.98 billion rupiahs. This is a remarkable amount, compared to the average monthly earnings in this region, which are around 2 million rupiahs.

Their dispute about the division of the marital property became intense, when Syahril demanded an equal share of it. Meanwhile, Yati insisted that the majority of assets belonged to her and the children, as prescribed in the local customary norm, or *adat*.[1] According to the *adat*, Yati and her children were entitled to a

[1] *Adat* is a broad concept, which can be used to mean either: (1) a concrete body of rules and practices inherited from the past; (2) a coherent discourse concerning history, land, and law; or, (3) a set of loosely related ideals which (rightly or wrongly) are associated with the past: authenticity, community, harmony, order, and justice (Henley & Davidson, 2007, 2008, pp. 817–818). In this study, the term *adat* carries the first definition, meaning a concrete body of rules and practices inherited from past Minangkabau (cf. Abdullah, 1966, p. 15, 2010, p. xxxii; F. von Benda-Beckmann & von Benda-Beckmann, 2013, p. 15) and developed in Mukomuko throughout the course of its history.

share of at least three-quarters each, and Syahril to no more than a one-quarter share. However, during a mandatory mediation session in court, a judge, acting as a mediator, intervened by suggesting that the property should be divided equally, according to state law. Yati was unhappy with this, but after a prolonged process that took almost a year, she reluctantly accepted the advice and signed a peaceful agreement (*akta perdamaian*). After converting all their assets into rupiah, Yati and Syahril agreed to allocate 300 million rupiah as alimony for their youngest daughter and distribute the remaining assets between themselves equally. However, this was not the end of the story, because execution of the agreement was another issue at play. Syahril could not take over some parts of his share, which were under the control of the couple's children, and Yati had not received a single rupiah of alimony for her daughter (16), who was under her tutelage. During my visit, a year later, Yati and the children were starting a new business, whereas Syahril was about to sell a house from his share, in order to pay for the alimony.

This case shows the tension between state and society, and amongst Muslim citizens, in matters of marriage and divorce. Existing studies teach us that the Indonesian state has implemented reforms in the field of marriage and divorce (Hanstein, 2002; Lubis, 1994; Nurlaelawati, 2010; O'Shaughnessy, 2009). In doing so, the state has employed multiple approaches, ranging from legislative change to the 'bureaucratisation' and 'judicialisation' of marriage registration and divorce procedures. Regardless of their differences, these approaches have been pivotal to Indonesian family law reforms. These reforms have made marriage registration and judicial divorce procedures mandatory. They have also restricted polygamy, and introduced a minimum marital age and equal divorce grounds for wives and husbands alike (M. Cammack, 1989; M. E. Cammack, 1997; Soewondo, 1977). The reforms have also formalised so-called 'legal pluralism'[2], by introducing state-sanctioned Islamic law and establishing an

[2] Here, the term 'legal pluralism' is equivalent to the term 'classic pluralism', which is used by Merry (or 'weak pluralism', the term used by Griffiths, 1986) to denote when "a sovereign commands different bodies of law for different groups of the population according to their ethnicity, religion, or geographic location" (Merry, 2017; Sartori & Shahar, 2012, p. 638).

Islamic court exclusively for Muslims (J. R. Bowen, 2001; M. E. Cammack, 1997; van Huis, 2019a). The main consequence is the imposition of a single form of Islamic law, i.e. the 1991 Compilation of Islamic Law (*Kompilasi Hukum Islam*, KHI) for Indonesian Muslims, with Islamic court judges as official interpreters (cf. J. Bowen & Salim, 2018, pp. 4–5).

Nevertheless, it remains not so clear just how the state interacts with Indonesian Muslims of various ethnicities, Islamic denominations, and sociocultural traditions. In other words, how does the single interpretation of Muslim family law that the state imposes actually interfere in practice, *especially* if we consider Indonesia's multicultural Muslim societies and different forms of empirical laws or norms to be operating within them? With a view to this, a number of important studies have suggested that the state's interference in these fields does not necessarily end with binary solutions, but that it is also a matter of compromise and mutual adjustment (Bedner, 2021, p. 393; Brickell & Platt, 2015; Fauzi, 2023, p. 9; Grijns & Horii, 2018; Horii, 2021). Despite these compromises and adjustments, broadly speaking, the state unification of Muslim family law and the (Islamic) judiciary is often at odds with local normative variations across the archipelago. These variations, as I will present briefly below, are primarily informed by different forms of local custom (*adat*), by Islamic precepts, or by a combination of the two.

To start with, Idrus, in her study among Bugis, maintained that a localised version of Islam continued to offer an alternative to that of the state, as seen in the numerous unregistered marriages in the community (Idrus, 2003; see also Millar, 1991). Likewise, Nurmila pointed out a growing public sphere of competing 'Islamic' discourses on polygamy, after the fall of Suharto's authoritarian regime in 1998 (Nurmila, 2009, p. 64). She also added that legal restrictions on polygamy are not seen as fundamental by many Indonesian men, who often prefer to secure their second and subsequent marriages via an Islamic ceremony, which is beyond the state's reach (Nurmila & Bennett, 2014, p. 84; cf. a more recent study by Wirastri, 2018; Wirastri & van Huis, 2021 about this particular topic). Van Huis' research on women's access to post-divorce rights in the Cianjur and Bulu-

kumba Islamic courts, taught us how the different historical trajectories of the courts have contributed to different attitudes towards informal divorce. Whereas in Cianjur autonomous *ulamas* and the Islamic court were competing institutions, in Bulukumba the two institutions and their actors were relatively new, and they managed to develop a more consensual relationship (van Huis, 2015, pp. 264–265). Platt's study on informal marriage and divorce amongst Sasak in West Nusa Tenggara, showed that marriage and divorce are predominantly a community-based affair (Platt, 2017, p. 8).

These insights have taught us that the state's reach remains limited, and that various forms of local norms continue to shape marriage and divorce among Indonesian Muslims. Confirming this, my research among matrilineal Muslim communities in Mukomuko shows that the local *adat* of *pegang-pakai* (customs and usages) on marriage and divorce remain the general norms observed. Yet, in *Syaril v. Yati* we witness how the husband, feeling dissatisfied with the result of the *adat* deliberation, chose the state Islamic court in order to obtain a greater share of the joint marital property (cf. 'forum shopping' in K. von Benda-Beckmann, 1981). And indeed, the adjudicating judges conducted a formalistic interpretation of Article 97 of the KHI, which stipulates that an ex-husband and wife should receive an equal share of their joint marital property[3]. This interpretation disregards both the local *adat* and any more nuanced interpretations of the provision.[4] This formalistic interpretation also went against one of the objectives of Indonesian family law, i.e. better legal protection for wives and children, who in this case are better served by their own *adat* than by state law. Put more generally, this case reflects an ongoing trend of homogenising and centralising Indonesian Muslim family law, and the first instance Islamic court serves as a strategic locus to this process.

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[3] An exception only applies if the couple has agreed to distribute the property differently (see also, Articles 35, 36, 37 of the Indonesian Marriage Law 1/1974 and Constitutional Court judgement 69/PUU-XIII/2015, which enable a couple to arrange an agreement regarding the separation of joint marital property at any point in the course of their marriage).

[4] More information on this topic is provided in Section 1.4.1.3 of this chapter, where I discuss important developments in the Islamic court regarding the distribution of joint marital property.

The role of the Islamic court in the unification of Muslim family law has inspired a number of studies in many Muslim countries.[5] Peletz' study on the Malaysian Islamic courts suggests that the courts have played a pivotal role in the formation of a nation state. He also argues that, by promoting the state's patriarchal ideology, the courts have been instrumental in the reproduction and transformation of symbols of nationhood and cultural citizenship, as they have penetrated deeply into communities and families, irrespective of their membership of a particular clan, ethnicity, or community (Peletz, 2002, pp. 4, 277–278). O'Shaughnessy's study about Indonesian Islamic courts in Central Java went even further, by holding the courts responsible for making the state's patriarchal ideology, namely the male-headed family and the stigmatisation of divorce, mainstream (O'Shaughnessy, 2009, p. 70). Van Huis' research in Cianjur and Bulukumba Islamic courts suggests that the courts may be held accountable for the transformation of divorce norms within society, according to the state's 'patriarchally-inclined' ideology.[6] However, he adds that the transformation occurs in subtle ways and depends on, "the courts' role and functioning in the local communities concerned and the level of competition between the local alternative normative systems and institutions" (van Huis, 2015, pp. 17–18).

The present study seeks to understand the complex entanglement between the state's more homogenised and centralised Muslim family law system and the existing local norms. The research asks how a geographically 'peripheral'[7] matrilineal Muslim community in Mukomuko constructs and safeguards its own Islamic law on marriage and divorce vis-à-vis the interpretation

[5] In Malaysia (Peletz, 2002), in Pakistan (Abbasi, 2017), in Egypt and Morocco (Sonneveld, 2019), in Zanzibar (Stiles, 2019), in Kenya (Hirsch, 1998), in Senegal (Bouland, 2022), in Jordan (Engelcke, 2018), in Iran (Mir-Hosseini, 2000), in Palestine (Moors, 1995), in Israel (Shahar, 2008), and in many Western countries (Sezgin, 2018; van Eijk, 2019).

[6] Despite the prevalence of patriarchal influence in the state's ideology (cf. "state ibuism" in Suryakusuma, 2011), it is important to note that the Muslim family law promulgated by the state also incorporates elements, i.e. existing local, Islamic and global ideas, that promote more equal relationships between men and women (M. Cammack et al., 2015; van Huis, 2015). Therefore, the term 'patriarchally-inclined' is more accurate than the word 'patriarchal', when describing Indonesian state ideology.

[7] In this research, the term 'peripheral' is not employed to mean a dichotomous category of great v. little tradition, central v. peripheral Islam, or orthodox v. non-orthodox Islam, in the study of Muslim communities (cf. Asad, 2009, pp. 7–9; Geertz, 1971; Gellner, 1981; Redfield, 1956). Rather, I use the term to mean the community's isolation from the surrounding regions, and the relatively late arrival of central government to this particular region.

of Islamic law as promulgated by the state. In state-society encounters at the Islamic court, this study reveals the prevalence of both compromise and conflict, loosely aligned with the national and local levels, respectively. While the Islamic Chamber of the Supreme Court has considerable room for compromise, local courts frequently see tension emerging. Mukomuko is a case in point, where the state's patriarchally-inclined Islamic law is sometimes in conflict with the local *adat* of the more matrilineally-inclined Islamic law.[8] One should keep in mind that the community in general continues to rely on its *adat.* Confirming van Huis' thesis, this shows that the state's top-down approach to the mainstreaming of unified Muslim family law has not automatically transformed local practices in favour of the state. However, some individuals, like Syahril, have started to take cases to the Islamic court. In this thesis, I will show how this is affecting non-court divorces too, even if the current social significance of *adat* and its institutional actors cannot be underestimated.

1.2 Mukomuko as a Research Site

Mukomuko is a district of Bengkulu province, on the West Coast of Sumatra. In this study, Mukomuko is primarily defined geographically, rather than ethnolinguistically or culturally. Its population is predominantly Muslim and, in terms of settlements, is comprised of three distinct community groups. These are: (1) matrilineal communities, who have resided in the upstream and downstream (*hulu-hilir*) villages since time immemorial; (2) migrants, mostly from the island of Java, who are scattered across several enclave settlements, following the mass arrival of state sponsored transmigrants from the 1980s to the present day; and, (3) urban people, who are a mixture of the first two groups and more recent migrants, and who live in emerging market and administrative centres across the district of Mukomuko. While most of the matrilineal community and the transmigrants remain ex-

[8] While the state's Islamic law has its origin predominantly in the Shafiite school of Islamic jurisprudence, which is more patriarchally-inclined (Azra, 1992; Hooker, 1984; Kooria, 2022; Lukito, 2008; Nakamura, 2006; van Bruinessen, 2012; van Huis, 2015), the local *adat* of Mukomuko inherits a unique mixture of Islam and matrilineal traditions from the Minangkabau (Abdullah, 1966, p. 15, 2010, p. xxxii; F. von Benda-Beckmann & von Benda-Beckmann, 2013, p. 1).

clusively within their respective settlements, urban people have become more inclusive, as more diverse ethnic groups have come to live side by side. In the field of marriage and divorce, the matrilineal community usually observes the *semendo-adat* (their own Islamic law), whereas the transmigrants often carry various traditions with them from their place of origin. Meanwhile, native-migrant encounters[9] are inevitable, as evidenced by the numerous cross-ethnic marriages occurring. This multicultural society is an interesting subject in its own right, but for a number of reasons this study draws mainly on the experience of those from the matrilineal community.

The main reason for focussing mainly on the experience of those from the matrilineal community concerns the aim of this study, which is to understand the complex entanglement between the 'official' Islamic law promoted by the state in the field of Muslim marriage and divorce, and the local law observed by the community. By narrowing its focus to Mukomuko's matrilineal Muslim community, the present study manages to concentrate on observing the everyday practices of marriage and divorce among this particular group, as well as extending its inquiry to other connected sites, such as the first instance and higher Islamic courts (the appellate and Supreme courts). This focus allows me to concentrate on studying the ways people conclude their marriages, obtain their divorces, and solve related disputes arising from these matters at societal level. Meanwhile, by extending the sites of research, the study manages to ask how people navigate between the state's patriarchally-inclined Islamic law and their equivalent local *adat*, which is a more matrilineally-informed form of Islamic law. Another benefit of expanding my focus sites is that I can delve into the logic informing judges' decisions regarding incoming cases in general, and cases brought to them by members of the matrilineal community in particular.

[9] While realising the colonial associations of the term 'native', I nevertheless use the term for the matrilineal community across the *hulu-hilir* villages, in order to distinguish them from the remaining locals who reside permanently in Mukomuko, but are not part of the *adat* community.

As I will show later in this dissertation, even though the majority of the people in Mukomuko's matrilineal Muslim community continue to rely on their *adat* and its institutional actors (*orang adat*),[10] a few individuals have started to conduct 'forum shopping', by bringing their disputes before the state Islamic court rather than making them the subject of *adat* deliberation (cf. K. von Benda-Beckmann, 1981, 1984). This anomaly, as seen in Syahril's case (above), usually stems from 'unsatisfied' husbands, whose chances for a better result are now higher, following the establishment of the Mukomuko Islamic court at the end of 2018. Another threat comes from local government, which tries to prevent *orang adat* being involved in village administration. Regardless of these threats, the social significance of *adat* and its institutional actors cannot be underestimated, and they remain a popular option, or at least a temporary alternative, within the community. The matrilineal Muslim community in Mukomuko serves as a perfect case for this study investigating the extent to which a local condition matters to the state, when it comes to promoting social change in the field of Muslim marriage and divorce. However, considering the diversity of Mukomuko's society from the onset, I did not approach this matrilineal community in isolation, as encounters between the community and people from different ethnic groups is inevitable.

Another reason for my choice on Mukomuko's matrilineal community lies in the fact that the community is now at a crossroads, following two subsequent and important events, i.e. the 2003 regional autonomy of Mukomuko district, and the 2018 establishment of the Mukomuko Islamic court. These events have brought rapid changes to members of this matrilineal community, who are now experiencing the increasing presence of the state. In other words, their *adat* and its institutional actors are now being really tested. My choice is known in anthropology as

[10] *Orang adat* is a local term used to designate *adat* elites, which are comprised of *kaum* (clan) leaders and elders, sub-village heads, and religious functionaries. This composition can be projected back to Minangkabau's *orang-tigo-jenis*, after the Padri movement formalised the involvement of religious dignitaries as an integral part of local elites (Abdullah, 1966, p. 15, 2010, p. xxxii).

'salvage ethnography', when a researcher places urgency on studying traditional ways of life that are rapidly changing (Monaghan & Just, 2000, p.28). While matrilineal kinship system is embraced by several regions, including Minangkabau, Mukomuko serves a unique site for this research as the region had long been isolated from the surrounding regions and neglected from the central governments. Its isolation and neglection were advantageous to the preservation of local *adat* and its institutional actors as compared to other regions, and the increasing presence of the state in the last two decades and its patriarchal ideology pose a serious threat to the existing local normative system observed by this particular group. The changing situation of contemporary Mukomuko signifies my choice on this region as it enables the present study to trace and document this timely process.

The more practical reason concerns a limit that I have to draw in order to make this research feasible. Within the framework of one-year fieldwork, it is almost impossible to conduct a balanced study of each community group, because they are scattered across the 4.146,52 km^2 region. Therefore, rather than approaching all the existing community groups, I chose to conduct an in-depth study of one particular group that is a matrilineal Muslim community inhabiting the upstream and downstream villages (or, the traditional *hulu-hilir* villages).

A more detailed explanation of the research setting is provided in Chapter 3. Below, I elaborate on three important questions that guide this inquiry, and how I approach each of them in my research.

1.3 Research Questions

To understand the complex relationship between state unification and the local variations regarding marriage and divorce in this region, I conducted my research at three different but connected sites. These were: everyday practices of marriage and divorce among the people of Mukomuko at societal level; incoming cases that involved these people at the first instance Islamic

courts, i.e. the Arga Makmur Islamic court up to 2018, and the Mukomuko Islamic court since 2018 onwards; and relevant cases and developments in the Islamic Chamber (*Kamar Agama*) of the Supreme Court at national level.[11] To guide this inquiry, I raised three central questions:

> The first question is:
>
> *How do geographically peripheral Muslim communities construct and safeguard their own Islamic law on marriage and divorce vis-à-vis the interpretation of Islamic law as promulgated by the state? And, how can we explain why some localised forms of Islamic law manage (or do not manage) to survive the dominant interpretation of Islamic law imposed by the state?*

The answer to these questions can be found mostly in the everyday practices of marriage and divorce among the people of Mukomuko. For the most part, attention will be paid to the experiences of those inhabiting the upstream and downstream (*hulu-hilir*) villages across this region. This focus is mainly based on a consideration that, while they are subject to the state's interpretation of Islamic law, these people still observe their *semendo-adat.* The term *semendo* derives from a popular denomination and a particular element of their matrilineal *adat*, to mean their own Islamic law on marriage and divorce (Adatrecthbundel VI, 1913, p. 290; Bogaardt, 1958, p. 34). To ensure that this matrilineal community is not presented in isolation, this research considers emerging encounters between members of this particular group and those who belong to more diverse ethnic groups. For these purposes, I have formulated the following set of practical questions: *(1) How do the people of Mukomuko, notably hulu-hilir people, conclude marriages and obtain divorces? (2) Who are the main actors involved in the process? (3) How do these actors navigate state law and the different forms of local norms in their marriage and divorce practices? (4) What conflicts and compromises*

[11] *Sistem Kamar* (or the chamber system) was first implemented following Supreme Court Decree No. 142/KMA/SK/IX/2011, which divides the court into five chambers: criminal, civil, administrative, Islamic, and military. In Decree No. 213/KMA/SK/XII/2014, the Supreme Court mentioned that the purposes of the chamber system are to maintain legal unity and the consistency of judgements, to improve the professionalism of judges, and to speed up case resolution.

arise from such norms diverging from state law? These questions are addressed in Chapters 3 and 4, where I discuss Mukomuko's multicultural Muslim society and the *semendo-adat* that informs their matrimonial affairs.

The second question is:

> *How do Islamic court judges representing the state respond to local conditions, when promoting social change in the field of marriage and divorce among the people of Mukomuko in particular, and among Indonesian multicultural Muslim societies in general? Why are some local conditions accommodated, while others are not? In other words, what is the 'logic' that informs judicial process (or reasoning) in the Indonesian Islamic courts?*

These questions focus on how incoming cases on marriage and divorce were treated at the state Islamic court. For the purposes of analysis, the existing normative systems, notably the state's Islamic law and that which belongs to Mukomuko's matrilineal community, will be perceived respectively as a 'discursive tradition' (Asad, 2009). By discursive tradition, I mean a tradition that "consists essentially of discourses that seek to instruct practitioners regarding the correct form and purpose of a given practice that, precisely because it is established, has a history. These discourses relate conceptually to a past and a future through a present" (Asad, 2009, p. 20). Employing this concept, this dissertation identifies both the state family law for Indonesian Muslims and the local *adat* of Mukomuko as distinctive discursive traditions, as they each relate conceptually, via their past, present, and future, to an established form of Islamic law. The former has its origin predominantly in the Shafiite school of Islamic jurisprudence (cf. Azra, 1992; Kooria, 2022; van Bruinessen, 2012 for excellent historical acounts of this school and its spread across the Indian Ocean, especially the Indonesian archipelago), as well as some elements of local norms and 'governmental' regulations (Hooker, 1984; Lukito, 2008; Nakamura, 2006; van Huis, 2015). Meanwhile, the latter inherits a unique mixture of Islam and matrilineal norms from Minangkabau (Abdullah, 1966, p. 15, 2010, p. xxxii; F. von Benda-Beckmann & von Benda-Beckmann, 2013,

p. 15), as adapted in Mukomuko. By distinguishing the two forms of Islamic law, I was able to explore how the parties and adjudicating judges made use of them (or not) when dealing with marriage and/or divorce disputes at the state Islamic court.

The answer to the second question is provided in two chapters: Chapter 2, on doctrinal developments within the Islamic Chamber of the Indonesian Supreme Court; and Chapter 5, on specific cases involving Mukomuko people at the first instance Islamic court. Chapter 2 discusses landmark decisions (case law), circulation letters (*Surat Edaran Mahkamah Agung* or SEMA), and regulations (*Peraturan Mahkamah Agung* or PERMA) at the Supreme Court, including further sources from existing scholarships and interviews with Supreme Court judges on the subject. Meanwhile, materials for Chapter 5 were collected via: an analysis of court records containing relevant case law from Mukomuko; observation at first instance court hearings; and interviews with parties, judges, and other important actors, such as court registrars, professional lawyers, 'informal' case drafters (*juru-ketik-perkara*), and *adat* elders. The two chapters bring the discussion to the second and third research sites: Islamic courts at the district and province levels, and one Islamic court at national level.

The third question is:

> *What can we learn from Mukomuko's case, with regard to the increasing trend in Indonesia toward a more centralised and homogenised Islamic judiciary? And, what are the implications of this increasing trend for a diverse nation like Indonesia?*

I raise these questions in order to extend my case studies to include a wider discussion on state formation in Indonesia. My point of departure is to assess the impacts of a highly centralised political system, as depicted in the more centralised and homogenised Islamic judiciary in Indonesia (J. R. Bowen, 2001; M. E. Cammack, 1997; van Huis, 2019a). I will demonstrate throughout subsequent chapters that the centralising and homogenising trend is at odds with a diverse nation like Indonesia. This trend, as I mentioned earlier, has led Islamic court judges and the state

Islamic law which they apply to create both compromise and opposition with local conditions. Opposition is more apparent in Mukomuko, since matrilineal Islam, which is observed by rural communities across the region, is often in conflict with the state's more patriarchally-inclined form of Islam.

1.4 Conceptual Framework

In this section I will describe how different bodies of the state, i.e. the parliament, judiciary, and government, have been instrumental to the development of the Indonesian Muslim family law system. They have contributed to the attainment of Muslim marriage and divorce law that is more centralising and homogenising. Nonetheless, for a diverse nation like Indonesia, this process reflects only part of the story, or only one story among many. Various forms of law or norms continue to coexist as 'differentiated' (Griffiths, 2017), but not necessarily 'isolated' (F. von Benda-Beckmann & von Benda-Beckmann, 2013, p. 15), normative systems and institutions. Santos spoke of this as 'inter-legality': when different legal spaces superimpose, interpenetrate and mix (Santos, 1987, pp. 297–298, 2020, p. 89). In this manner, legal developments as promulgated by the state and existing local variations among Indonesian multicultural Muslim societies are equally important to the inquiry. By combining 'state-law-focussed' and 'law-in-context' analyses, this study seeks to understand how the state's more centralising and homogenising Muslim family law actually works in practice, *especially* among the matrilineal Muslim community in Mukomuko. It also looks at inevitable encounters between the state's patriarchally-inclined Islamic law and the equivalent local *adat* of the more matrilineally-inclined Islamic law.

1.4.1 Multiple approaches to the development of Indonesian Muslim family law

Over the past century, Islamic family law has been the subject of statutory reforms in many Muslim-majority countries. Welchman maintains that this process, which varies from one state to

another, evolved through three phases. The first phase was the early codification of Muslim family law in the first half of the 20th century, and the second phase was statutory reforms in the second half of the 20th century, which began to restrict a husband's rights and expanded those of a wife. The third phase denotes more recent developments toward men and women having an equal standing in Muslim family law (Welchman, 2007, pp. 12–15). In the field of divorce, for instance, many Arab states have passed legislation that treats divorce as a judicial process which is conditional to certain grounds, and which: constrains a husband's recourse to the traditional *talak*; expands the divorce grounds available for wives; introduces judicial *khulʿ* (consensual divorce) as a non-consensual and no-fault divorce procedure for wives; and applies compensation for those who have been injured by a divorce (Sonneveld, 2019, p. 150; Welchman, 2007, pp. 107–131). Most statutory reforms are thus still in the second phase of distinguishing men from women,[12] as informed by provisions in the traditional *fikih.*[13] An exception can be found in Tunisian law, which promotes a more equal relationship between men and women. However, a more recent study shows that "the 'progressive' character of Tunisian personal status law is only relative, as the legislation leaves much room for judicial interpretation"(Voorhoeve, 2012, p. 222).

[12] Although the variety of divorces is modelled on those in the traditional *fikih*, their present-day applications have been genuinely modified. A husband's recourse to *talak* has been restricted, by procedural constraints, court permission, etc.; *khulʿ*, which was based on mutual consent, is made non-consensual and no-fault in Egypt and in many other countries; *taṭlīq* or *tafrīq* (judicial divorce) divorce grounds have been expanded; and the judges' attitude to *fasakh* (marital dissolution) has also become more lenient (Sonneveld, 2019; Welchman, 2007).

[13] There are three different terms that are used interchangeably to refer to the prescribed rules of Islam, i.e. sharia, *fikih*, and Islamic law. Sharia is (in a broad sense) equal to Islam as a religion, but its narrow meaning refers to the 'practical' rules mentioned in the primary sources of Islam, i.e. the Qur'an and prophetic traditions. Meanwhile, *fikih* means 'practical' rules deriving from primary sources, through a process of *ijtihad* (legal reasoning). In this sense, both sharia in its narrow meaning and *fikih* yield the same output: namely, practical rules. The only distinction is in how the rules are derived. This explains why the terms are often used interchangeably, to mean either 'practical' rules, or provisions prescribed in Islam (Anwar, 2021, pp. 1–3; Auda, 2008, p. xxiii). Lastly, the term 'Islamic law', which was invented by colonial regimes (Buskens & Dupret, 2014; Cohn, 1989), refers to either sharia in the narrow sense or *fikih* that have gained legal status from a sovereign regime (state). In this chapter these distinctions will be retained, but sometimes the term Islamic law will be employed in its broader sense, to include either sharia in its narrow meaning or *fikih*.

In 2019, Brill published a volume that documented more recent developments in *khulʿ* divorce within the Muslim world. The developments range from Muslim-majority nations in the Middle East and Southeast Asia to Muslim-minority societies in Western Europe. Across these jurisdictions, *khulʿ* and other forms of wife-initiated divorce have been significantly developed, not solely through statutory reforms but also through independent reasoning (*ijtihad)* and judicial lawmaking (Abbasi, 2017; Engelcke, 2018; Sezgin, 2018; Sonneveld, 2019; Stiles, 2019; van Eijk, 2019). The latter trend also resonates in Indonesia, where reforms of Muslim family law, particularly the law of *khulʿ*, have predominantly been informed by judicial practice in the Islamic court (or 'judicial tradition', the term used by van Huis, 2015, pp. 10, 85, 2019a). Van Huis maintains that important legislation on Muslim matrimonial affairs in Indonesia "was primarily built upon the existing judicial tradition, and as the appropriation of that legislation by the judicial tradition." I will explain the term judicial tradition later, in Section 1.4.1.2 of this chapter. For now, it can be said that the roles of legislators in parliament and judges in the state Islamic courts have been equally important to the development of Indonesian Muslim family law.

In addition to the two state bodies above, the government's role has also been pivotal. The government, notably bureaucrats from the Ministry of Religious Affairs (henceforth, the MoRA) and the Ministry of Home Affairs, have been actively involved in the reform process. Their contributions are clearly seen, among other things, in the establishment of the Islamic court, the formalisation of *taklik talak* (conditional divorce), the creation of KHI, and better access to important civil documents for citizens (see Section 1.4.1.2, for more detail). In this manner bureaucrats (or officials) have become 'politized', rather than confining themselves to being mere enforcers of the existing law (cf. Andreetta & Kolloch, 2022, p. 280; Sezgin & Künkler, 2014). Therefore, this dissertation argues that, prompted in part by legislative deliberation in parliament, the development of Indonesian Muslim fam-

ily law has been shaped for the most part by important policies and discretion generated within the Islamic courts and the ruling government. In other words, the Indonesian Muslim family law system is the result of three important approaches, namely: legislation, bureaucratisation, and judicialisation. A description of each of these is given in the following sections. First, I will sketch important legislation (or statutory reforms) concerning Muslim family law in Indonesia.

1.4.1.1 Statutory reforms

Since the late 20th century, the Indonesian state has implemented reforms in the field of marriage and divorce. These reforms have made marriage registration and judicial divorce mandatory, while restricting polygamy, introducing a minimum marital age and equal divorce grounds for wives and husbands, and formalising so-called 'legal pluralism', by introducing state-sanctioned Islamic law and establishing an Islamic court exclusively for Muslims (M. Cammack, 1989; M. E. Cammack, 1997; Nurlaelawati, 2010; Soewondo, 1977; van Huis, 2015). These reforms have been the subject of debate and compromise among three major groups in Indonesian society, namely: the women's movement, conservative Muslims,[14] and progressive Muslims. The first group advocates a better position for women, which corresponds with 'strategic' and 'practical' agendas concerning gender.[15] Meanwhile, the second group favours Muslim marriage

[14] Conservative Muslims fall within the so-called *santri* group, in Geertz's trichotomy of Javanese Muslims: *santri-abangan-priyayi* (Geertz, 1976). According to this classification, *santri* refers to an individual who adheres to Islam and adopts Islamic values as his/her way of life; *abangan* refers to an individual who adheres to Islam, but maintains the animistic views of Javanese syncretism; and *priyai* refers to Muslim social elites, as opposed to lay people. While the inclusion of *priyayi* has been criticised, mainly because the term is regarded as a social stratification rather than a religious category, the first two categories of *santri* and *abangan* are still used today to depict the pattern of Muslims in Java. For the purpose of analysis, the term *santri* (a generic term comprising traditionalists, modernists, and so on) is used to designate those maintaining Islamic doctrine on marriage and divorce, in opposition to women's movement agendas and state penetration (M. Cammack et al., 2015; Saat & Burhani, 2020).

[15] Gender agendas include early marriage, polygamy, divorce rights, spousal freedom of choice, equal rights in education, equal citizenship, and the improvement of women's socioeconomic status. These agendas, as Cammack and friends suggest, can be divided into two categories. The first category—strategic agendas—comprises the first four issues (above). The second category—practical agendas—consists of the last three issues (above). Accord-

and divorce that is based on the traditional *fikih*. In between the two, the third group aspires to a middle ground, somewhere between the need for reform and preservation of the 'core values' in Islamic law.[16] These competing interests have inspired a number of statutory developments that belong to the second phase of reform mentioned by Welchman earlier, but (as I will demonstrate later) other progressive developments in government policy and judicial discretion took place simultaneously, which fit better within the third phase of Muslim family law reform.

After proclaiming independence in 1945, the Indonesian state issued Law 22/1946, requiring marriages, divorces and *rujuk* to be registered.[17] Yet, this law only concerns registration, which meant that the family law inherited from the colonial period was still in effect. Therefore, the people were still divided into different ethno-religious categories, with Muslims as the majority, remaining subject to their customary and religious norms. After a lengthy endeavour to unify the law, the state eventually passed Law 1/1974 on Marriage, which makes marriage registration and judicial divorce mandatory and stipulates the same divorce grounds for husbands and wives, restrictions on polygamy, and minimum marital ages: 16 years for a bride, and 19 years for a bridegroom (M. Cammack, 1989, pp. 59–60; Katz & Katz, 1975, p. 674; Soewondo, 1977, p. 286). These reforms have formalised so-called 'legal pluralism', by introducing state-sanctioned Islamic law and by establishing an Islamic court exclusively for Muslims. The reason for this was that the government wished to appease pleas from the competing groups mentioned earlier, in an attempt to maintain political stability and gain electoral fa-

ingly, strategic agendas concerning gender are most likely to directly encounter the agendas of Islamic conservatives and the state (M. Cammack et al., 2015, pp. 3–5).

[16] Among this group are reform-minded bureaucrats, judges, and Muslim scholars and figures, all of whom perceive legal reforms in this field to be necessary, as long as they do not go against the core values of Islam. 'The core values' is a generic term, which is used to designate established principles and rules in Islamic law, such as the religious nature of marriage, divorce, inheritance, and the like.

[17] Initially, the 22/1946 law applied in Java and Madura. Only later did the law apply to Sumatera through the government's Emergency Decision Number I/pdri/ka, and to the whole nation through the passage of the 32/1954 law.

vour (M. Cammack et al., 2015, pp. 5–9; Katz & Katz, 1975, 1978, p. 681; Künkler & Sezgin, 2016, pp. 15–17). Despite the change in approach, it is important to note that the formalised Muslim family system at the time was also conditioned to the limits set out in the marriage law.

Having adopted a pluralistic approach, the state passed Law 7/1989 to enhance the institutional status and jurisdiction of the Islamic court. The law provides procedural rules (*hukum acara*) for the court and annuls provisions dating from the 19th century, which required Islamic court decisions to be made enforceable by the general court (M. E. Cammack, 1997, p. 157). Long before the enactment of this law,[18] the Islamic court had survived Law 19/1948 and Emergency Law 1/1951, which promoted a single court for all citizens. The reasons behind the failed attempts were strong resistance from conservative Muslims, coupled with the role which the MoRA played in protecting the court from abolition (Alimin & Nurlaelawati, 2013; Lubis, 1994; Noer, 1983). Under the MoRA, the Islamic court grew to cover a wider scope than ever before, through the issuance of Government Regulation 45/1957 on the establishment of Islamic courts outside of Java and Madura (Lev, 1972; Otto, 2010; van Huis, 2015). The ministry also played a role in the creation of state Islamic higher education, which has been crucial to the development of prospective judges and employees for the court. In 1991, a joint committee from the MoRA and Supreme Court compiled a body of Islamic law (or KHI) by involving Islamic figures and scholars. The KHI was intended to be the official reference for judges in the Islamic court, even though a few judges initially retained the views available within the traditional *fikih* (Nurlaelawati, 2010).

After the collapse of the New Order (1966-1999), the state started to reform its judiciary by issuing Law 4/2004, placing the organisational, administrative, and financial matters of the Is-

[18] Earlier forms of Islamic court can be traced to past Islamic 'judiciary' throughout the archipelago, i.e. the *Penghulu* courts in Java and Palembang, the *Qadi Malikun Ade* in Aceh, the *Kali* in Sulawesi, and the *Qadi* in Kalimantan and Ternate. A number of seminal studies have been conducted on the institutional background of the Islamic court (Hanstein, 2002; Hisyam, 2001; Isma'il, 1997; Rahim, 1998; see van Huis, 2015).

lamic court under sole control of the Supreme Court. This reform, which is known as 'the one-roof system', brought MoRA's control over the Islamic court to an end. In 2006, the state passed Law 3/2006, as an amendment to Islamic Judicature Law 7/1989, which broadens the jurisdiction of the Islamic court to include sharia economics, full competence on Muslims' inheritance, and the special appointment of *Mahkamah Syar'iyah* in the Aceh province. By establishing *Acehnese Mahkamah Syar'iyah*, which assumes exclusive competence on Islamic penal law as part of the Indonesian Islamic Chamber of the Supreme Court, the law puts an end to the previously much-debated issue of the status of this special court, which was vaguely mandated in Law 18/2001 (Salim, 2010, p. 8).[19] Another aspect worth mentioning concerns the responses to the law. While media attention focussed mainly on the court's new jurisdiction over sharia economics and Acehnese Islamic penal law, its full competence in the field of inheritance among Muslims went relatively unnoticed (van Huis, 2019b, p. 19). However, the law does not automatically make the Islamic court the only forum for inheritance disputes among Muslims, as seen in the general court preference demonstrated by Minangkabau's matrilineal Muslim community (K. von Benda-Beckmann, 2009).

In December 2006, the state passed Civil Registration Law 23/2006, enabling local governments to impose heavier administrative fines on people who do not register their marriages. However, its implementation falls short of expectation, as local authorities rarely proceed complaints regarding either unregistered marriage or informal polygamy to the competent authorities. In early 2010, the government submitted a Draft Bill on Substantive Muslim Family Law to the parliament that entailed, among other things, the criminalisation of unregistered

[19] To appease bloody conflicts in Aceh, the central government enacted Law 44/1999, granting greater local authority over religion, customs, and education in this region. This special acknowledgement was followed by Law 18/2001 which, among other things, entailed the establishment of *Mahkamah Syar'iyah* for the Province of Nanggroe Aceh Darussalam. Only five years later, the jurisdiction of the court was addressed in a more meaningful way, when Law 11/2006 was issued just a couple of months before the passing of Judicature Law 3/2006 on 29 December 2006.

marriages and informal polygamy. However, the draft had to be withdrawn, as it was strongly rejected by the public. The rejection revolved around the imposition of financial penalties and criminal charges for actions permissible in Islam. The critics also pointed out that heavier sanctions on these matters were unnecessary, since case law had begun treating non-compliance with registration as felony. For the critics, the sanctions seemed likely to threaten those already at risk, notably the wives and children of unregistered or informal polygamous marriages (van Huis & Wirastri, 2012, pp. 11–12). More recently, in its attempt to prevent the occurrence of under-age marriages, the state enacted Law 16/2019, raising the minimum marital age for women from 16 to 19 years. The law has caused a staggering rise in marriage dispensation cases in the Islamic courts,[20] predominantly filed by prospective brides who suddenly found themselves to be under-age under the new law.

This brief overview shows how the state has implemented reforms in the fields of marriage and divorce. These reforms have been shaped by compromise, notably with conservative Muslims, as seen in the establishment of the state's Islamic law, Islamic marriage registrar, and Islamic court (which is exclusively for Muslims). By doing so, the state has formalised legal pluralism by distinguishing Muslims from non-Muslims. However, as I mentioned earlier, the development of Indonesian Muslim family law is not only in the hands of the legislature, because it also involves actors from different state bodies, i.e. the executive and judicature, whose roles in to the process should not be underestimated.

1.4.1.2 The bureaucratisation of Muslim marriage and divorce

The term 'bureaucratisation (of Islam)' refers to its conventional use, meaning "a formalisation, expansion, and functional diversification of Islamic institutions…, as a top-down strategy

[20] In 2019, marriage dispensation in the Islamic court increased twofold: from 13,822 to 24,864 cases. In the following year, when Law 16/2019 had been in full effect for a year, the number soared threefold, to 64,196 cases (*Laporan Tahunan Badilag* 2017-2020).

for co-opting religious-political opposition by integrating its ideas and actors into the state apparatus and thus neutralising it" (Müller & Steiner, 2018, p. 12; Sezgin & Künkler, 2014). Bureaucratisation thus resonates with a phenomenon where "state actors have empowered state-funded 'administrative' bodies—including state-formed ones such as the Indonesian Ulama Council or MUI (Müller & Steiner, 2018, p. 9)—in diverse ways to guide and influence Islamic discourses and regulate matters of religion and morality in the public sphere in accordance with their political interests" (Müller, 2017). In the present study, the concept of bureaucratisation was used to designate important policies and implementing regulations generated by the government, notably officials of the MoRA, in its attempt to streamline Islamic marriages and divorces in accordance with their own agenda. I will show in this section that, rather than confining themselves to being mere enforcers of the law, the ruling government has been active in bureaucratising marriage and divorce among Indonesian Muslims.

Firstly, since securing an important place in the newly independent state, the Indonesian MoRA has been held responsible for administering marriage, divorce, and reconciliation (*Nikah-Talak-Cerai-Rujuk* or NTCR) among Muslims. It has thus inspired the creation of a local office, the KUA (*Kantor Urusan Agama* or an Office of Religious Affairs), in each sub-district, with the state Penghulu as the official registrar. However, it must be noted that the creation of these offices did not automatically replace the 'informal' registrars in each village, i.e. P3N (*Pegawai Pembantu Pencatatan Nikah*). Instead, after a number of failed attempts to abolish these informal actors,[21] the MoRA issued Regulation 20/2019 (*Peraturan Menteri Agama* or PMA), which tolerates the existing P3N remaining operative. Article 18 of this regulation stipulates the possibility of the official registrar relying on the informal registrar, or the P3N. The ministry's more accommodating approach toward P3N corresponds with Fauzi's findings in Pasuruan, where

[21] See the equivalent MoRA Regulations (PMA) on P3N from 2018 and before, which all tried to eliminate the involvement of non-state actors in marriages.

(to ensure the attainment of citizens' rights) local marriage registrars often cooperate with the local *modin*, who act as P3N, rather than confining themselves to being the sole actor in solemnising a marriage (Fauzi, 2023, p. 222). Nevertheless, generally speaking, MoRA officials remain the main actors in the administration of Muslim matrimonial affairs.

As I mentioned in the previous section, the role of the MoRA has been prevalent in the development of the Indonesian Muslim family law system. The ministry played a crucial role in the institutionalisation of the Indonesian Islamic court, successfully shielding the court from a number of failed attempts at its abolition. Unlike *adat* courts across the archipelago, which were abolished by the issuance of Law 19/1948 and Emergency Law 1/1951 on the unification of the Indonesian judiciary (Hanstein, 2002; Lev, 1972; Lukito, 1999), the Islamic court managed to survive under the tutelage of the Directorate General of the Islamic Court within the MoRA (Lubis, 1994; Noer, 1983). The ministry even passed Government Regulation 45/1957, inspiring the establishment of Islamic courts outside of Java and Madura, including in places which had never previously housed such courts (Lev, 1972; Otto, 2010; van Huis, 2015).[22] Moreover, in response to the shortage of competent employees, the ministry initiated the creation of state Islamic higher education (*Perguruan Tinggi Agama Islam Negeri*, or PTAIN). The creation of PTAIN has been conducive to the development of so-called Indonesian '*religio*-legal identity' (Hallaq, 2009). Now, the state Islamic court and Islamic higher education are available in nearly every district, or at least in every province across Indonesia.

MoRA also played a pivotal role in the institutionalisation of *taklik talak* (conditional divorce). The ministry successfully formalised and unified the pre-colonial institution of *taklik talak* for marriage between Muslims. The institution has its origin in a

[22] It is important to note that, unlike their counterparts in Java that have suffered a number of restrictions, the existing Islamic courts outside of Java and Madura have continued to exercise greater jurisdiction over inheritance, *hadanah*, *wakaf*, *hibah*, and *baitul mal* (cf. Noer, 1983, p. 90).

number of ordinances issued by the Islamized Javanese Kingdom and other sultanates throughout the archipelago (Hurgronje, 2007; Nakamura, 2006, p. 11). Unlike the pre-colonial *taklik talak*, which differs from one place to another, the present-day *taklik talak* contains fixed conditions that are 'compulsorily' agreed to by a husband. Viewed this way, the former *taklik talak* has risen from being a mere optional agreement between a couple into a compulsory agreement between the state and a husband (Nakamura, 2006). The violation of *taklik talak* remains a popular divorce ground for wives in the Islamic courts, particularly for those who were 'neglected' by their husbands.[23] I will return to this topic in Chapter 4, when discussing the impact of more formalised *taklik talak* on out-of-court divorces within Mukomuko's matrilineal Muslim community. This study will show how members of this community have creatively invoked the *taklik talak* criteria imposed by the state, when dissolving marriages using their own *adat*, suggesting that the formalised form of *taklik talak* has converged with local practice, to become known as the *minta-sah* procedure.

Another MoRA contribution appeared in the creation of the 1991 KHI. With full support from the president, the ministry collaborated with prominent figures from the Supreme Court and Islamic scholars[24] to promote the creation of KHI as a standardised interpretation of Islamic family law, for Islamic court judges to refer to. Later, following the collapse of the New Order, the ministry also attempted to introduce a more 'progressive' interpretation of Islamic family law by making a Counter Legal Drafting (CLD) proposal, but the proposal had to be withdrawn following strong objection from conservative Muslims (Mulia & Cammack, 2007). More recently, the ministry was the main actor behind

[23] While the majority of *fikih*-based divorce grounds, such as *talak*, *khul'*, *šiqāq*, and *fasakh*, are now disappearing as types of broken marriage (van Huis, 2019a; see also Chapter 2 of this book), the violation of *taklik talak* is still observable in present day Islamic court practice.

[24] The prominent figures include: Busthanul Arifin, a senior judge of the Supreme Court who became the first Chair of the Islamic Chamber of the Supreme Court; and Munawir Syadzali, the Minister of Religious Affairs from 1983-1993 (Nurlaelawati, 2010, pp. 80–84; van Huis, 2015, p. 50).

the proposal of the 2010 Draft Bill on Substantive Muslim Family Law, which entailed (among other things) the criminalisation of unregistered marriages and informal polygamy, but the proposal also had to be withdrawn, following public resistance to it (van Huis & Wirastri, 2012). In another collaboration with the Islamic Chamber of the Indonesian Supreme Court and a number of district governments, including the Indonesian foreign embassy in Malaysia, the MoRA bureaucrats facilitated a number of mass retroactive validation programmes, or *isbat nikah massal.* These programmes were designed to accommodate persistently widespread unregistered marriages (Nisa, 2018; Wahyudi, 2014).

All the above-mentioned ministry-level policies and regulations show that the involvement of the ruling government has been instrumental in the development of Indonesian Muslim family law. However, it is important to note that, here, 'ruling government' is not taken to mean exclusively officials from the MoRA. The Ministry of Home Affairs (for example) issued two important regulations, i.e. the 9/2016 and 108/2019 regulations on civil registration. The regulations enable a local Civil Registry Office under the ministry to issue important civil documents, such as family cards (*Kartu Keluarga*, or KK) and birth certificates, but only with *Surat Pernyataan Tanggung Jawab Mutlak* (SPTJM, or a letter of absolute responsibility). The issuance of these documents used to be dependent on presenting a marriage certificate determining whether a person's marriage was registered or not, but now a person may obtain the documents simply by presenting their SPTJM to the Civil Registry Office. This shows that the Ministry of Home Affairs, in its attempt to make the civil documents more accessible to citizens, has participated in the wider process of Indonesian family law reform.

This section has shown how MoRA officials, including those from the Ministry of Home Affairs, have been active in shaping marriage and divorce among Indonesian (Muslim) citizens. This demonstrates a so-called bureaucratisation process, in which the ruling government is involved as an integral aspect of the devel-

opment of Indonesian marriage and divorce law, and therefore cannot be overlooked.

1.4.1.3 The judicialisation of Muslim marriage and divorce

The judicialisation [of politics] is an umbrella-like concept that is usually used by legal and political scholars to designate either "(1) the expansion of the province of the courts or the judges at the expense of the politicians and/or the administrators, that is, the transfer of decision-making rights from the legislature, the cabinet, or the civil service to the courts or, at least, (2) the spread of judicial decision-making methods outside the judicial province proper" (Beirich, 1999; Ginsburg & Moustafa, 2008; Handberg, 1999; Shapiro & Sweet, 2002; Tate, 1993; Tate & Vallinder, 1997). The point of departure is when a court is being used as a political institution, an issue which has attracted scholarly attention since the late 20th and early 21st century (cf. the Indonesian Islamic courts in Lev, 1972; van Huis, 2019b, p. 109). Within this development, Hirschl further classified the concept to mean three distinct phenomena, which include:

> "(1) at the most abstract level, a 'juridification of social relations' to mean the spread of legal discourse, jargon, rules, and procedures into the political sphere and policy-making fora and processes, (2) a 'procedural justice and formal fairness in public policymaking processes' to mean the expansion of the province of courts and judges in determining public policy outcomes, mainly through administrative review, judicial redrawing of bureaucratic boundaries between state organs, and 'ordinary' rights jurisprudence, and (3) a 'transition to juristocracy' to mean the transformation of supreme courts worldwide into a crucial part of their respective countries' national policymaking apparatus or, in other words, the reliance on courts and judges for dealing with what we might call 'mega-politics': core political controversies that define (and often divide) whole polities" (Hirschl, 2009b, pp. 2–6).

In this section, I explore this concept in its most practical sense, when it designates "a phenomenon of judges making public policies that previously had been made or that, in the opinion of most, ought to be made by legislative and executive

officials appears to be on the increase" (Handberg, 1999; Tate & Vallinder, 1997). For operational purposes, I adapted the concept to mean the persisting and increasing roles of the Indonesian Islamic judiciary in representing the state, by initiating and introducing reforms to the field of Muslim matrimonial affairs. This corresponds to similar phenomena around the Muslim world[25], ranging from judicial *ijtihad* in Pakistan (Abbasi, 2017), through judicial law making in Egypt (Lindbekk, 2017),[26] Morocco (Sonneveld, 2019) and Zanzibar (Stiles, 2019), the more lenient use of *fasakh* divorce in favour of women in the contemporary Malaysian Islamic courts (Peletz, 2018, p. 665), and the dominant influence of Supreme Justice on Jordanian lawmaking (Engelcke, 2018), to civil court interference in the reform of Islamic family law in many Muslim-minority nations in Western Europe (Sezgin, 2018; van Eijk, 2019). Across these jurisdictions, Islamic family law has increasingly been the subject of reform, by either the Islamic judiciary or civil courts, thereby making it the subject of judicialisation.

Specific to Indonesia, my point of departure is Van Huis' thesis on 'judicial tradition', as an approach to understand present-day Indonesian Muslim family law. By judicial tradition, Van Huis means:

> "The legal heritage transmitted over generations within a judicial institution or system, with each generation consciously building on the transmitted heritage of their predecessors, the authoritativeness of which is based on a certain origin or historicity. Legal change proceeds within a judicial tradition by conscious reinterpretation of legal heritage, but always with due consideration for its origins and historical background" (van Huis, 2015, p. 10).

Employing this concept, Van Huis suggests that present-day Indonesian Muslim family law must be viewed as "legislation

[25] Some countries, such as Indonesian and Egypt, have sanctioned new codifications and integrated the Islamic court into their state bodies (Sonneveld, 2019; van Huis, 2019a); some countries, e.g. Zanzibar and India, have not yet introduced substantive law, but have accommodated Muslim divorce through the creation of an Islamic court (Sezgin & Künkler, 2014; Stiles, 2019); and other countries have neither developed substantive law nor institutionalised the Islamic court, but have instead creatively exercised religious law through different means, such as the civil court (Sezgin, 2018; van Eijk, 2019).

[26] See also 'the judicialization of religion' in Egypt (Moustafa, 2018).

that was primarily built upon an existing judicial tradition, and as the appropriation of that legislation by the judicial tradition". According to this line of thought, the development of Indonesian Muslim family law is an ongoing process that takes place mainly in the Islamic courts via (Islamic) judges, who interpret and apply legal norms in their everyday adjudication (van Huis, 2015, p. 10). Henceforth, the judges become the vanguard of reforms in Indonesian family law, considering the relative absence of substantive law making after the passing of Marriage Law 1/1974. The following gives an overview of important reforms informed by this judicial tradition, which I refer to in this section as a judicialisation process.

Long before the passing of Marriage Law 1/1974, Islamic courts were known as a promising forum for Muslim women, and thereby equivalent to women's courts (Lev, 2000, p. 155; Nurlaelawati, 2013a, p. 245). Judges from Islamic courts have been creative in exercising *ijtihad* (Islamic legal reasoning), by invoking various thoughts and opinions available in classical Islamic jurisprudence (*fikih)*, such as *khulʿ*, *šiqāq*, and *fasakh,* in order to grant divorces for women, especially when their husbands have refused to deliver a unilateral repudiation, or *talak*, on their wives (van Huis, 2019a; Yakin, 2015). The judges have simultaneously resorted to the pre-colonial *taklik talak*, as an exclusive divorce mechanism for 'neglected' wives. Although, as I mentioned when discussing the impacts of bureaucratisation (above), the institution of *taklik talak* contains fixed conditions that are 'compulsorily' agreed to by a husband (Nakamura, 2006). Even after the issuance of Marriage Law 1/1974, which makes marriage registration and judicial divorce procedures mandatory, the judges began to validate unregistered marriages retroactively, as they had not developed a consensus on the status of registration in terms of validating a marriage. Meanwhile, the judges were at first indecisive about divorce pronounced out-of-court by a husband; some counted it as the first *talak*, while others argued just the opposite. Only later, in the late 1990s, did they reach a con-

sensus to invalidate such divorce (J. R. Bowen, 2003; Lev, 1972; van Huis, 2015).

After the passing of Islamic Judicature Law 7/1989, which contains procedural laws and ends the general court's executorial force (*executoire verklaring*) over Islamic courts, the position of Islamic courts became more established. Yet, the situation did not change significantly, as Islamic court judges continued to run their tasks as usual, different judges rendering different judgements on 'similar' cases. This caused inconsistencies and legal uncertainties (Otto, 2010). In response, the judges collaborated with prominent figures from the Supreme Court and the MoRA, in order to codify KHI as a standardised interpretation of Islamic law (Nurlaelawati, 2010). However, Van Huis maintains that, rather than being a new invention, for the most part the KHI was a codification of existing judicial practice in the Islamic court, and thereby a continuity of judicial tradition (van Huis, 2015, p. 103). Nevertheless, he added that this codification, including the marriage law, provides a threshold that prevents judges from falling into more conservative *fikih* interpretations (Nurlaelawati & van Huis, 2020). In this way, developments in marriage and divorce law are an ongoing process—taking place mainly in the Islamic courts—including developments on different substantive areas of Islamic law, such as property and inheritance disputes (J. R. Bowen, 2005; K. von Benda-Beckmann, 1981, 2009). The following presents a number of legal breakthroughs generated within the Islamic Chamber of the Indonesian Supreme Court.

The most apparent judicial breakthroughs in the field of marriage and divorce appeared in the extended and refined form of *isbat nikah*, and in the invention of broken marriage as a unilateral, no-fault, and all-encompassing divorce ground. Through the new form of *isbat nikah* Islamic court judges manage to validate unregistered marriages retroactively, as long as such marriages do not go against other legal provisions, e.g. they are religiously valid and not an informal polygamy. In doing so the judges mediate the mandatory marriage registration procedure, because

unregistered marriages remain socially widespread. Meanwhile, through the invention of broken marriage, judges are introducing a simpler divorce procedure for both husbands and wives, and lifting the burden to discover who is at fault from their own shoulders. Moreover, to prevent their court from becoming merely a divorce registration office, judges have started to reapply a fault consideration to a divorce by broken marriage, so that they can hold one party accountable for the breakdown of a marriage without necessarily falling into prolonged blame games (cf. van Huis, 2015). A more elaborate discussion of these topics is provided in Chapter 2 of this dissertation, where I link them to a wider issue: the 'autonomy' of the Indonesian Islamic court.

Important breakthroughs have also appeared in other substantive areas of Islamic law. Concerning joint marital property, Islamic court judges, notably those from the Supreme Court, have started introducing more nuanced interpretations of Article 97 of the KHI, which stipulates an equal share between an ex-husband and wife. In Judgement 266K/Ag/2010, the Supreme Court judges adjudicated a three-quarter portion of joint marital property to a wife from Yogyakarta, taking into consideration her greater contribution in acquiring the property. In a similar case from West Sumatra, i.e. Judgement 88/Ag/2015, the judges allocated one-third to the husband and two-thirds to the wife, by invoking the local norm of *harta-pusaka* (a matrilineally-inherited property), which constitutes part of the disputed property (cf. a more recent case, 78K/Ag/2021, which allocated 70% of marital property to a wife and 30% to a husband). Concerning the minimum marital age, judges have also exercised discretion, prioritising the best interests (*maṣlaḥah*) of children over the minimum age required by law, by granting most incoming dispensation petitions for under-age marriage (Wahyudi, 2014). As I mentioned above, this explains why marriage dispensation cases skyrocketed after the passage of Law 16/2019, which elevates women's minimum marital age from 16 to 19 years. More recently, the Indonesian Supreme Court introduced PERMA 3/2017 on women

to the court. This regulation serves as an affirmative action to proffer better access to justice for disadvantaged groups; notably, women and children.

All the breakthroughs generated within the Islamic Chamber of the Indonesian Supreme Court are signs of the judicialisation of Muslim family law. This trend, which can be traced back to existing judicial tradition, has become more relevant after the adoption of the one-roof system in 2004, which marked a full transfer of the Islamic court from shared supervision with MoRA to the Supreme Court alone. Under the one-roof system, Islamic court judges enjoy a greater autonomy as the vanguard of reforms in present-day Indonesia. However, it is important to note that in exercising their autonomy the judges have been very careful not to trespass on the 'core values' of Islam (Lev, 1972, p. 163; Nurlaelawati, 2010, p. 224; Nurlaelawati & van Huis, 2020; van Huis, 2015, p. 113). They still maintain the balance between the so-called 'Islamic triangle', or the three types of symbolic universe, i.e. sharia (religion), state law, and customary law (*adat*) (Buskens, 2000; K. von Benda-Beckmann, 2009, p. 217).

1.4.2 Law in context: the unification of Muslim family law and Indonesian multicultural Muslim society

The previous section demonstrated that legislative deliberation, bureaucratic discretion, and judicial law making have been instrumental to the development of Muslim family law. These approaches have unified Islamic family law and promoted Islamic court judges as its official interpreters (J. R. Bowen, 2001; M. E. Cammack, 1997; van Huis, 2019a). The unification was further accelerated by the adoption of the one-roof system in 2004, which 'centralised' (Rositawati, 2010, pp. 50–52) and 'homogenised' the Islamic courts under the Islamic Chamber of the Indonesian Supreme Court (see Chapter 5 of this dissertation). These developments are in fact advantageous to the modernisation of Muslim matrimonial affairs in general (cf. other countries in Hirschl, 2009a; Peletz, 2002, pp. 227–278). However, one should keep in mind that they do not automatically replace the existing

normative systems and institutions available; various forms of more localised Islamic law have continued to shape Muslim matrimonial affairs across the archipelago (J. R. Bowen, 2000; Platt, 2017; K. von Benda-Beckmann, 2009). Therefore, in order to further understand these developments it is necessary to consider the local variations at play and how they have been appropriated or overlooked by the state.

Local variations appear in the everyday marriage and divorce practices of Indonesian multicultural Muslim society. A number of studies have suggested that the social importance attached to marriage and divorce remains strong, and that community recognition is often more important than that of the state (Brickell & Platt, 2015; Idrus, 2003; Mulia & Cammack, 2007; van Huis & Wirastri, 2012). By featuring the rural Muslim Pasuruan communities from East Java, Fauzi maintains that state-society encounters on the subject of marriage are not necessarily a point of conflict, but sometimes a point of 'mutual adjustment[s]' (Fauzi, 2023, p. 9; ; see also West Java case in Grijns & Horii, 2018). In the field of inheritance, while people may resort to the state upon failure to resolve their own disputes, initially people usually prefer to solve their disputes according to either their *adat* or a more localised version of Islamic law (K. von Benda-Beckmann, 2009, p. 217). Viewed in this way, the existing normative systems coexist as 'differentiated' empirical laws (Griffiths 2017, 103), operating on 'a continuum scale', resolving people's marriage, divorce, and other related disputes (Brickell & Platt, 2015; Platt, 2017) at some point over the course of their lives.

In Mukomuko, where I conducted my research, the unification of Muslim family law can come into conflict with the equivalent local *adat* observed by members of Mukomuko's matrilineal Muslim community. Unlike the state's family law, which is patriarchally-inclined (cf. O'Shaughnessy, 2009, p. 70; van Huis, 2015, pp. 17–18), the local *adat* inherits a unique mixture of Islam and matrilineal traditions from Minangkabau, which is more matrilineally-inclined (Abdullah, 1966, p. 15, 2010, p. xxxii). In this

dissertation I will show how local *adat* law continues to operate as either a differentiated empirical law (Abel, 2017; Griffiths, 2017, p. 103) or a semi-autonomous law (Moore, 1973), even though the trend toward (a) more centralised and homogenised law and judiciary is also inevitable. However, it must be noted that the *adat* does not operate in isolation, as it incorporates some outside elements, especially from the state. Conversely, the state (mainly via judges) has started to consider local variations, as seen in a number of landmark decisions within the Islamic Chamber of the Supreme Court. Santos spoke of this phenomenon as 'inter-legality', where different legal spaces superimpose, interpenetrate, and mix (Santos, 1987, pp. 297–298, 2020, p. 89). Chapters 2 and 4 provide a more elaborate discussion of the complex entanglement between state and local interpretations of Muslim family law.

By considering this pluralistic configuration, this dissertation seeks to understand how developments in Indonesian Muslim family law actually work in practice. It looks primarily at everyday practice in Muslim marriage and divorce among the matrilineal Muslim community in Mukomuko, which either involves state bodies and actors, or has occurred exclusively within Mukomuko society, beyond reach of the state.

1.5 Research Methods

This dissertation is the result of sociolegal research that seeks to understand the relationship between state and society with regard to marriage and divorce. The research is interdisciplinary and it combines doctrinal and historical analysis of the law with ethnographic accounts of legal phenomena. Its main objective is thus to describe and understand, rather than to prescribe (Griffiths, 2017; Halliday & Schmidt, 2009; Monaghan & Just, 2000; Pirie, 2013, p. 22). The research is an area study, focussing on Mukomuko on the west coast of Sumatra and how its inhabitants conclude marriages, obtain divorces, and solve related disputes, either on their own or by involving the state. The research

was conducted bottom-up, by looking at marriage and divorce practices at three different but connected 'sites' or contexts: i.e. societal level, the first instance Islamic court at district level, and the higher courts (the Appellate and the Supreme courts) at provincial and national levels. In researching these sites I employed various strategies, ranging from participation observation, in-depth interviews, life histories, and extended case studies. In addition, I collected archival data concerning Mukomuko's history, marital records from the local MoRA, incoming petitions and lawsuits at the Islamic court, population records from a number of government agencies, and other relevant statistics on Mukomuko.

From a methodological point of view, this sociolegal research is qualitative in nature, as it has been drawn mostly from case studies. The research thus calls for logical rather than statistical inference, for case-based rather than sample-based logic, and for saturation rather than representation (Small, 2009). The research is therefore rooted firmly in the descriptive richness of cases and a more nuanced view of reality; notably, on the everyday marriage and divorce practices of Mukomuko's matrilineal community (Flyvbjerg, 2006, p. 223; Monaghan & Just, 2000, p. 2; Pirie, 2013, p. 3). Further, rather than focussing on representation or generalisability issues, the research was conducted in a more interpretive fashion (Geertz, 1973a, 1973b), in accordance with case study logic that seeks to produce an in-depth study instead of making generalisations regarding other (not observed) empirical conditions (Flyvbjerg, 2006, p. 219). It revolves mainly around "the extent to which I attained an empathetic understanding of my informants, on the level of reflexivity in the work, or on the extent to which the history of the neighbourhood informed the analysis" (Small, 2009). What follows is a more detailed description of how the fieldwork was conducted, in order to answer my research questions, including the various strategies I employed in approaching research contexts and selecting the featured cases.

1.5.1 Empirical fieldwork

Field research has been a core element of this study. Prior to starting my PhD, I paid a short visit to North Bengkulu from 23-28 December 2015 to interview Darussalam, a former employee of the North Mukomuko KUA and its chairman from 1990 to 1997, about how the people of Mukomuko concluded marriages and obtained divorces during his period of service. I also interviewed some former judges of the Arga Makmur Islamic court, which served as the competent court for the people of Mukomuko, until the establishment of their own court in late 2018. My intention was to obtain a general picture of Mukomuko, and to make sure that this particular region and its matrilineal society would serve as a perfect case for my PhD thesis. Despite being born in Bengkulu, I was not familiar with Mukomuko, since this district is quite far away from my hometown - an approximately eight-hour road trip. More importantly, the kinship system observed by the natives of Mukomuko is matrilineal, whereas the system in my hometown is predominantly patrilineal. Nevertheless, I found myself in a somewhat privileged position, since the interlocutor for the initial visit was my uncle, and this allowed me to follow up on interviews from a distance while I lived in Leiden, in 2016. While refining my research proposal abroad, I managed to arrange a visit to Mukomuko with the help of my cousin, Dang Guntur, who settled there following his marriage to the daughter of a Mukomuko native. In 2017, I went back to Indonesia to conduct my research in the field.

I did my primary research in Mukomuko for 10 months, and during several subsequent shorter visits. I spent two months preparing for my first visit (in January-June 2017), including arranging permits and collecting demographic data and records on marriage and divorce. At the same time, I approached elite members of the *adat* council (*Badan Musyawarah Adat*, or BMA), journalists, and NGO activists, who were available in Mukomuko, in order to learn about the current situation there. The latter approach aimed to find local collaborators who would guide

me to a particular village that best represents the region. While I had found a similar approach to be effective in my previous research in West-Java (Farabi, 2011, 2013), it did not work well here. Later, I realised that the BMA institution had only 'recently' been invented and its members had been appointed according to how close a relationship they had to the district government, rather than with the aim of representing and reflecting the existing *adat* communities across Mukomuko. Meanwhile, I found that the local journalists and NGO activists were too centralised to the district capital, and they therefore knew little about the surrounding rural areas. These constraints prevented me finding a 'perfect' village for this research, until I accidently met a local head of ADIRA Finance. From his experience in the automotive financing business I could learn the various characteristics of villages and their respective populations. This eventually led me to Talang Buai, a village renowned for its strong matrilineal *adat* community, where I would spend most of my remaining four months carrying out fieldwork.

In addition to the fact that it is renowned for its matrilineal kinship system, I chose Talang Buai for its strategic location. The village is relatively close to the district capital and the market centre of Penarik. In addition, the village is surrounded by various forms of migrant settlement, such as transmigrant enclaves and plantation settlements. As is shown in Chapter 3, looking into the local variations is crucial to any research which takes Mukomuko's contemporary multicultural society into account. As well as focussing on this particular village, I could also make visits to other surrounding urban and migrant settlements, which belong to more diverse community groups. In doing so, I tried to hinder any temptation to present Talang Buai and its matrilineal residents as temporally and spatially isolated as "the 'ethnographic present' in which communities were presented as frozen in time, outside any historical context, and without reference to neighbouring societies or encapsulating states" (Monaghan & Just, 2000, pp. 25–26). Another reason for choosing one village

concerns one of the key principles observed in matrilineal marriage that is clan-exogamous. The principle makes inter-village marriages inevitable, and involves not only clan members from other villages but also those who do not belong to a clan. Therefore, it is necessary for this research to focus on a particular site, and at the same to make its inquiry as open as possible.

During my stay in Talang Buai, I concentrated on observing everyday marriage and divorce practices at societal level. I attended a number of marriage feasts that took place there and in the surrounding villages, and I participated in a number of *adat* deliberations. At the same time, I conducted a mini survey on the marital history of each family in Talang Buai, to discover whether the current marriages were the couple's first or second. My main purpose was to obtain the actual number of divorces that have occurred among the villagers, since these were not well documented in the official records—i.e. the decennial census by *Badan Pusat Statistik* (BPS, or the Central Bureau of Statistics), the monthly survey by *Badan Kependudukan dan Keluarga Berencana Nasional* (BKKBN, or the National Family Planning Coordinating Agency), and records from *Kependudukan dan Pencatatan Sipil* (*Dukcapil*, or the Civil Registry Office Service). In addition, unlike marriage, which is openly celebrated, divorce often goes unnoticed. This is why the survey on marital history is instrumental, as it led me to prospective interviewees for my inquiry. In performing these interviews, I had to be very careful, since discussing marriage and divorce with a stranger is always uncomfortable. After establishing good communication, the interlocutors began to be more open to discussing their private affairs, and they even invited me to attend ongoing marital disputes that were being handled in the *adat* council. After spending four months among these people, I went back to Leiden to process the empirical data I had gathered.

On my second visit to Mukomuko (September-December 2017) I followed up on my preliminary findings by digging deeper into cases I had encountered during my earlier visit. I conduct-

ed in-depth interviews with elite members of *adat* clan elders who were directly involved, not only in arranging marriages and granting out-of-court divorces, but also in resolving related disputes according to their local customs. With regard to the latter, I also inquired at the local police station, because I came across an adultery accusation case where one of the disputing parties threatened to bring their dispute to the police, supposing that his or her demand went unfulfilled by *adat* deliberation. For cases of divorce involving civil servants in the district government, I interviewed their superiors, local inspectorates, and the *Badan Kepegawaian* Daerah (BKD, or Human Resource Agency), whose approvals and mediating services are mandatory prior to formalising such a divorce in the Islamic court. Meanwhile, I paid several visits to the Arga Makmur Islamic court, to observe ongoing divorces involving people from Mukomuko. I spent these visits interviewing the parties, adjudicating judges, registrars, lawyers, and informal case-drafters. I also collected incoming cases to the court from Mukomuko, which included marriage dispensation petitions, retroactive validation (*isbat nikah*) petitions, divorce lawsuits, marital property distribution (*harta-sepencarian*) lawsuits, and inheritance lawsuits.

By way of comparison, I stayed for a month with Wo Tin's (another of my cousins) family in Penarik, to look at marriages and divorces occurring in this market centre. Meanwhile, together with my research assistants, I conducted the same inquiry at three other villages: Agung Jaya, Bantal, and Sibak. In Agung Jaya, a former transmigrant enclave, I collaborated with an old friend, Wahib, who helped me analyse villagers' marital histories. In Bantal, a coastal village, I was assisted by Elvandi, Matkaharda, and Renaldi, in conducting the same analysis of the villagers' marital histories. In Sibak, a rural village that belongs to the Pekal people who inhabit the southern part of Mukomuko, I relied mostly on M. Zikri. Zikri spent several subsequent weeks making shorter visits to Sibak, to observe the village's everyday marriage and divorce practices and record the marital histories

of its the villagers. By extending the research sites, I did not intend to make a generalisation for the whole of Mukomuko, but to obtain a better understanding of my earlier findings in Talang Buai and the Islamic court. My purpose was thus therefore saturation rather than representation (Flyvbjerg, 2006; Small, 2009). I returned to Leiden to analyse the data and write my thesis, and at the end of 2018 I returned to Indonesia for personal reasons. While writing my thesis from a distance, I also spent my time in Indonesia enriching my data, by interviewing judges from the Islamic Chamber of the Supreme Court and several stakeholders from the MoRA and the Ministry of Villages, Development of Disadvantaged Regions, and Transmigration.

1.5.2 Archival data collection

In addition to the fieldwork, I conducted archival data collection to put my empirical research into context. The archival data were divided into two categories: historical sources from Mukomuko, and marriage and divorce statistics. While the former focus on continuities and changes in this particular region, the latter aim to present an overview of marriage and divorce over five recent years (2016-2020). Together, they enrich my materials, making it easier to understand marriage and divorce in contemporary Mukomuko, and to answer my research questions.

First, in describing Mukomuko, I relied mostly on secondary historical sources, such as *History of Sumatra* (by William Marsden), the *Syair Mukomuko*, Thomas Barnes' expedition to Kerinci in 1818 (edited by Jeyamalar Kathirithamby-Wells), the *Undang-Undang* of Mukomuko (translated in 1822 by Richard Farmers), *Moko-Moko in 1840* (by T.C. Bogaardt), and the 1862 *Undang-Undang* of Mukomuko, which is codified in *Adatrecht Bundel* (Adatrecthbundel VI, 1913, pp. 290–292). I also referred to historical texts on this particular region, written by a number of historians, such as John Bastin, Jeyamalar Kathirithamby-Wells, John Ball, David S. Moyer and Heinzpeter Znoj. Additionally, I collected historical information (life stories) from the elders I met

during my fieldwork, and from former state employees serving at the local KUA and Arga Makmur Islamic court. Afterwards, to describe more recent changes in Mukomuko, I collected reports on state-sponsored transmigration programmes in Mukomuko, from the Ministry of Villages, Development of Disadvantaged Regions, and Transmigration. With regard to the rise of large-scale plantations since 1990, which have attracted more migrants to the region, I consulted yearly reports issued by two multinational companies, SIFEF and AEP, both of which operate and dominate palm oil and natural rubber plantations in the region. All the above materials inform my writing on contemporary Mukomuko and its history, in chapters 3 and 4.

Second, in order to obtain the total number of marriages and divorces among the people of Mukomuko, I collected registered marriage records from the local MoRA office. The office also provided me with a list of 2,031 unregistered marriages in Mukomuko, which formed part of its attempt to arrange an *isbat nikah massal* (a mass retroactive validation of marriage) in 2016. Afterwards, I consulted divorce records within the five-year period 2016-2020, at two competent courts: the Arga Makmur Islamic court, and the Mukomuko Islamic court (from late 2018 onwards). After eliminating non-Mukomuko cases, the records contained 1,184 incoming cases: i.e. 552 cases at the Arga Makmur Islamic court, and 632 cases at the Mukomuko Islamic court. By inventorying the parties' profiles, I managed to sort the cases according to their village of origin. The main purpose for this was to understand the spread of cases across the region and (more importantly) to obtain an initial hint that would guide me to the parties' domicile. Rather than being evenly distributed across the region, the inventory shows that the majority of judicial divorces originated in the villages that were formerly migrant enclaves. Moreover, by cross-checking these numbers with a mini-survey I conducted at the Talang Buai village, I found that the number of judicial divorces hardly represent the actual total number of divorces which have occurred in this particular village.

In search of the actual number of divorces at societal level, I collected relevant data from BPS, BKKBN, and *Dukcapil*. However, these sources were problematic, because of their different scopes and timespans. The BPS 2010 decennial census was no longer actual, but the latest census has not yet been made available to the public. The BKKBN record provides a monthly updated 'single-headed' family survey, but unfortunately it lacks financial support - i.e. 50 thousand rupiah (around 3 euros) for each surveyor - which contributes to its poor quality. In addition, the classification used in the survey does not distinguish a divorcee from a widower (*cerai mati*). Fortunately, the *Dukcapil* population record (*kartu keluarga*, or KK) includes more comprehensive information, including the marital status, religion, and parents of household members. With the help of Zikri, Rahmadani, and Kaharda as my research assistants, I conducted a close reading of the KK for five villages: Talang Buai, Penarik, Agung Jaya, Bantal, and Sibak. By looking at the children's biological parents, this reading provides not only the number of divorcees from each village, but also the number of people who had remarried. Even though this result could not be cross-checked with the annual divorce records of the Islamic court, I can safely assume that the actual number of divorces was significantly higher than the number of judicial divorces.

1.6 Research Ethics

Marriage and divorce are always a sensitive topic, kept hidden from strangers. Therefore, as a researcher I first needed to gain people's 'trust' by participating in a number of marriage and customary feasts in the main village, establishing good communication with local elites, and finding my host parents (Maadas and Kudimah), who introduced me to the villagers as their own son. Only then could I reach my interlocutors more conveniently. When talking to female interlocutors, such as brides, wives, and divorcees, I was always accompanied by a local colleague, as it is socially improper to contact female

members on my own; I might make myself liable to a customary sanction for breaching the local *cobak* (sanction), which requires proper male-female interaction. This proximity even allowed me to attend a number of disputes within the *adat* council, as well as unregistered marriages, as an observer. To maintain trust I needed to protect my informants, as the information I gained usually contained their private stories. For this reason, I identified most of the informants by using pseudonyms or their current positions in the structure of *adat*, religion, or government, rather than using real names. An exception applied to the names of the villages. I retained the real village names, in order to make important insights into these places accessible to the public and stakeholders.

While I conducted my inquiries as carefully as possible, I still experienced ethical issues with regard to my positionality toward the subjects being studied. When attending a marital dispute that was being handled in the *adat* council, I was often asked for my opinion by those who were present at the deliberation. From my experience living among the people, I knew that they were not looking for an answer; they were merely making a gesture of appreciation for my presence. For this reason, I preferred to become a 'good' observer, by not interfering. However, the situation was sometimes very tempting. For example, when attending a village deliberation on the invention of *Lembaga Adat* (LA, *Adat*, or institution), I knew that the deliberation was the village leader's bid, representing the district government, to discharge representations of *adat* (*orang adat*) from the village structure. My knowledge of the ongoing unification of *adat* has taught me that the elimination of *orang adat* will endanger not only the position of *orang adat*, but also the government's social legitimacy in the eyes of village communities. While tempted to interfere, I preferred to become a passive observer, because the debate between the proponents of LA and *orang adat* was already intense. In other words, I tried my best not to show any allegiance to either group, and only gave my own view when I was asked for it.

Another ethical issue concerns my strategy for collecting marriage and divorce statistics. With the help of village secretaries, I conducted a close reading of population records containing more reliable numbers for marriages and divorces which had occurred in their respective villages. The records were not available to the public, by law, but I consulted them anyway, as I needed to know the villagers' marital histories. This particular information would provide a more reliable picture of marriage and divorce among the villagers and, more importantly, it would lead me to prospective interlocutors. To make sure that I would not abuse this access, I confined myself to accessing the records on my own and always with the assistance of the village secretaries. By doing so, I managed to reconcile my need for more reliable data with the need not to infringe the secrecy of that information. Still, interviewees often asked me, during a visit to their home, how I knew them in the first place, which undoubtedly caused unease on my part. However, after a careful approach and explanation they consented to be interviewed, as I assured them that I would protect their privacy by presenting their story using pseudonyms.

This section has presented my strategies for dealing with the ethical issues I encountered during my fieldwork. By employing pseudonyms, I wanted to ensure that this research does not harm the people I studied (Monaghan & Just, 2000, pp. 31–33). Moreover, by distancing myself from actively interfering with ongoing disputes, I prevented conveying any preference for one particular group in any dispute. Despite all the privileges I have as a native of Bengkulu, I realised that my position is still that of an outsider. These strategies proved effective for maintaining a 'proper' relationship between me as a researcher (i.e. an insider and, at the same time, an outsider), and the people as the subjects of the study.

1.7 Structure of the Thesis

Chapter 1 serves as an introductory section, and it includes the research background, design, and methodology. The chapter

begins with a case and an overview of the existing scholarship on marriage and divorce among Indonesian Muslims. It proceeds to describing the research site and questions, conceptual frameworks, and research methods and ethics. In addition, this chapter provides an explanation of the different approaches of this study, i.e. legal (doctrinal) analysis, case studies, historical research, and ethnography. These approaches will be employed interchangeably in subsequent chapters, so as to understand marriage and divorce at three different but connected sites, namely: (1) the everyday practice of marriage and divorce at societal level; (2) relevant cases available in the first instance Islamic court for the people of Mukomuko, i.e. the Arga Makmur Islamic court until 2018, and the Mukomuko Islamic court from late 2018 onwards; and, (3) landmark decisions and judicial developments within the Islamic Chamber (*Kamar Agama*) of the Supreme Court, at national level.

Chapter 2 provides a doctrinal analysis of the Indonesian law of marriage and divorce for Muslims. By doing so, this chapter consults landmark decisions, emerging discourses available in the quarterly magazine of *Majalah Peradilan Agama* from 2013 onwards, and various forms of judicial policy, namely: *Peraturan Mahkamah Agung* (PERMA, Supreme Court's regulations), *Surat Edaran Mahkamah Agung* (SEMA, the Supreme Court's circular letters), and *Rapat Pleno Tahunan* (yearly plenary meetings). These materials reveal a consistent trend of judicial law making, as is apparent in the extended and refined form of *isbat nikah* (the retroactive validation of marriage) and the invention of broken marriage as a unilateral, no-fault, and all-encompassing divorce ground. By employing the new *isbat nikah*, judges manage to accommodate unregistered marriages that are still pervasive, as long as the marriages are religiously valid and not against the law (e.g. not informal polygamy). Through the increasing use of broken marriage as a ground for divorce, they also promote a more simple and equal divorce procedure for husbands and wives and lift the burden to find who is at fault from their own shoulders.

Moreover, in the case of broken marriage divorce, judges can still employ consideration of fault, especially when the 'fault' is relevant to a spouse's post-divorce rights. These breakthroughs suggest the 'autonomy' of Islamic court judges, mainly in bridging gaps between a formal application of law and a sense of justice within society that is informed by more diverse forms of Islamic law and their specific conditions.

Having discussed the judicial trend at national level, the next chapters shift attention to Mukomuko, on the west coast of Sumatra, focussing on everyday marriage and divorce practices at both societal level and in the Islamic first instance court.

Chapter 3 presents an overview of the sociostructural and political background of Mukomuko. This overview suggests that Mukomuko's population comprises three distinct community groups. These are: (1) the matrilineal community which has lived in upstream and downstream (*hulu-hilir*) villages since time immemorial; (2) transmigrants, mostly from the island of Java, who have lived scattered throughout several state-sponsored enclaves, including private palm oil plantation enclaves, since their initial arrival in the 1980s; and (3) urban people, who are a mixture of the first two groups and more recent migrants, and who live in emerging market and administrative centres across the region. Together, these multicultural community groups constitute the so-called 'local people of contemporary Mukomuko'. While a great majority of the *hulu-hilir* people and transmigrants stay exclusively within their respective settlements, urban people have become more inclusive. In the fields of marriage and divorce, for instance, the matrilineal community usually observes the matrilineal *adat* inherited from Minangkabau, whereas the (trans)migrants and urban people often bring various traditions with them from their place of origin. Therefore, in addition to the 'official' marriage and divorce law imposed by the state, Mukomuko people simultaneously observe various forms of 'localised' law in their respective community groups.

Chapter 4 focusses on everyday marriage and divorce practice among the matrilineal communities of the *hulu-hilir* villages. In doing so, the chapter looks at how people navigate between state law (patriarchally-informed Islamic law) and the equivalent local norm of *semendo adat* (matrilineally-informed Islamic law) in concluding marriages, obtaining divorces, and solving related disputes. The term *semendo* derives from a particular element in local tradition, designating a matrilineal marriage and divorce, whereas *adat* means "a concrete body of local rules and practices inherited from the past [Minangkabau, added]" (Henley and Davidson 2008, 817–18). This study reveals how *semendo* marriage and divorce are often complementary, and do not necessarily go against registered and judicial marriage and divorce as required by state law. The *semendo adat* and the state's more patriarchally-inclined Islamic law coexist as 'differentiated' normative systems and institutions (Griffiths 2017, 103). They operate on 'a continuum scale', shaping people's marriages, divorces, and related disputes (Platt 2017). *Semendo adat* in fact runs secondary to state law in *hulu-hilir* society, in terms of popular alternatives, but it is often more important socially, and in practice it is certainly more established when compared to the remaining non-state normative systems and institutions available, such as a religious marriage or divorce.

Chapter 5 draws upon marriage and divorce cases among the people of Mukomuko in two Islamic courts, i.e. the Arga Makmur Islamic court (2016-2018), and the Mukomuko Islamic court (from 2019 onwards). During these periods, cases were mainly brought by people of migrant origin. This can be attributed to the fact that, unlike the matrilineal community, who may resort to their *adat* council, migrants have no forum that is binding and which serves as an alternative to the state Islamic court. The situation was better when the people of Mukomuko could bring cases to a regular circuit court (*sidang keliling*) which was held in the Arga Makmur Islamic court in Mukomuko. However, this option was no longer available after the adoption of the one-roof system (*sistem*

satu atap) in 2004. This system, which centralises both the technical judiciary and court administration under the Supreme Court, has turned the previously demand-based circuit court into a mere annual programme. The demise of the regular circuit court shows the flip side of the one-roof system, which has estranged people, rather than bringing them closer to the court. The situation was exacerbated by the 'late' establishment of the Mukomuko Islamic court, in 2018. To reach the court, for instance, people had to make a seven-hour road trip to the capital regency of North Bengkulu. Even after the establishment of their own court the situation did not automatically change, as people mainly continued to resolve their matrimonial affairs out-of-court.

Although incoming cases from the matrilineal community are rare, the few cases I found, notably cases relating to property, are still of great importance. They helped me to delineate between emerging conflicts and possible reconciliations between the state's patriarchally-inclined Islamic law and the more matrilineally-inclined Islamic law of the Mukomuko community. The adjudication process involves three main actors: parties or justice seekers, adjudicating judges, and brokers. Parties are members of matrilineal communities, who went to the court upon failing to resolve their disputes amicably out-of-court. To secure their respective interests, each party usually engages in 'forum shopping' in state courts and 'discourse shopping' between different legal repertoires – notably, *semendo adat*. Meanwhile, the judges are state-appointed officials, who are rotated regularly from one place to another; they therefore know little about local norms. In rendering their decisions, the judges rarely exercise their competence beyond the established judicial developments at national level, disregarding parties' particular conditions. In between, brokers refer to informal case-drafters (*juru-ketik-perkara*), legal aids (*Pos Bantuan Hukum*, POSBAKUM), and professional lawyers, who assist the parties in 'formulating' their lawsuits, but also serve the judges in 'constructing' incoming cases to fit the latter's agenda.

Chapter 6 summarises the discussion with four main findings. The first finding is the pluralism of law, i.e. the state law and *semendo-adat,* which governs marriage and divorce among Mukomuko's matrilineal community. The second finding concerns the different logic observed by judges at different levels of court. While the general wisdom of Supreme Court judges has been more accommodating, judges from the first instance Islamic court for the people of Mukomuko are often trapped in a formalistic approach. The reason for this finding lies in an increasing trend toward more centralised and homogenised Islamic law and Islamic judiciary in Indonesia, which circumscribes the independence of first instance court judges. All these findings contribute to the fourth finding, which concerns the role of Islamic courts play in the process of nation-state formation. For a diverse nation like Indonesia, the state's unifying agenda has launched Islamic court judges on a path toward both compromise and opposition. The case of Mukomuko teaches us that opposition is inevitable, and that judges' insistence on not considering local norms will endanger their own legitimacy before the community and bring harm to the interests of wives and children—one of the objectives of Indonesian family law—who are better served by *semendo-adat*.

2

The Autonomy of the Islamic Court: Indonesian Marriage and Divorce Law for Muslims

2.1 Introduction

The introductory chapter showed that Indonesian matrimonial affairs have been the subject of state control through several statutory reforms. The reforms have: made marriage registration and judicial divorce mandatory; restricted polygamy; introduced a minimum marital age, and equal divorce grounds for wives and husbands; and formalised so called 'legal pluralism', by introducing state-sanctioned Islamic law and establishing an Islamic court exclusively for Muslims (M. Cammack, 1989; M. E. Cammack, 1997; Nurlaelawati, 2010; Soewondo, 1977; van Huis, 2015). For the most part, the reforms had already been developing through judicial practice in the Islamic court. This is apparent in case law dating back to the colonial era, whenever judges creatively interpreted *fikih*,[27] *adat* (customary law) and *siyāsah* (state law) in their judgements (J. R. Bowen, 2005; Lev, 1972; Nurlaelawati, 2010; van Huis, 2015, p. 85). Therefore, following Van Huis' line of argument, Indonesian family law for Muslims was a result of two aspects: legislative deliberation in parliament, and judicial tradition in the Islamic court (van Huis, 2015, p. 113). They were crucial to the development of Indonesian family law (see also the 'bureaucratisation' process in Chapter 1 Section 1.4.1.2). While

[27] There are three different terms that are used interchangeably to refer to the prescribed rules of Islam, i.e. sharia, *fikih*, and Islamic law. Sharia is (in a broad sense) equal to Islam as a religion, but its narrow meaning refers to the 'practical' rules mentioned in the primary sources of Islam, i.e. the Qur'an and prophetic traditions. Meanwhile, *fikih* means 'practical' rules deriving from primary sources, through a process of *ijtihad* (legal reasoning). In this sense, both sharia in its narrow meaning and *fikih* yield the same output: namely, practical rules. The only distinction is in how the rules are derived. This explains why the terms are often used interchangeably, to mean either 'practical' rules, or provisions prescribed in Islam (Anwar, 2021, pp. 1–3; Auda, 2008, p. xxiii). Lastly, the term 'Islamic law', which was invented by colonial regimes (Buskens & Dupret, 2014; Cohn, 1989), refers to either sharia in the narrow sense or *fikih* that have gained legal status from a sovereign regime (state). In this chapter these distinctions will be retained, but sometimes the term Islamic law will be employed in its broader sense, to include either sharia in its narrow meaning or *fikih*.

the legislation provides a threshold that prevents judges referring to more conservative interpretations of Islamic family law, judicial tradition acquaints them with judicial law making.

In contrast with legislation, which is imposed top to bottom, judicial law-making is predominantly formed through dialogue between adjudicating judges and justice seekers in a courtroom. In the latter, judges cast themselves as interpreters of (Islamic) law, whereas justice seekers appear before the court to negotiate their respective interests and conditions. In this way, the state's Islamic court serves as an important place, not only for judges to encounter justice seekers, but also for the development of Muslim family law, considering the absence of substantive legislative reforms after the passing of Law 1/1974 on Marriage. However, as maintained by many studies, developments within the Islamic court are still 'less inventive', since the balance between the Islamic triangle, i.e. sharia, state law, and customary law (Buskens, 2000), is equally important and cannot be underestimated in the Indonesian context (Lev, 1972; Nurlaelawati & van Huis, 2020; van Huis, 2015, p. 113). By featuring an *isbat nikah* (a retroactive validation of marriage) and 'broken marriage' as grounds for divorce, this chapter seeks to investigate the role of Islamic court judges in reforming marriage and divorce law. These topics will be viewed in light of their role in maintaining the balance between the preservation of law and the need to consider social conditions when promoting reforms in the field of marriage and divorce among Muslims.

This study reveals a consistent trend of judicial law making in the field of marriage and divorce law, as apparent in the 'extended' and 'refined' forms of *isbat nikah*, and in the 'invention' of broken marriage as a unilateral, no-fault, and all-encompassing ground for divorce. Employing the new *isbat nikah*, judges manage to accommodate unregistered marriages that are still pervasive, as long as they are religiously valid and not against other legal provision(s). Meanwhile, through the increasing use of broken marriage as a ground for divorce, they promote

a simpler and more equal divorce procedure for husbands and wives, as well as lifting the burden to find who is at fault from their own shoulders. Moreover, in the case of broken marriage divorce, judges can still employ consideration of fault, especially when the 'fault' is relevant to a spouse's post-divorce rights. In this manner, a question of fault is dealt differently from the general norm of broken marriage that continues to be treated as a unilateral and no-fault divorce ground. These judicial developments, as argued in this chapter, demonstrate the 'autonomy' of Islamic court judges in exercising judicial law making, mainly to bridge gaps between a formal application of the law and a sense of justice within society that is informed by social norms, *adat* and religious provisions. In this respect, judges manage to reconcile two unfruitful schisms in the law, i.e. formalists versus instrumentalists (cf. Terdiman, 1987, p. 807), by exercising their autonomy as its official interpreters.

For analytical purposes, the concept of autonomy is adapted from Bedner to mean:

> "...the condition in which legal institutions, constituting a legal system, are able to perform their tasks—and notably the systematic development of substantive rules and principles of law—in accordance with the procedural rules designed to guide them, without interference from outside actors based on non-legal grounds" (Bedner, 2016, p. 10).

To make this concept operational, Bedner draws on essential autonomy of law features from three great social traditions. *First*, the Weberian tradition: an autonomous law requires the presence of a 'cannon of interpretations', by which legal rules are linked to its underlying principles and concepts, in order to minimise the gap between formal-rational law and social reality. *Second*, Bourdieu's elements, applicable in either sociological or juridical fields: the functioning of an autonomous law lies in the division of labour between theoreticians and practitioners, with their own distinctive internal rules; together, they constitute *corpus juridique*, by which judges are guided when adjudicating similar cases (Bourdieu, 1987). *Third*, Luhmann's autopoietic theo-

ry: an autonomous law requires 'communication', by which "law reproduces its own elements by the interactions of its elements" and 'self-referential autonomy', and "laws are only regarded as norms because they are intended to be used in decisions, just as these decisions can only function as norms because this is provided for in laws" (Bedner, 2016; Michailakis, 1995; Savelsberg & Teubner, 1994).

Equipped with this theoretical framework, Bedner concludes that legal institutions in Indonesia, notably Indonesian courts, generally lack the autonomy to perform the legitimating and stabilising functions ascribed to them by Western social theory. In his view, the state's Islamic court is an exception, because it has developed some of the required features to be 'relatively' autonomous. Islamic court judges have managed to bridge a gap between sanctioned law and the sense of justice within society that is informed by *adat* and religious provisions. They have also managed to bridge gaps in theoretical thinking, i.e. between that of scholars and the Supreme Court, and practitioners or the first instance court. The legal training received by Islamic court judges differs from that received by their counterparts in general courts, because it places emphasis on integrating Islamic doctrine and legal theories, and as well on having a platform for communication, i.e. *Mimbar Hukum* magazine (*Majalah Peradilan Agama*, from 2013 onwards). While the presence of all these features is remarkable, the court still lacks autonomy from outside interference (particularly from Islamic authorities), due to its strong religious symbolism. Nonetheless, recent judicial innovations on the *isbat nikah* and the broken marriage grounds mean it can be argued that the Islamic court is an autonomous institution, capable of exercising judicial law making from within, unconstrained by outside interference.

The emergence of the Islamic court as an autonomous institution has witnessed the transfer of Islamic authority to Islamic court judges. The judges develop a platform for Islamic family law reforms by balancing theory (the existing norms

of marriage and divorce) with practice (the sense of justice informed by *adat*, religious provisions, and social conditions). In this regard, judges cast themselves as prominent actors in exercising religious authority and reforming Islamic family law.[28] The discussion in this chapter looks closely at *isbat nikah* and broken marriage to give an account of how Islamic court judges exercise their autonomy in reforming Islamic family law. The main reason for focusing on these two topics is practical, that is to select the most established judicial innovations on marriage and divorce in the Islamic courts. However, one should keep in mind that important developments are taking place regarding other topics as well. For this reason, the discussion on *isbat nikah* and broken marriage must not be approached in isolation as they invariably correlate with other relevant topics I discussed in the subsequent chapters of this dissertation, such as joint marital property, alimony, child support, *mahar* (bride price), and even inheritance.

To provide a background, the discussion on *isbat nikah* and broken marriage in this chapter must be read against the background of Chapter 1 Section 1.4.1, which provides a general overview of Indonesian Islamic family law. The topics of *isbat nikah* and broken marriage will be discussed analytically, in a chronological way, by consulting the codified laws and then looking at how judges have shaped them. The materials for the discussion were mostly drawn from landmark decisions by the Islamic Chamber of the Supreme Court, *Peraturan Mahkamah Agung* (PERMA, or Supreme Court regulations), *Surat Edaran Mahkamah Agung* (SEMA, or Supreme Court circular letters), and *Rapat Pleno Tahunan* (yearly plenary meetings). Interviews with judges, emerging discourse available in the quarterly magazine *Peradilan Agama*, from 2013 onwards, and relevant decisions by the Constitutional Court were also consulted.

[28] For instance, a call for judges to perform *ijtihad*, or judicial law making, was widespread within the Islamic Chamber of the Supreme Court. Accordingly, the English term 'judicial activism' was employed in the editorial notes of the second edition of *Majalah Peradilan*. This call was disseminated confidently via trainings for judges and quarterly-magazines (*Majalah Peradilan Agama Edisi-2*, 2013).

2.2 *Isbat Nikah* (a Retroactive Validation of Marriage)

One of the key features of the Indonesian Marriage Law 1/1974 is the establishment of religion as the foundation of marriage. In article 2, paragraph (1), the law stipulates that "a marriage is valid when the two parties conclude the marriage according to their religion and conviction." The same article stipulates in paragraph (2) that, "the parties must register their marriage according to the existing law." The articles do not mention how registration status relates to the validity of a marriage, but the law is clear on registration being the only way for a marriage to be recognised by law. Accordingly, the Religious Judicature Law 7/1989 enables the retroactive validation of marriages concluded before the 1974 marriage law was passed.

Nevertheless, a strict application of marriage registration is problematic, considering that unregistered marriages are still pervasive (Fauzi, 2023; Platt, 2017; van Huis & Wirastri, 2012).[29] In 2018, Islamic courts received 122,932 *isbat nikah* petitions—113,648 (92.4%) were approved, 4,758 (3.9%) were withdrawn, and 4,526 (3.7%) were scheduled to be decided in the following year (Badilag Mahkamah Agung RI, 2020). This led Islamic court judges to find the middle ground by bridging the strict application of registration law and the high demand for retroactive validation. *First* the judges started to validate unregistered marriages retroactively, including marriages that were concluded after the Marriage Law was passed; *second*, they extended the application of *isbat nikah* by introducing a more comprehensive form of *isbat nikah*; and *third*, to avoid arbitrary use, they applied the comprehensive form of *isbat nikah* only when an unregistered marriage was religiously valid and there were no legal barriers to such a marriage.

[29] Among Muslims, many unregistered couples file *isbat nikah* at the Islamic Court, to register their marriage retroactively. Isna Wahyudi, once a judge at Giri Minang-West Nusa Tenggara Islamic Court, confirmed that from this first instance court alone there was an average of 2,000 petitions in one year for marriage validation; the majority of these petitions were marriages concluded after the enactment of the marriage law (Wahyudi, 2014).

2.2.1 Registration and the Legality of (Islamic) Marriage

Article 2 (1) of the Marriage Law 1/1974 maintains that the religion or conviction adhered to by the parties determines the validity of their marriage. By emphasising the religious nature of Indonesian marriage, the article promotes a normatively pluralistic marriage law that acknowledges multiple orders, applicable to people according to their respective religions and convictions (Künkler & Sezgin, 2016). This acknowledgement introduces a formal pluralism to Indonesian marriage law that, in reality, distinguishes Muslim marriages from those of non-Muslims (Pompe, 1988, p. 262).[30] Nevertheless, an exclusive acknowledgement of Islamic marriage does not apply to the entire body of religious provisions, since the law also modifies the substance of this body by imposing restrictions, and even prohibitions (M. Cammack, 1989; Pompe, 1988). The marriage law, for instance, restricts a husband's unilateral rights to divorce and polygamy;[31] in its implementing regulation, article 4 (2) of Government Regulation 45/1990 even forbids a female civil servant to be taken as the second wife in a polygamous marriage. However, this *is* still allowed under Islamic law. Given these restrictions, Pompe suggests that, from an analytical reading of the existing statute, religious provisions (notably Islamic) are applicable, as long as they are not in opposition to the marriage law and its implementing regulations (Pompe, 1988, pp. 270–271).[32] This analytical view leads to another question: Does article 2 (2) on registration act as a restriction on the validity of Islamic marriage?

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[30] Article 12 of Marriage Law 1/1974 stipulates that the procedure of marriage is carried out according to other regulations. Government Regulation 9/1975, article 2, stipulates that a Muslim marriage is registered by a marriage registrar from the Office of Religious Affairs (KUA) - as mentioned in Law 22/1946 and Law 32/1954 on Marriage Registration - and a non-Muslim marriage is registered by a marriage registrar from the Office of Civil Registry. This stipulation, among other relevant regulations, maintains the distinction between Muslim marriage and non-Muslim marriage.

[31] Articles 3 and 4 of Marriage Law 1/1974, and Articles 40-45 of Government Regulation 9/1975.

[32] This view corresponds to the explanation in Article 2 (1) of Marriage Law 1/1974: "religious provisions include other relevant regulations, which apply to people according to their respective religions and convictions, as long as the provisions are not in conflict with, or stipulates otherwise than, the marriage law."

The marriage law contains no explicit answer to the question posed above.[33] The lack of clarity around how the status of registration relates to the validity of a religious marriage has generated debates. Those who perceive article 2 as a unit, consider that registration determines the validity of a marriage. In contrast, those who see it as separate hold the opposite opinion, considering registration a merely administrative requirement (Otto, 2010, pp. 463–464). Marriage registration is also mentioned in the Compilation of Islamic Law, which aims to provide Islamic court judges with a standard point of reference.[34] Article 4 of the compilation stipulates that a marriage is valid when it is concluded under Islamic law, corresponding to article 2 (1) of Marriage Law 1/1974. Article 5 (1) of the compilation stipulates that, "to ensure marital order (*ketertiban perkawinan*) among Muslims, every marriage shall be registered", and (2) "registration is conducted by the Official Marriage Registrar". The compilation further stipulates, in article 6 (1), that "every marriage shall be conducted before and under the supervision of the Official Marriage Registrar", and (2) "a marriage carried out without the supervision of the Official Marriage Registrar does not have the force of law". The compilation, particularly article 6, paragraph (2), makes it clear that the discussion on marriage registration among Muslims is no longer about validity, but more about legal recognition. An unregistered marriage is neither valid nor invalid, but it is unrecognised by state law.

The emphasis on state recognition, instead of validity, does not prevent the marriage law and other relevant regulations from imposing a strict distinction between registered and unregistered marriages. The law maintains that registration determines the legality of marriage, without which the marriage

[33] The implementing regulations of the marriage law, i.e. Government Regulation 9/1975 *junto,* Civil Registration Law 23/2006, mention that an unregistered marriage is liable to administrative fines, and even felony, but this does not necessarily imply that the marriage would be invalid.

[34] The Compilation of Islamic Law was issued via Presidential Instruction No. 1/1991. Its formulation involves *ulama*, judges from the Islamic court and General Court, and many key figures from the Ministry of Religious Affairs and the Supreme Court.

would not have the force of law. In a slightly different manner, Religious Judicature Law 7/1989 stipulates that it is within the Islamic court's jurisdiction in the field of Muslim marriage to validate a marriage retroactively. Still, this procedure only applies to marriages concluded before the enactment of Marriage Law 1/1974.[35] In this sense, the existing laws allow no possibility for a marriage to obtain legal recognition if it was conducted *after* the passing of the marriage law, unless the marriage has been registered first. Failure to register a marriage would mean that the marriage will 'never' have state recognition, regardless of whether it is religiously valid or not. All the stipulations eventually generate a concept of 'state legality'. This concept refers to a marriage that, besides being religiously valid, is also required to be properly registered. The legality of a marriage that requires the fulfilment of religious provisions and registration becomes a defining feature that distinguishes a registered marriage from a marriage that is unregistered.

2.2.2 Dual Validity and a More Extended Form of *Isbat Nikah*

The emerging concept of state legality shows that the state's strategy is to manage marital affairs by acknowledging religious validity while also imposing controls upon it, via the obligation to register. In this way, the state uses registration as a tool to force people to comply with state marriage. Otherwise, the rights and duties arising from a marriage will not have the force of law. According to the law, a marriage will be considered legally valid upon completion of a religious marriage ceremony and the signing of a marriage certificate with the official marriage registrar from the Office of Religious Affairs (*Kantor Urusan Agama,* KUA). However, after the marriage law passed, judges from the state Islamic court remained indecisive about the state's agenda regarding the legality of marriage (J. R. Bowen, 2003; Riadi,

[35] This exception corresponds to the non-retroactive principle of the marriage and religious judicature laws. This is explained in number [22] of article 49 (2) of Religious Judicature Law 7/1989, as amended by the first amendment via Law 3/2006 and the second amendment via Law 50/2009.

2011). Throughout that period, Islamic court judges started to acknowledge the validity of a religious marriage by allowing it to achieve retroactive validation. By applying retroactive validation to unregistered marriages conducted after 1974, the judges are recognising the 'dual validity' of Muslim marriages in Indonesia, i.e. (state) legal *and* religious validities. In doing so, *first*, the judges overlook the strict provisions of marriage registration and make a religiously valid but unregistered marriage capable of retroactive validation; *second*, they extend the form of marriage validation via *isbat nikah;* and *third*, they establish dual validity for Muslim marriage.

First, in the decade after the marriage law passed, judges began validating unregistered marriages retroactively. The Marriage Law 1/1974 only recognises the legality of a registered marriage, and does not allow an unregistered marriage—other than those concluded before the marriage law came into effect—to be validated retroactively. This provision placed unregistered marriages beyond the scope of the marriage law. It did not equip judges with a legislative reference for validating a marriage, if the parties had failed to register it in the first place. This provision trapped judges in the difficult position of deciding whether to adhere to the prescribed law, or to extend the use of marriage validation (*pengesahan perkawinan*) to those who are not entitled to it by law. As Bowen suggests, the Islamic Chamber of the Supreme Court did not immediately develop a stable corpus of case law on this matter, as seen in many judgements during the period 1991-1995. In 1991, the court treated unregistered marriages as invalid, although such marriages were religiously valid; in contrast, in 1995 the court treated unregistered marriage as valid; and in 1995, the court switched again to treating it as invalid (J. R. Bowen, 2003, pp. 182–185). Edi Riadi, currently an acting judge at the Supreme Court, shares Bowen's view in his doctoral thesis, in which he reviews the case law during 1991-2007 and comes to the same conclusion (Riadi, 2011). In some cases, judges would admit a petition to validate an unregistered

marriage, on the ground that the marriage was religiously valid. Yet, in other cases, judges would reject such a petition.

The judges' indecisive attitude toward unregistered marriage has confirmed the foundation of dual validity established in the Marriage Law, i.e. legal and religious validity. Here, dual validity differs from another concept with the same name, which designates a state marriage as comprising of state (legal) and religious validities (cf. J. R. Bowen, 2001, p. 9; Nurlaelawati, 2010, p. 103). The use of dual validity in this book considers legal and religious validities to be two separate entities that exist simultaneously. While the legal validity refers to a 'state' marriage that is both registered and religiously valid, the religious validity referring to a marriage that is not registered but is religiously valid. The distinction between the two concepts is increasingly blurred. As judges have overlooked the prescribed provisions on marriage registration, a legal precedent for the possibility of retroactive validation toward an unregistered marriage concluded after 1974 has been created. According to this trend, a religiously valid but unregistered marriage can obtain legal validity from an Islamic court, after it has validated the marriage retroactively. In this way, a religious marriage is not only valid according to religious provisions, it is also 'recognisable' to the state. By recognisable, I mean that the status of such a marriage may be elevated to the level of legal validity after obtaining retroactive validation from an Islamic court. However, one should keep in mind that after this validation a marriage still needs to be registered, as legal validity is only achieved through the issuance of a marriage certificate (*buku nikah*).[36]

Second, the application of dual validity was reinforced by the adoption of the 1991 Compilation of Islamic Law, which formally introduces *isbat nikah* as a replacement for *pengesahan perkawinan* (marriage validation) in Religious Judicature Law 7/1989. The compilation stipulates, in article 7 paragraph (3),

[36] Article 7 of the Compilation of Islamic Law stipulates that "only a marriage certificate can serve as legal proof of a marriage".

that *isbat nikah* may only happen under the following conditions:

> (a) In order to make a formal divorce possible; (b) If the marriage certificate is lost; (c) If there is doubt about the validity of one of the marriage conditions; (d) If the marriage was concluded before the enactment of the marriage law (this condition derives from the Religious Judicature Law 7/1989); and (e) If there are no legal barriers to the marriage, according to the Marriage Law 1/1974.

The prescribed conditions for *isbat nikah* can be divided into two categories: one intended for a registered marriage, and the other intended for an unregistered marriage. The first category comprises: point (b), on the applicability of *isbat nikah* to a marriage when the marriage certificate is lost; and point (c), when there is doubt about the validity of one of the marriage conditions. Point (b) applies only to a registered marriage, since the loss of a marriage certificate implies that the marriage is registered. Nurlaelawati believes this point is unnecessary, particularly if the condition is applied from the date when the missing certificate was issued. If the lost certificate was issued after the marriage law came into effect, the parties could go to the Office of Religious Affairs (KUA), where their marriage was registered, to ask for a duplicate. On the other hand, if the date of the lost certificate is before the enactment of the marriage law, the parties could relate their petition to point (d), which derives from religious judicature law and includes all marriages before the passage of the marriage law (Nurlaelawati, 2010, pp. 202–203).

Nevertheless, Van Huis maintains that point (b) is still necessary to replace the lost certificate. Drawing his argument on pension-related cases, he shows how the pension agency for civil servants, i.e. PT TASPEN, only accepts a court ruling (*penetapan*) instead of a duplicate obtained from KUA (van Huis, 2015, p. 226). This debate relates closely to the discussion among judges about whether or not, after *isbat nikah*, the relevant parties (couples) should still go to the KUA to obtain a marriage certificate. Some say that a *penetapan* is adequate, since couples often need only that, but others say that a certificate is still needed for

a formal divorce lawsuit, except in cases of *isbat nikah*. Likewise, point (c) applies only to a registered marriage, because it does not make sense to examine the validity of a marriage condition if the marriage was never recorded in the first place. For example, if a petition to examine a marriage were to be filed at an Islamic court, but the marriage in question had not been registered, the person filing would have no legal standing before the court. This corresponds to point (a), discussed later, where an *isbat nikah* itself is a prerequisite procedure, if the parties of an unregistered marriage wish to make a formal divorce possible. Point (c) is to provide certainty for a husband and wife who are in doubt as to the validity of one of their marriage conditions. In all other cases, such marriage, according to articles 26 (1) and (2) of the marriage law, is liable to nullification through the court.

The second category comprises: point (a), on the applicability of *isbat nikah* as a prerequisite procedure to make a formal divorce possible; point (d), to validate a marriage concluded before the enactment of the marriage law; and point (e), to validate a marriage when no legal barriers to it exist. Unlike the first category, all the conditions in the second category are designated for an unregistered marriage. Point (a) is not necessary if the marriage is registered, but it remains unclear whether or not this point is restricted to marriages that precede the marriage law. However, it hardly makes sense if this condition is intended for marriages concluded before the marriage law was passed, because the same logic as in point (b) applies here; marriages preceding the marriage law are eligible (under point [d]) for retroactive validation. Point (d) needs no further explanation, since this condition is simply a reiteration of the condition stipulated in the religious judicature law. The wording of point (e) implies that the marriage referred to here is a marriage concluded after 1974: "there are no legal barriers according to the Marriage Law 1/1974"[37], otherwise point (e) would not mention "the 1974

[37] The legal barriers refer to the marital barriers stipulated in articles 8,9, and 10 of the Marriage Law 1/1974, constituting: (1) religious barriers, such as incest and other situations prohibited in religion (mainly Islam); and, (2) state-imposed barriers, such as prohibition

Marriage Law", because the law is not intended for retroactive application.

The first category, which applies only to a registered marriage, is of concern to this discussion. Likewise, point (d) from the second category will not be addressed, because it is a mere reiteration of the 1989 Judicature Law. This leaves just two conditions: one is point (a), and the other one is point (c). These conditions are quite problematic in terms of their positions regarding the restrictions introduced by the 1989 Judicature Law. Are they an extension, or a mere reiteration, of the judicature law? It remains unclear how these conditions relate to the religious judicature law, which restricts the application of retroactive validation to marriages concluded before the issuance of the marriage law. Nurlaelawati suggests assuming that Islamic court judges are applying *isbat nikah* strictly. In that case, all the conditions in article 7 paragraph (3) of the compilation are cumulative and not in conflict with the religious judicature law. However, she maintains that judges tend to treat these conditions as non-cumulative, either in the name of "public utility" or to accommodate petitions brought before them (Nurlaelawati, 2010, p. 143, 2013b). Van Huis confirms the non-cumulative nature of these conditions, by presenting many relevant cases (van Huis, 2015, p. 225). The judges' inclination to treat the prescribed conditions in article 7 as non-cumulative has extended the form of *isbat nikah,* which can now be used to validate an unregistered marriage retroactively, as long as no legal barriers (point [e]) prevent such retroactive validation.

Third, judges' lenient use of the extended form of *isbat nikah* has established dual validity for Indonesian marriages among Muslims; a religious marriage is now recognisable by state law. Thus, the strict distinction between a state marriage, which is both legally and religiously valid, and a mere religious marriage is blurred. This trend is advanced further by a number of collaborations between the Ministry of Religious Affairs and local gov-

of informal polygamy.

ernments, in order to organise mass *isbat nikah*. These collaborations are intended to tackle unregistered marriages, which are still pervasive. For instance, the local government in Jember-East Java—together with Jember Islamic Court and the regional office of the Ministry of Religious Affairs—organised a mass *isbat nikah.* The programme even set a MURI (*Museum Rekor-Dunia Indonesia*) record for validating 1,000 marriages at once, and the majority of the marriages were concluded after the marriage law had come into effect. In total, from 2017 to 2020, the Islamic court in this region validated 7,112 unregistered marriages (Permana & Nursalikah, 2020). Given this trend, the Supreme Court became aware of the possible misuse of retroactive validation via mass *isbat nikah* and consequently circulated Circular Letter 5/2014, stating: "Mass *isbat nikah*, conducted domestically using either local government funds or international funding, is allowed. However, the ceremony must be held carefully, in accordance with sharia rules, and its extensive impact (including on inheritance, and other matters) must be taken into consideration. Moreover, a mass *isbat nikah* due to be held abroad must first obtain permission from the head of the Supreme Court."[38] Accordingly, the Supreme Court sets certain limits for the use of *isbat nikah*, as will be discussed below in more detail.

2.2.3 Refining the Law of *Isbat Nikah*

The extended forms of retroactive validation through *isbat nikah* have shifted the attitude of judges towards the legality of a religious marriage. Such marriage is now eligible for retroactive validation, which challenges the strict distinction between registered and unregistered marriage, because the latter may be validated retroactively throughout couples' lives. Given this shift, the question is whether or not *isbat nikah* can be applied to all unregistered marriages. The answer, as might be expected, is neither 'yes' nor 'no', since the registration law is still retained,

[38] The 2011 Supreme Court Decree, number 08-kma/sk/v 2011, enables *Isbat nikah* for Indonesian migrant workers, at the office of Indonesian representation.

to this day.[39] On the one hand, judges expanded the use of retroactive validation, blurring the distinction between registered and unregistered marriage. On the other hand, they continued to rely on the existing law of marriage registration. To bridge the gap, and mainly to avoid the arbitrary use of *isbat nikah*, judges created several limits to the application of *isbat nikah* from prescribed law, case law, Supreme Court supervision, and Constitutional Court decisions. The boundaries were set at a threshold that eventually refined the application of *isbat nikah*. Before discussing the limits in detail, I will first examine the impact of the extended form of *isbat nikah*.

2.2.3.1 The Impact of an Extended Isbat Nikah

The main impact of judges' extensive use of *isbat nikah* has been the establishment of dual validity for state marriage; namely, legal validity and religious validity. The establishment of dual validity has made the distinction between registered marriage and religious marriage more fluid, as the status of a religious marriage may be elevated through *isbat nikah* and registered retroactively. This fluidity is beneficial for both the judges and the parties seeking validation. The first benefit is linked to the use of *isbat nikah* as a prerequisite procedure to obtain a formal divorce, which derives from a non-cumulative interpretation of point (a), article 7 of the compilation. *Isbat nikah* on this ground extends judges' authority to dissolve not only a registered marriage but also an unregistered one, after granting an *isbat nikah* petition. The second benefit is linked to condition point (e) of the compilation, which allows the use of *isbat nikah* if no legal barriers to an unregistered marriage exist. Accordingly, Van Huis suggests that the Islamic Court interprets point (e) to mean that a marriage between Muslims must be concluded according to Islamic requirements (van Huis, 2015, p. 228). This interpretation makes an *isbat nikah* petition possible at any time, as long as the marriage is religiously valid and not constrained by any legal

[39] An effort to revoke this law, namely article 2 (2) on marriage registration, via the Constitutional Court resulted in failure (Constitutional Court judgement number 46/PUU-VIII/2010, 17 February 2012).

barriers. As a result, the extended forms of *isbat nikah* benefit parties longing for certainty about their unregistered marriages, and strengthen the state's authority over those who come before them petitioning for *isbat nikah*.

In unusual cases *isbat nikah* may even apply to a religiously invalid marriage, as appears in Supreme Court judgement number 134K/AG/1996. In this case the Supreme Court nullified the decision of the South Jakarta Islamic Court, which rejected an *isbat nikah* petition.[40] The first instance court denied the petition based on the following legal facts: (1) The couple confirmed that they had concluded a religious marriage on 1 September 1989, without an official marriage registrar being present; (2) The marriage was not conducted by a valid guardian; and, (3) At the time of the marriage, the bride was still in a waiting period (*idah*) of a revocable divorce to her previous (religious) marriage with another man. These facts led the judges to issue a verdict stating that the petition was null and void, and must be rejected. However, the Supreme Court overturned this decision and validated the marriage as "the first marriage". The bride's first marriage did not count, because it was never registered and therefore not legally binding. Regarding the religious barriers concerning the bride's former marriage, i.e. using an invalid guardian and still awaiting divorce, the Supreme Court formulated a legal consideration: "A marriage becomes liable to nullification (*fāsid*), not null and void (*bāṭil*), if the bride is a divorcee, is still waiting for a revocable divorce from her former husband, and is represented by an invalid guardian. The bride's second marriage remains intact as long as her ex-husband from the first marriage has not submitted a petition for marriage nullification to an Islamic court."

This consideration corresponds to Article 26 (1) of Marriage Law 1/1974, which stipulates: "a marriage concluded before an official registrar, invalid guardian, and without the presence of two competent witnesses is eligible for a nullification. The nullification can be initiated by blood relatives from the husband

[40] South Jakarta Islamic Court Decision Number 01/Pdt.P/1995/PA.JS.

and wife, by public prosecutor, and by the couple themselves." The Supreme Court interprets this article to mean that nullification is dependent on a petition, and that the marriage remains intact, as long as those who are entitled by law to nullify it have not brought the case to a competent court. However, this case does not demonstrate common practice because, in more recent cases the first instance court has tended to reject an *isbat nikah* petition if the marriage was not concluded according to Islamic requirements. Van Huis features a case from Bulukumba Islamic Court, where the judges did not validate a marriage because it was revealed that the acting guardian was the brother of the petitioner's mother, which means that he is neither a competent nor a valid guardian (van Huis, 2015, p. 229). The lack of consensus on this matter might generate other debates about whether or not *isbat nikah* applies to a religiously invalid marriage. This question will be addressed in a separate section that focusses on the limits of *isbat nikah*. In this section, reference to this case is only to show that religious marriage is now recognisable by state law through the extended use of *isbat nikah*.

2.2.3.2 The limits of isbat nikah

The judges' inclination to interpret the content of Article 7 of the Compilation of Islamic Law as non-cumulative conditions has not only extended forms of retroactive validation through *isbat nikah*, it has also made *isbat nikah* prone to misuse; most notably, when it is used to validate informal polygamy. To avoid the arbitrary use of *isbat nikah*, judges have started to treat points (a) and (e) of Article 7 as cumulative conditions. Article 7 allows the use of *isbat nikah* - in point (a) - to obtain a formal divorce, and - in point (e) - to validate a marriage retroactively - in point (e) - as long as the marriage is not in opposition to the legal barriers prescribed in the marriage law. Through a cumulative reading, the Islamic court judges set the phrase "… if no legal barriers exist", derived from Article 7 point (e), as a threshold for exercising the law of *isbat nikah.* They interpret 'legal barriers' wording to mean not only prescribed barriers in the marriage law,

but also limitations stipulated by the compilation, the Supreme Court's yearly plenary meetings,[41] and other relevant provisions. The interpretation of legal barriers is shaped simultaneously by case law and its reference to relevant judgements by the Constitutional Court.

Initially, judges interpreted the legal barriers in Article 7 point (e) to mean the barriers stated in Articles 8, 9, and 10 of the 1974 Marriage Law. Article 8 prohibits: "(a) A marriage between two parties of the same vertical bloodline; (b) A marriage between two parties of the same horizontal bloodline, such as brother-sister, nephew-aunt, and niece-uncle; (c) A marriage between two parties related by marriage, such as stepchildren and in-laws; (d) A marriage between two parties related by breastfeeding (*raḍāʿah*); (e) A marriage between two parties related by the same bloodline, when there is more than one wife; (f) A marriage between two parties that is prohibited by religious or other provisions." Article 9 also "prohibits a polygamous marriage, except for those who are exempted by articles 3 (2) and 4 of the 1974 marriage law." Article 10 "prohibits a third remarriage between two parties, except if their religion or conviction allows it." These codified barriers, which are restated in articles 39-44 of the 1991 Compilation of Islamic Law, are derived substantively from religion (mainly Islam) and the state's plan to restrict the application of polygamy. The barriers manifest in two general limits: one is that the petitioned marriage is neither religiously invalid nor against the existing laws, and the other is that the petitioned marriage is not informal polygamy.

The first limit concerns the religious validity of a marriage. Islamic court judges are likely to reject an *isbat nikah* petition if the marriage being petitioned is religiously invalid. In judge-

[41] Since 2012, the Supreme Court has arranged a yearly plenary meeting in each chamber, involving both judges and clerks. The results of this meeting take the form of legal formulations that are disseminated via circular letters. The circular letters are available on the Supreme Court's website. In addition, the letters (including other reforms initiated by the Supreme Court) are communicated to the public via *Majalah Peradilan Agama*—replacing and reviving a well-known *Mimbar Hukum* journal that no longer exists—which has been issued every three months since 2013.

ment number 439K/AG/1996, a woman got married to a widower with three children. The marriage was unregistered and concluded according to Islamic provisions. After three years and six months, they began to quarrel, and the wife wanted a divorce. To obtain a formal divorce, she filed a petition at an Islamic Court to validate her marriage. The evidentiary session revealed that the wife was still religiously married to another man at the time she got married to her current husband. The court rejected this petition on the ground that paragraphs (1) and (2) of Article 2 of the marriage law are cumulative. While paragraph 2 requires a marriage to be registered, the first paragraph needs it to be conducted according to the party's religion or conviction. Given this consideration, by rejecting the above petition the appeal court and Supreme Court reinforced the first instance court judgement. This judgement corresponds to the previously mentioned case of Bulukumba Islamic Court, where the acting judges rejected an *isbat nikah* petition because the marriage being petitioned was religiously invalid (van Huis, 2015, p. 229). The marriage was not conducted by a valid guardian, but rather by the brother of the petitioner's mother, and for this reason the marriage could not be validated retroactively.

In a recent development, the Supreme Court required an *isbat nikah* petition for a religious marriage to be conditional on valid grounds and evidence. In judgement number 111/K/AG/2011, the Supreme Court annulled Baubau Islamic Court's judgement granting an *isbat nikah* petition, because the petition was based on false testimony. The testimony was proven to be faulty by the Baubau General Court decision. The details of this case are as follows:

> In 2006 a man filed an *isbat nikah* petition to the Baubau Islamic Court. In his petition he claimed to have married a woman in 1997. The marriage was registered at the Office of Religious Affairs in his home town. Soon after the wedding, the couple went to Malaysia to work. The wife later returned to their home town in Poelang Timur-Sulawesi, whilst the husband went back and forth between Sulawesi and Indonesia for eight years. In 2005, the husband was imprisoned in Malaysia for eight months. Af-

ter completing the term, he went back to meet his wife, but she had meanwhile got married to another man. Disappointed, he wanted to repudiate his wife and filed an *isbat nikah* petition to validate his marriage, because (he claimed) the marriage certificate was lost. The petition was filed on the ground of Article 7 point (b): "if the marriage certificate is lost." The wife admitted that they had concluded a religious marriage during their stay in Malaysia, rather than in their home town as was also claimed by the man. The couple had three children whilst being married, but their marriage was never registered.

In the judgement, the first instance court accepted the petition. It also allowed the husband to utter *talak* before the court, and distributed the couple's joint marital properties 50:50. The Kendari Court of Appeal reinforced this decision. Unsatisfied with the decision, the wife filed a cassation to the Supreme Court on the ground of false testimony delivered by the petitioner's witnesses. To support her claim, the wife attached two verdicts from Baubau general court,[42] sentencing each witness presented by the husband to the commission of fraud by delivering false testimony. After examining the petition, the Supreme Court concluded that the evidence (two witnesses) was not valid, referring to the Baubau General Court verdicts. For this reason, the Supreme Court annulled the first instance and court of appeal decisions on the *isbat nikah* and ultimately rejected the husband's petition for divorce as well.

This case is quite complex, because it involves an *isbat nikah* petition, divorce petition, and *harta-sepencarian* (distribution of joint-marital property) petition. In addition, the petitioned marriage was concluded abroad, the wife was already married to another man, and the petition was framed around Article 7 point (b), which turned out to be a false claim based on engineered testimony proven by general court verdicts. Hypothetically, the outcome of this case would have been different if the husband had not committed fraud and the petition was registered on other grounds, notably points (a) or (e) of Article 7 of the compilation. This hypothesis draws on the existing legal precedent and judges' inclinations to treat *isbat nikah* leniently, as long as the marriage is religiously valid and not against the

[42] Judgement numbers 319/Put.Pid.B/2009/PN.BB and 320/Put.Pid.B/2009/PN.BB.

law. The 2015 Supreme Court plenary meeting even mentions, in point (8), that "an unregistered marriage abroad between two Indonesian citizens can be brought to the Islamic Court for *isbat* a year after their return, if they did not register the marriage directly after returning."[43] In this regard, the nullification of *isbat nikah* in judgement 111/K/AG/2011 is likely to be attributed to the petitioner's inability to frame his petition within more relevant grounds, notably grounds from points (a) or (e), and his false claim of a lost marriage certificate. In other words, the nullification is caused by the petitioner's strategy failing to consider recent developments within the Supreme Court, rather than by whether or not such a marriage is eligible for an *isbat nikah*.

The second limit requires that the marriage being petitioned is not informal polygamy, regardless of whether the marriage is religiously valid or not. In judgement number 477K/AG/1996 the Supreme Court rejected an *isbat nikah* petition for a polygamous marriage. In this case, a 22-year-old woman was married to a 25-year-old man who had impregnated her. The marriage was concluded according to the procedures prescribed in Islam: a valid guardian, two competent witnesses, and a dowry. Five years after the wedding, and blessed with one child, the couple started to live in disharmony, and the wife asked for a divorce. She registered a petition to validate her marriage at an Islamic Court, as a prerequisite procedure to obtaining a formal divorce. In her case, involving an Islamic court was mandatory, not only to formalise the divorce but also to make divorce possible, since a wife is not entitled to a unilateral divorce under Islamic provisions. However, the petition was rejected by both the first instance court and the court of appeal, because the marriage was not registered and the husband had been married to another woman before the marriage was petitioned; his second marriage had been concluded religiously, without his first wife's permission. The Supreme Court later reinforced this judgement, because the marriage was an informal polygamous marriage.

[43] The Supreme Court Circular Letter 3/2015.

The judges' refusal to validate informal polygamy corresponds with an emerging trend in the general court to start penalising informal polygamous marriage. The marriage law does not clearly mention legal sanctions for the violation of restrictions on polygamy. Its implementing regulation, namely Government Regulation 9/1975, only sets an 'out-dated' and trivial administrative fine of 7,500 rupiahs (around 50 cents) for informal polygamy. In 2010 there was a proposal to amend this outdated law in parliament by drafting the substantive law of Islamic courts (*Hukum Materiil Peradilan Agama*) to criminalise informal polygamy with up to three years imprisonment. Yet, following the controversy it triggered and the strong resistance it received from society, this proposal ended up in deadlock. In fact, Civil Registration Law 23/2006 basically enables local governments to impose heavier administrative fines on people who fail to register vital events, such as marriage (including informal polygamous marriage), but its implementation falls short of expectation. Local authorities rarely allow an informal polygamy complaint to proceed to the competent authorities. Nevertheless, Van Huis mentions that the Criminal Chamber of the Supreme Court has started to apply felony to informal polygamy by employing Article 279 of the Criminal Code (van Huis & Wirastri, 2012, p. 12). Article 279 stipulates that:

> "Persons who marry despite being aware that there are legal barriers to the marriage can receive a maximum sentence of five years (paragraph 1 [1]). The same penalty applies to persons who marry, despite knowing that an existing marriage of one of the parties forms a legal barrier to their own marriage (paragraph 1 [2]). Persons who deliberately conceal a previous marriage that constitutes a legal barrier to marriage, as intended in paragraph 1 (2), will face a maximum sentence of up to seven years imprisonment (paragraph 2)."

By featuring judgement number 2156 K/Pid/2008, Van Huis gives an example where a husband who secretly concluded informal polygamy was sentenced to six months imprisonment for violating Article 279 of the Criminal Code (van Huis &

Wirastri, 2012, p. 12). This development corresponds with an earlier judgment from the Constitutional Court, which upheld the restrictions on polygamy even if the marriage was religiously valid. In 2007, the Constitutional Court judges rejected a lawsuit filed by Muhammad Insa. He claimed that the codified restrictions on polygamy were against his constitutional right to practice his religion, as his religion allows polygamous marriage. In this judgement, the judges argued that the restrictions were a correct understanding of Islamic doctrine and not against the constitution (Butt, 2010, p. 279; M. Cammack et al., 2015; Chan, 2012). The marriage law does maintain the religious nature of marriage. However, its application is restricted to conditions required by law, i.e. Articles 4 and 5 of the Marriage Law 1/1974, and Article 4 (2) of Government Regulation 45/1990 for Civil Servants. Such restriction refers to Article 28 J of the Constitution, which enables legislation-level law (*Undang-Undang*) to restrict the application of people's fundamental rights; notably, their rights to practice religion. The same logic applies to the restrictions on a husband's access to unilateral *talak,* which I discuss in the broken marriage section.

All these barriers prevent an unregistered marriage from getting validated retroactively, via *isbat nikah*. A petition may be granted after the judges have assured that an unregistered marriage did not violate the barriers. In the 2012 plenary meeting, the Islamic Chamber of the Supreme Court formulated: "In point (11), an *isbat nikah* is basically allowed, in order to obtain a formal divorce, except if the marriage being petitioned is clearly against the existing laws,[44] and in point (12) an *isbat nikah* to obtain a formal divorce is not allowed if the petitioned marriage constitutes informal polygamy without the first wife's permission, except where permission for polygamy is available from Islamic Court."[45] Accordingly, the Supreme Court sets prac-

[44] It is important to note that the Marriage Law also stipulates that a marriage shall be based on mutual consent (Article 6[1]), and that the minimum marital age is 19 years for the bride and groom (Article 7). However, it remains unclear whether or not these restrictions stand as a barrier for an *isbat nikah* petition.

[45] Supreme Court Circular Letter 7/2012.

tical guidelines for judges in exercising their jurisdiction on *isbat nikah.* The guidelines include the following directions: "it requires the judges to be very careful in adjudicating an *isbat* petition; it requires a petition to be announced, grounded with clear reason and purpose, and treated as contentious if the petition is filed only by one party (either a husband or a wife); and those whose rights are injured by an *isbat* petition may either file their objection and intervene in the ongoing process of *isbat*, or file a petition for nullification, if the petitioned *isbat* has already been granted (Mahkamah Agung RI, 2013, pp. 153–155)."

In the 2018 plenary meeting, the Supreme Court mentioned in point (1.h) that "an *isbat nikah* petition for informal polygamy cannot be accepted, even if the petition is to secure the best interests of a child. In this case, a parent may instead apply for a petition to determine the child's origin."[46] The background of this formulation is the 2012 Constitutional Court amendment on Article 43 (1) of the 1974 Marriage Law.[47] This amendment modifies Article 43 (1), to mean: "a child born outside of wedlock has a legal relationship (*hubungan perdata*) with his or her biological father and the father's family, if medical technology or other means of legal evidence can convincingly prove biological fraternity." Initially, the Supreme Court adapted this amendment to fit its own existing *isbat nikah* trend. A petition to legalise a child's status was conditional on an *isbat nikah* judgement that first validated his or her parent's marriage. Only then could the child's legal relationship to his or her biological father be legalised.[48] In this sense, a petition on a child's origin is restricted to the limits set for *isbat nikah*, i.e. a religiously valid marriage, and not informal polygamy. Later, as Nurlaelawati and Van Huis suggest, Islamic court judges started to legalise child-father relationships from informal polygamous marriage, but conflicting judgements on this issue remained (Nurlaelawati & van Huis,

[46] Supreme Court Circular Letter 3/2018.

[47] Before the amendment, this article stipulated that "a child born outside of wedlock is legally related only to his or her mother and the mother's family."

[48] Point 14 of Supreme Court Circular Letter 7/2012.

2020, pp. 365–366).[49] This recent development explains why the 2018 Supreme Court plenary meeting ruled not to combine an *isbat* petition with a petition on a child's origin (*hak asal usul*). This separation enables the Supreme Court to legalise child-father relationships within informal polygamy, whilst invalidating informal polygamy itself.

In summary, this section demonstrates that Islamic Court judges play a defining role in developing a nuanced interpretation of *isbat nikah*. On the one hand, they extended the application of *isbat nikah* to any unregistered marriage concluded after the passing of Law 1/1974. On the other hand, to avoid an arbitrary use of *isbat nikah,* they refined its application by introducing certain limits, i.e. a religiously valid marriage, not informal polygamy, and not against the law (such as would arise with invalid grounds or false evidence). In this manner, they managed to reconcile the gap between a formal application of *isbat nikah* and increasing demand from society to validate unregistered marriages retroactively. Moreover, the judges adapted the 2012 Constitutional Court ruling on child-father legal relationships to the existing interpretation of *isbat nikah*. Initially, legalisation of a child-father relationship is conditioned to an *isbat nikah* judgement. Later, a child of informal polygamy may legalise his or her legal relationship to the biological father through a separate child origin petition. In doing so, judges seek to protect not only the child but also the first wife, whose husband committed informal polygamy without her consent. However, beyond this adaptation a child-father legal relationship may only be 'acknowledged' (with a restricted legal relationship), rather than 'legalised' (with

[49] Details of the impacts of the 2012 Constitutional Court ruling on the status of children born outside wedlock can be read in (Nurlaelawati & van Huis, 2020). Their article revealed how the Islamic court incorporates the Constitutional Court ruling, by distinguishing a child's legalisation (a full filial relationship) from a child's acknowledgement (a mere biological parental relationship). The legalisation enables a child to claim a full filial (*nasab*) relationship to his or her biological father, but this procedure is constrained by the limits set on *isbat nikah*, exempting a recent development on informal polygamy. However, acknowledgment establishes a child-father biological relationship only (not a full *nasab* relationship and restricted rights), but this procedure allows greater competency for Islamic court judges to establish a child-father relationship, including a pre-marital child who is not valid in a religious sense.

a full *nasab* relation). Regardless of this limitation, we learn that reform on this subject is strictly dependent on Islamic court judicial developments.

2.3 Broken Marriage Divorce

In Indonesia, statutory (legislative) reforms have brought two significant changes to divorce. One requires a divorce to be judicial and accompanied by sufficient ground(s). The other differentiates between two competent courts on divorce: a state Islamic court for Muslims, and a general court for non-Muslims. In this regard, the divorce statute may be subsumed under the 'second phase' of reform—the categories employed to divide different trajectories of family law reform in majority-Muslim countries (Welchman, 2007, pp. 108–109)—where judicial divorce and divorce ground(s) are made mandatory. Nevertheless, in a recent development within the Islamic court, Islamic court judges have stepped into the 'third phase' of reform, where a husband's facility to *talak* (unilateral repudiation) is balanced with a wife having more options for judicial divorce. The third phase of reform manifests in the invention of a broken marriage concept. This concept is the result of both inductive and deductive methods. It gradually evolved through judges' interpretation of divorce ground point (f) as unilateral and no-fault, and developed through several criteria attached to this ground. The ground was then deductively linked to an underlying purpose for Indonesian marriage, i.e. realising a marriage based on mutual love and consent. Later, the judges refined the application of broken marriage by reapplying fault consideration to the consequence of such divorce, allowing them to deliver a nuanced and just judgement that is threatened by a strict application of a no-fault ground. Before addressing broken marriage, the following discussion elaborates on judicial divorce and divorce grounds in Indonesian (Islamic) family law.

2.3.1 Judicial divorce and different grounds for divorce

Article 39 of the 1974 Marriage Law stipulates in paragraph one that "a divorce must be conducted in court, after

the court has attempted and failed to reconcile the parties", and in paragraph two that "there must be sufficient ground(s) for the breakdown of a marriage". The first paragraph makes divorce a state affair, by requiring it to be conducted in a competent court. The competent court refers to two different courts, i.e. the Islamic court and the general court. In Government Regulation 9/1975, the Islamic court is designated for Muslims or those who have concluded their marriages in accordance with Islamic religion, and the general court is provided for non-Muslims. The second paragraph requires a divorce lawsuit to be based on sufficient grounds. In the marriage law and its implementing regulations, divorce grounds comprise six conditions for all citizens and two additional conditions exclusive to Muslims:

> For all Indonesian citizens, the Explanation to Article 39 (2) of the 1/1974 Marriage Law *jo*. Article 19 of the 09/1975 Government Regulation mentions six grounds for divorce: (a) If a spouse commits adultery or suffers from incurable addiction to alcohol, opium, gambling, etc.; (b) If a spouse leaves the other spouse for two consecutive years, without permission or a legitimate reason for doing so; (c) If a spouse is imprisoned for a minimum period of five years; (d) If a spouse commits domestic violence; (e) If a spouse suffers from a physical disability or incurable disease which causes him/her to neglect their duties as husband and wife; and, (f) If continuous dispute and discord occurs between the spouses, and there is no hope of living peacefully together within a household.
>
> For Muslims, Article 116 of the 1991 Compilation of Islamic Law stipulates two additional grounds: (g) The violation of *taklik talak* (conditional divorce); and, (h) A religious conversion (*riddah* or *murtad*) that causes discord and disharmony.

Accordingly, a husband or wife may register a divorce at the competent court only when their respective spouse has violated at least one of these grounds. In this sense, the grounds are fault-based in nature, and are available as 'exit' grounds for those who are not at fault for the breakdown of their marriage. These grounds apply to both spouses, except the *taklik talak* ground - point (g) - which is only relevant to wives. Nevertheless, a divorce petitioned for by a husband is distinguished from that petitioned

for by a wife; namely, *talak* divorce for a husband and *gugat* divorce for a wife. The distinction revolves around different mechanisms and outputs available to the husband and wife in obtaining a formal divorce. The mechanisms refer to a wide range of divorce procedures, such as *talak* (a husband's unilateral right to repudiate), *khulʿ* (a consensual divorce), and *fasakh* (a divorce by judge[s]). The outputs refer to the consequences of the given procedures, such as a revocable divorce, an irrevocable divorce, and a final divorce.

First, regarding the mechanism of divorce, in *talak* divorce a husband seeks permission from the Islamic court to repudiate his wife, whilst in *gugat* divorce a wife requests that Islamic court judges terminate her marriage. This distinction is modelled after traditional *fikih* provisions, which give a husband the privilege of unilateral divorce (*talak*). However, this privilege is now subject to state control. A husband is still required to provide valid grounds, as prescribed in the marriage law, and can only then perform *talak* before an Islamic court. In certain cases, a husband is no longer entitled to perform *talak*, if he converts from Islam to another religion (*riddah* or *murtad).*[50] In *gugat* divorce there are two mechanisms available to a wife, i.e. *khulʿ* and *fasakh*. *Khulʿ* is consensual divorce, in which a wife agrees to pay compensation (*iwad*) to her husband in exchange for his *talak*. In Indonesia, *khulʿ* divorce may be obtained through regular *khulʿ*, *taklik talak, šiqāq*, and *fasakh* (van Huis, 2019a). Each procedure is different, but they may all end up as *khulʿ* in the hands of judges. In view of this, Van Huis suggests that different forms of *khulʿ* are the result of a 'judicial tradition', developed by judges in their daily adjudication (van Huis, 2015, p. 82). *Fasakh* is judges' prerogative right to terminate a marriage on their own. They often employ *fasakh* when a marriage is already beyond repair, but the husband has refused to pronounce *talak*.

[50] A husband can still initiate divorce via *gugat* divorce, by requesting that Islamic court judges terminate his marriage through *fasakh* (Mahkamah Agung RI, 2013).

Second, regarding outputs, *talak* divorce first generates *talak raǧʿi*, and *gugat* divorce generates *talak bain ṣuǵrā*. Whilst the former constitutes 'revocable' divorce, the latter is 'irrevocable' divorce. In a revocable divorce, the husband might reconcile with the divorced wife (*rujuk*) within a waiting period (*idah*).[51] In an irrevocable divorce, a husband is not entitled to *rujuk* and the only way to reconcile is via remarriage. There is also another type of irrevocable divorce, *talak bain khulʿi.* This type of divorce is adapted from *khulʿ* (consensual divorce), which in Indonesia appears in many forms: *regular khulʿ*, *taklik talak*, *šiqāq*, and *fasakh* (Nakamura, 2006; van Huis, 2019a). In essence, *talak bain khulʿi* is irrevocable and equal to *talak bain ṣuǵrā.* In Article 148 of the 1991 Compilation of Islamic Law, the result of a *khulʿ* divorce is a final divorce that is closed to appeal and cassation, but later, the Supreme Court ruled out this article through "*Buku II Pedoman Pelaksanaaan Tugas*" and made *talak khulʿ* similar to other divorce, and open to appeal and cassation (Mahkamah Agung RI, 2013). In addition to revocable and irrevocable divorce, there is also 'final' divorce (*talak bain kubrā)*, where the couple is not ever allowed to marry each other again. As an example, a divorced couple is never allowed to remarry if they obtained their divorce through *lian* (accusing a spouse of committing adultery that is unproven) or *riddah* (converting from Islam to other religion) procedures. In this manner, the outputs of a divorce are determined by who registers the lawsuit, and on what grounds the lawsuit proceeds, as depicted in the following table.

[51] However, his divorce becomes final once *talak* has been pronounced three times (*talak bain kubrā*). The husband could then only remarry his wife if she had married and then divorced another man (*muḥallil*).

Who	Divorce Grounds	Types	Available Options	Outputs	
Husband (*Talak* Divorce)	a. Committing adultery and incurable addiction	fault-based	*talak*	*talak raǧ'i*	revocable
			lian	*talak bain kubrā*	irrevocable
	b. Neglecting spouse for two consecutive years without legitimate reason	fault-based	*talak*	*talak raǧ'i*	revocable
	c. Imprisoned for a minimum period of five years	fault-based	*talak*	*talak raǧ'i*	revocable
	d. Committing domestic violance	fault-based	*talak*	*talak raǧ'i*	revocable
	e. Suffering from an incurable disease that prevents the fulfilment of duties	fault-based	*talak*	*talak raǧ'i*	revocable
	f. Continuous strifes that cause the breakdown of marriage	unclear	*talak*	*talak raǧ'i*	revocable
			šiqāq	*talak raǧ'i*	revocable
	h. Converting from Islam (*riddah* or *murtad*) that causes the breakdown	fault-based	*talak*	*talak bain kubrā*	irrevocable
Wife (*Gugat* Divorce)	a. Committing adultery and incurable addiction	fault-based	*talak*	*talak bain khuli'i*	irrevocable
			fasakh	*talak bain sughrā*	irrevocable
			lian	*talak bain kubrā*	irrevocable
	b. Neglecting spouse for two consecutive years without legitimate reason	fault-based	*talak*	*talak bain khuli'i*	irrevocable
			fasakh	*talak bain sughrā*	irrevocable
	c. Imprisoned for a minimum period of five years	fault-based	*talak*	*talak bain khuli'i*	irrevocable
			fasakh	*talak bain sughrā*	irrevocable
	d. Committing domestic violance	fault-based	*talak*	*talak bain khuli'i*	irrevocable
			fasakh	*talak bain sughrā*	irrevocable
	e. Suffering from an incurable disease that prevents the fulfilment of duties	fault-based	*talak*	*talak bain khuli'i*	irrevocable
			fasakh	*talak bain sughrā*	irrevocable
	f. Continuous strifes that cause the breakdown of marriage	unclear	*talak*	*talak bain khuli'i*	irrevocable
			fasakh	*talak bain sughrā*	irrevocable
			šiqāq	*talak bain sughrā*	irrevocable
	g. Taklik-talak violation	fault-based	*talak*	*talak bain khuli'i*	irrevocable
			fasakh	*talak bain khuli'i*	irrevocable
	h. Converting from Islam (*riddah or murtad*) that causes the breakdown	fault-based	*fasakh*	*talak bain kubrā*	irrevocable

Figure 2.3.1.1: Muslims' divorce grounds, procedures, and outputs

2.3.2 The evolution of 'continuous strife' as a ground for divorce

The 1974 Marriage Law requires a divorce lawsuit to meet at least one sanctioned ground. One particular ground for divorce, i.e. point (f) on continuous strife, tends to generate debate. The ground stipulates that a husband or wife may register a divorce "if continuous dispute and discord occur between the spouses, and there is no longer hope of living peacefully together within a household."

If the stipulated condition has already been met, is it necessary to determine who was at fault? Suppose the answer is 'yes'; in that case the ground is fault-based, which gives rise to another question: Is the person who caused the dispute and discord allowed to use the ground? In other words, is the ground unilateral or non-unilateral?

Suppose the answer to the first question above is 'no'; in that case, the ground is both unilateral and no-fault. The lack

of a clear answer to these questions has generated different attitudes amongst Islamic court judges. Some judges rejected divorce lawsuits made on this ground, if the lawsuit was filed by the person who had caused the conflict (*non-unilateral and fault-based*). Some judges accepted such cases, but still determined who was at fault (*unilateral and fault-based*). Still others received such cases without necessarily feeling burdened to find out who was responsible for the dispute and discord (*unilateral and no-fault*). To address this issue, Islamic court judges (notably those from the Islamic Chamber of the Supreme Court) gradually developed a stable interpretation of the ground through their judgements, plenary meetings, and circular letters, and by implementing guidelines and regulations. Initially, they treated the ground as fault-based, and then they started to interpret it as no-fault. Later, they established the ground as no-fault, and this was reinforced by the Indonesian Constitutional Court judgement number 38/PUU-IX/2011.

2.3.2.1 Debates on the nature of the 'continuous strife' ground

Debates about the nature of the continuous strife ground in point (f) appeared in the *Siti Hawa v. A. Rahman* case. In this case, an appellate court overturned a decision from a first instance Islamic court, because the respective courts held different views on whether it was necessary to determine who was responsible for the alleged dispute and discord. Whilst the first instance court perceived that finding out who was at fault was necessary, the appellate court perceived that it was also important to determining whether the lawsuit would be accepted or rejected (*non-unilateral*). Only later in the cassation did the Supreme Court reinforce the first instance court decision, by granting divorce through a *fasakh* procedure, on the ground of continuous strife. The details of this case are as follows:

> In 1979, Siti Hawa filed a divorce suit against A. Rahman at Kuala Simpang Islamic court. The lawsuit was built on multiple grounds—i.e. dispute and discord, *taklik talak* violation, and do-

mestic violence—seeking either *talak* or *fasakh*. During evidentiary sessions, the first instance court found that: (1) Conflicts had occurred for three years; (2) The husband had neglected his wife for four months, and had not provided her with maintenance support; and, (3) The husband had committed domestic violence. However, until the last session, the husband refused to pronounce *talak*. Given this, the court dissolved the marriage through *fasakh* by referring to a jurist's opinion in a classical *fikih* book, i.e. *Kitab Bugyah*. Later, this decision was overturned by the appellate court, which argued that: (1) There was no convincing evidence of dispute and discord, and the court could therefore not determine who was at fault; (2) If conflict were to be proven, the solution should be *šiqāq*, instead of *fasakh*; and, (3) Maintenance negligence that could provide a basis for *fasakh* was not supported by sufficient evidence, as the husband claimed his wife had refused to take a share of his salary. In judgement number 015K/Ag/1980, the Supreme Court considered that the evidence was sufficient and decided to grant Siti Hawa a divorce through *fasakh*, on the ground of irreconcilable continuous strife, point (f). This judgement formulates a legal principle: "a divorce lawsuit filed to an Islamic court and seeking *fasakh* must be accepted if the judges find 'sufficient evidence' for the occurrence of continuous strife and failed attempts at reconciliation."

This judgement demonstrates how Supreme Court judges have employed a lenient use of *fasakh,* mainly when a husband refuses to pronounce *talak.* This corresponds to Van Huis' argument that—through what he referred to as a 'judicial tradition'—the Islamic court had developed a lenient attitude towards *fasakh* long before the marriage law was passed (van Huis, 2015, p. 82, 2019a). This attitude enabled the court to extend its application of the *fasakh* procedure to a divorce lawsuit on the ground of continuous strife in point (f). The extended use of *fasakh* provides leeway for judges to terminate such marriages. In this judgement the Supreme Court started to treat divorce ground point (f) as unilateral, meaning it can be employed by either party, as long as the marriage is already irreconcilable. However, the Supreme Court did not make any explicit reference to whether this ground should be treated as fault or no-fault. Thus, it remained unclear whether it was nec-

essary to determine who was responsible for the marital breakdown.

In 1981, Supreme Court judges observed that an increasing number of judgements were being decided on divorce ground point (f). In their view, the judgements were often drawn hastily, without 'proper' procedure, and this led them to circulate letter 3/1981. The letter required judges within the Islamic Chamber of the Supreme Court:

> (1) To arrange a proper procedure for this ground, by conducting a thorough investigation of the occurrence of dispute and discord; (2) To establish who was at fault and decide accordingly, a lawsuit filed by the person who caused the dispute and discord shall be rejected; and, (3) To arrange a hearing session involving family and close relatives, as mandated in Article 22 (2) of Government Regulation 9/1975.

In examining divorce on the ground of continuous strife, the letter required (in its first point) the thorough investigation of an occurrence of dispute and discord. The first point emphasises the condition of the alleged conflict, and this will be discussed further in the broken marriage section. In its second point, the letter signified two things: one emphasised the ground as fault-based, and the other as non-unilateral. By fault-based, the letter means that Islamic court judges are required to establish who was at fault. By non-unilateral, the letter means that judgement on this ground is dependent on the establishment of fault. Suppose the accuser caused the fault; in that case, judges will reject the lawsuit. Suppose the fault was caused by the accused; in that case, judges may accept the lawsuit. In the third point, the letter compared this ground with a *šiqāq* ground requiring the involvement of (an) arbitrator(s), or *hakam*. Article 76 of Religious Court Law 7/1989 stipulates in paragraph one that "a divorce on the ground of *šiqāq* shall involve witnesses from the husband's and wife's families, or their relatives". In paragraph two, "after the hearings, the court may appoint (an) arbitrator(s) (*hakam*) from each party". All these restrictions aimed to make divorce on this ground more difficult.

In the 1990s the Supreme Court observed a reverse situation, in which judicial divorce was being sought for marriages that were already broken. However, such lawsuits were often filed by the person responsible for the breakdown of their marriage. This situation was problematic for Islamic court judges. On the one hand, they felt obliged to dissolve such irreconcilable marriages, just as they had done before, as reflected through their lenient use of the *fasakh* divorce procedure. On the other hand, they were required to uphold the 1981 Circular Letter restrictions, notably on the non-unilateral and no-fault principles of the continuous strife ground. To address this issue, the Supreme Court passed judgement number 038K/Ag/1990, in 1991. In this judgement, which is known as 'Bustanul Arifin's jurisprudence', the judges interpreted the continuous strife ground as no-fault. The judgement stated: "When (Islamic court) judges are convinced that a marriage is already broken, it is no longer relevant to find out who caused the dispute and discord. Blaming one side is not the best solution, and it most likely has a bad impact on the spouses and their descendants". This judgement repealed Supreme Court Circulation Letter 3/1981, which interpreted the continuous strife ground as non-unilateral and fault-based. Since then, the ground has been treated as unilateral and no-fault.

2.3.2.2 The 2011 constitutional court judgement on unilateral and no-fault divorce

In 2011 the Constitutional Court reinforced the existing Islamic court interpretation of divorce ground point (f). In judgement number 38/PUU-IX/2011, the Constitutional Court treated this ground as unilateral and no-fault. Before discussing this judgement further, it is necessary to provide background in the form of the *Bambang v. Halimah* case, as follows:

> In 1981, Bambang married Halimah and registered their marriage at the Setiabudi Sub-District Office of Religious Affairs. They were happy together for 21 years, raising three children, until 2002 when the husband married a well-known singer religiously. Bambang moved in with his new wife, leaving his first wife and children. In 2006, Bambang repudiated Halimah out-of-

> court. In 2007, he filed a petition at the Central Jakarta Islamic Court, to gain permission to utter *talak*. The petition was registered on the ground of point (f), on continuous dispute and discord. The petitioner claimed that this condition was caused by principal differences between the original spouses. In his view, the differences prevented them from achieving the sanctioned purpose of marriage, by realising *sakinah* (serenity), *mawadah* (prosperity), and *raḥmah* (blessedness).[52] Nevertheless, Halimah tried to preserve her marriage by arguing that her husband was not entitled to this ground, because he was the one who had caused dispute and discord.

On 16 January 2008 the first instance court accepted this petition and allowed the husband to repudiate his wife. The husband was also sentenced to pay one billion rupiah—six hundred million rupiahs in expenses to the repudiated wife during the waiting period (*idah*), and four hundred million rupiahs as a consolation gift (*mutah*)—and charged 506,000 rupiahs for court fees. On 24 September 2008 the Court of Appeal overturned this judgement in favour of the wife's objection to the divorce. The judges maintained that the husband: (1) failed to present concrete events or legal facts, and (2) failed to indicate the differences in 'principle' which, according to his claim, had caused (3) continuous dispute and discord between the spouses. The husband appealed for cassation at the Supreme Court, but on 4 August 2009 the court reinforced the appellate court decision by rejecting the husband's divorce petition. The husband responded by filing another legal action, i.e. *Peninjauan Kembali* (judicial review), to the Supreme Court. He developed his prepositions, to include:

> *First*, the argument regarding the lack of any concrete events or legal facts to prove this ground was not reasonable, because they had been presented in general to the first instance court—the details were left for judges to reveal throughout the court hearings. *Second*, continuous disputes and separation began in 2002 and continued from that point onwards, proving that the marriage was beyond repair. *Third*, the situations were "an indisputable fact" of "the breakdown of their marriage". *Fourth*, retaining an already broken marriage is against *fikih* principles on 'realising

[52] Marriage Law 1/1974, in Chapter II *jo*. Article 3 of the Second Book of KHI.

greater benefits' (*maṣlaḥah*) and avoiding possible risks (*muḍarrah*). *Fifth*, the use of *hakam*—which was deemed exclusive for a *šiqāq* divorce procedure—should be viewed as an additional means, rather than a procedural inconsistency.

Having reviewed these arguments, the Supreme Court accepted them. Accordingly, the Supreme Court formulated three considerations: 1) Both the fighting and the separation were sufficient facts for this ground; 2) The failure of *hakam* to reconcile this couple was evidence that there was no hope for them continuing to have a harmonious marriage; and 3) The Supreme Court has developed a stable corpus of case law on broken marriage that corresponds to the no-fault principle. In judgement 67 PK/AG/2010 the Supreme Court granted the husband permission to repudiate his wife. The court also raised the consolation gift from IDR. 400.000.000 to IDR. 900.000.000, so that in total the husband had to provide 1.5 billion rupiahs to his ex-wife, excluding court fees of IDR. 2.500.000.

Disappointed with this judgement, Halimah brought the ground of continuous strife – in Article 39 (2) point (f) of the Marriage Law 1/1974 - to the Constitutional Court for judicial review. She claimed that the ground is against Article 28D (1) and 28H (2) of the Indonesian Constitution 1945. Article 28D (1) stipulates that "each person has the right to recognition, security, protection and certainty under a 'just' law that treats everybody as equal before the law". Article 28H (2) states that "each person has the right to facilities and special treatment, to obtain the same opportunities and advantages for reaching equality and justice". The petitioner perceived that point (f) of this ground lacks 'normative regulations' that protect the interests of a victim, notably wives. She maintained that this is against Article 28D (1) of the constitution, which guarantees protection, certainty, and justice for each person, and against Article 28H (2) of the constitution, which allows affirmative action to protect wives as a disadvantaged group. In many cases a divorce will readily be granted through an all-encompassing sentence of "if continuous

dispute and discord occurs between the spouses, and there is no longer hope of living peacefully together within a household', which disregards the interests of a wife who actually prefers to save her marriage. Meanwhile, a fault partner, notably a husband, could freely release himself from marital duties.

In Judgement 38/PUU-IX/2011, the Constitutional Court rejected this petition. The judgement summary comprises the following points:

> *First*, the judges interpret Article 1 of the 1974 Marriage Law that stipulates: "A marriage is a 'physical' and 'non-physical' contract between husband and wife, aiming to realise 'a happy and long-lasting family' that is based spiritually on 'the almighty God'". A physical contract means that a marriage shall be based on mutual consent. In contrast, a non-physical contract refers to Article 33 of the 1974 Marriage Law: that a marriage contract shall be based on mutual love. The phrase 'a happy and long-lasting family' as the purpose for marriage shall be interpreted in accordance with Article 30 of the Marriage Law 1/1974, which requires the principle to be mutually upheld by both sides, and projected as the basis of the Indonesian social structure. The phrase, "based spiritually on 'the almighty God'" shows the defining characteristic of Indonesian marriage: that it manifests not only living needs (*hajat hidup*), but also religious observance (*ibadah*). However, when mutual consent has been broken, either physically or spiritually, and there is no hope of realising the purpose of marriage, the marriage law provides leeway via divorce. In this sense, it would be unnecessary to establish who was at fault, because each party is allowed to review their own respective consent to the marriage.
>
> *Second*, The Constitutional Court argued that Article 39 (2) Point (f) on continuous strife does not oppose Article 28D (1) of the 1945 Constitution. The ground offers leeway for an unhappy marriage and provides the legal certainty and justice required by Article 28D (1) of the constitution. *Third*, the court disagrees with the petitioner's proposition that Article 39 (2f) is against Article 28H (2) of the 1945 Constitution, because Article 28H (2) is designated for affirmative action, whilst the marriage law clearly states that a wife shares equal status with her husband. Therefore, the plea for a wife's affirmative right is deemed irrelevant. The judgement has established the ground as no-fault and projected it as leeway for each party to review his/her consent

to their irreconcilable marriage. Nevertheless, judge M. Akil Mochtar held a different view to the majority of the judges. He argued that Article 39 (2f) on continuous strife is not constitutional, because the ground is in opposition to another purpose of the 1974 Marriage Law; namely, to make the occurrence of divorce difficult. For Muslims, he perceived that this ground is redundant to the existing institution of *šiqāq*, as stipulated in Article 76 of Religious Court Law 7/1989. Despite the objection from this particular judge, the majority of judges managed to decide that Article 39 (2) Point (f) is constitutional.

This 2011 Constitutional Court judgement reinforced the existing Islamic court judicial tradition which treated the divorce ground of continuous strife point (f) as unilateral and no-fault. The judgement also prioritised mutual consent and love as an underlying purpose and principle of Indonesian marriage, over another purpose and principle of Indonesian marriage, i.e. to control the occurrence of divorce, by making it judicial and accompanied by (a) sufficient ground(s). More importantly, the judgement provided a solid support for the invention of a broken marriage concept for Indonesian divorce, which will be discussed in the following section.

2.3.3 The invention of 'broken marriage' as unilateral and no-fault

Simultaneous to the establishment of a unilateral and no-fault ground, the Supreme Court judges developed several criteria as thresholds for the ground. Later, they linked these criteria deductively to the underlying purpose and principle of Indonesian marriage—i.e. to realise a marriage as a physical and non-physical (spiritual) contract that is based on mutual love and consent—in order to invent a broken marriage concept. This invention corresponds with the 2011 Constitutional Court decision that appeared to adopt the existing trend within the Islamic court. The Constitutional Court reinforced both Islamic court views on divorce ground point (f) being a unilateral and no-fault ground (as discussed in the previous section), and its invention of a broken marriage concept. In a recent development,

judges from the Islamic Chamber of the Supreme Court went further, by reapplying fault consideration to the application of broken marriage. This consideration enables the judges to sense how a neglected or abused spouse feels, and to gain a general feeling of justice within society. By doing so, judges may deliver a nuanced judgement that would be impossible under the strict application of broken marriage as a no-fault ground. In this sense, broken marriage is indeed a modified version of divorce ground point (f) on continuous strife, although it has been further developed and refined into an all-encompassing ground for divorce.

2.3.3.1 Formulating the criteria for broken marriage

To elucidate how the criteria for broken marriage were formulated, it is necessary to refer to the exact wording of divorce ground point (f) on continuous strife. The ground enables a husband or wife to register a lawsuit "if continuous dispute and discord occur between the spouses, and there is no longer hope of living peacefully together as one household". This ground requires: an 'occurrence' of dispute and discord; that conflict occurred 'continuously'; and that these two conditions are preconditions to the 'breakdown' of the marriage. However, each element is still general, and this gives rise to the following questions: *First*, does a physical quarrel determine an occurrence of dispute and discord or does the demise of proper communication suffice? *Second*, does the word 'continuous' carry a threshold for a minimum period of dispute and discord? Is it modelled after the minimum period of separation, as stipulated by either the Marriage Law or the 1991 Compilation? *Third*, are there any criteria for the breakdown of marriage, in order to conclude that a marriage is beyond repair? These questions have generated different interpretations, which have appeared in the corpus of case law, plenary meetings, circular letters, and implementing regulations.

Deciphering the criteria for continuous strife

The earliest interpretation I could find, which defines the criteria for this ground, appeared in the case of *Siti Hawa v. A. Rahman* (mentioned above). In this case, the judges employed *fasakh*, as they found 'sufficient evidence' for continuous strife and failed attempts at reconciliation. In the judgement, the judges stated that "a lawsuit filed at a court and seeking *fasakh* must be accepted, should the judges find 'sufficient evidence' of the occurrence of continuous strife and 'failed attempts at reconciliation'". Given this legal formulation, the judgement deciphered two criteria, i.e. sufficient evidence and an irreconcilable marriage, for divorce ground point (f). In Circulation Letter 3/1981, aside from establishing this ground as 'non-unilateral' and 'fault-based' (see the discussion on point [2] in Section 2.3.2.1), the Supreme Court requires, in point (1): "The arrangement of proper procedure, by conducting a thorough investigation into the occurrence of dispute and discord", and in point (3): "The arrangement of a hearing session that involves family and close relatives, as mandated in Article 22 (2) of Government Regulation 9/1975". Point 1 was a mere statement of formulation of legal precedent in the *Siti Hawa v. A. Rahman* case. Point 2 compared this ground to a *šiqāq* ground. Yet, in recent guidelines disseminated in the Islamic court, a divorce on a *šiqāq* ground is distinguished from that petitioned for on other grounds (Mahkamah Agung RI, 2013, p. 163). Put simply, the distinction is the mandatory use of an arbitrator(s) or *hakam* institution in the *šiqāq* procedure.

In a later judgment, 044K/Ag/1998, *Sampurni v. Sudayanto*, the Supreme Court recognised family testimony as valid evidence to prove alleged continuous strife. This case took place in 1998, when Sampurni filed a divorce lawsuit against Sudaryanto at the Kediri Islamic court, on the ground of continuous strife. The judges' assembly examined this ground and granted her *talak*, on behalf of her husband. The appellate court overturned this decision, and only later did the Supreme Court reinforce the

first instance court decision by granting her a divorce. The debates in this case questioned whether family testimony counts as valid evidence for the occurrence of dispute and discord. While the appellate rejected the use of family testimony as evidence, the first instance court and Supreme Court accepted it. This case shows how the Supreme Court has elevated the status of family testimony, both as valid evidence and as part of the compulsory procedure for the continuous strife ground. The same attitude appeared in Supreme Court Judgment 495K/Ag/2000, which enabled the use of family testimony in both *gugat* divorce and *talak* divorce.

Another effort to define the point (f) ground appears in the pragmatic use of mediation findings as evidence to determine the occurrence of continuous strife and failed attempts at reconciliation. Article 5 (1) of Supreme Court Regulation 1/2016 stipulates that mediation is a 'closed session', meaning that mediation records cannot be disclosed. In Article 35 the regulation draws a sharp line between mediation and litigation, stating that mediation records must be destroyed, and the mediator him/herself cannot be accepted as a witness in the case. However, Article 5 (2) states that conveying a report to judges about who is not acting in good faith and who is responsible for the failure of mediation is not a violation of the closed nature of the mediation process. In an interview with a member of the Islamic Chamber of the Supreme Court, judge Edi Riyadi argues that mediation reports are a fact worth considering throughout the evidentiary process, particularly in divorce cases. The use of (failed) mediation reports has not formally widened the criteria for evidence, but in practice it has equipped judges with solid facts to prove the occurrence of continuous strife. Even when a defendant is absent (*verstek*), meaning there was no mediation, the judges could still employ his or her absent as a strong indication that one of the spouses is no longer committed to reconciling, and that the marriage is beyond repair.

Formulating the operational criteria for broken marriage

Judgement 038K/Ag/1990—the landmark decision for the unilateral and no-fault principles of divorce ground point (f)—mentioned a broken marriage term. Instead of questioning each one of the elements of ground point (f), which are difficult to measure, the judgement requires judges to determine whether a marriage is already broken or not. This judgement is indeed the breakthrough which introduced the broken marriage term, although definitive criteria remained undeveloped. In Judgement 285K/Ag/2000 the Supreme Court started to develop three operational criteria to determine the breakdown of a marriage: (1) The marriage was concluded without the consent of the plaintiff's family; (2) The couple no longer lived under the same roof for a 'certain' period and; (3) The couple's family failed to reconcile them. The presence of these criteria determines whether a marriage was already broken, but the criteria are quite casuistic, and the minimum period of separation still remains unclear.

Nevertheless, in this decision the Supreme Court has tried to develop some operational criteria for the continuous strife ground, point (f). This breakthrough was reinforced by the 2011 Constitutional Court ruling that linked this ground deductively to an underlying purpose for Indonesian marriage; namely, mutual love and consent. When mutual love and consent to marriage no longer exists, it implies that the marriage is already broken. Given this approach, a broken marriage is defined through via two different methods: inductive and deductive. It was inductively shaped through case law and deductively inferred from a 'teleological' interpretation of the underlying principle and purpose of Indonesian marriage and divorce law (see the discussion in Section 2.3.2). In this manner, both the Islamic and Constitutional Court judges showed a preference for the purpose of marriage (namely, mutual consent and love), rather than the purpose of controlling the occurrence of divorce.

In the 2013 plenary meeting, the Islamic Chamber of the Supreme Court addressed broken marriage by formulating the following criteria: "1) There has been a (failed) attempt at reconciliation; 2) Good communication between the spouses no longer exists; 3) One of the parties, or both spouses, is/are neglecting their duties as husband and/or wife; 4) The spouses live separately, either under the same roof or in different domiciles; and, 5) There were other relevant findings during the trial, such as romantic affairs, domestic violence, gambling, etc".[53] These criteria are indeed a modified version of divorce ground point (f) on continuous strife. They also derive from point (b) on separation, and point (g) on the violation of *taklik talak*. Additionally, other grounds may be subsumed under the fifth criterion for broken marriage. The broken marriage ground transforms all the sanctioned divorce grounds into one single category of broken marriage. Mannan explains that this ground operates deductively. When judges encounter a marriage that was already broken and irreconcilable, they may employ these conditions to deduce a conclusion about whether or not a divorce lawsuit is accepted or denied (*Majalah Peradilan* Agama 2013, 50). In this way, other grounds were practically relegated to being merely complimentary.

However, a broken marriage ground still lacks definite criteria for the minimum period of separation. Is it modelled after the minimum period of separation, as set out in the marriage law or compilation? The marriage law sets a minimum period of two consecutive years as a distinctive ground for divorce. The 1991 Compilation of Islamic Law introduces two criteria for the separation period in Article 116 (g) on the *taklik talak* violation, i.e. three months for maintenance negligence (in point [2]) and six months for a general lack of responsibility (in point [4]). As quoted by Van Huis, Judge Abdul Manan explains that a three-month separation is enough (van Huis, 2015, pp. 241–243). In a recent interview, Judge Edi Riyadi said that the Supreme Court

[53] Supreme Court Circular Letter Point (4) 4/2014.

had not developed a consensus on this issue. However, he maintained that the minimum period is more than three years, overall. Whilst Manan is likely to draw his criterion from one of the requirements set out in the *taklik talak* violation ground, Riadi set a much more extended period than the threshold that is stipulated by the existing provisions.[54] More recently, in the 2022 plenary meeting, the Islamic Chamber of the Supreme Court sets a clearer minimum period of separation: i.e. 12 months for a negligence case and six months for a continuous strife case.[55] Further research into case law is nevertheless required, in order to shed light on which view corresponds to actual practice.

2.3.3.2 Refining broken marriage and reapplying fault consideration

Nowadays, the broken marriage ground is increasingly popular. This ground constitutes the majority of divorce grounds tried before an Islamic court. Its popularity outstrips the other divorce grounds, including *taklik talak*, which was once very popular amongst neglected wives. For example, in the Arga Makmur Islamic court there are a total of 365 judgements of Mukomuko origin for the period from 2016 to 2017. Out of this total there are 303 broken marriage cases and only 62 cases of *talik-talak* violation. The number shows how broken marriage cases outnumber *taklik talak* three times over, let alone how they outnumber other grounds that are disappearing from the court record. Van Huis suggests that divorce grounds listed in Article 39 (2) points (a-f) of the 1974 Marriage Law are no longer in use, having been replaced by a single ground, i.e. broken marriage (van Huis, 2015, p. 241). The Supreme Court applies broken marriage not only to lawsuits on the continuous strife ground, but also to lawsuits on other grounds. In Judgement 266K/Ag/2010 the Supreme Court decided a lawsuit ex officio, which was filed on the ground of *talik-talak* violation through broken marriage. This trend concerns

[54] Interview and correspondence with Supreme Court Judge Dr. H. Edi Riyadi, SH. MH, in Jakarta, 31 May 2019.

[55] Supreme Court Circular Letter Point 1 (b) 1/2022.

some learned jurists and scholars, regarding the possible harms emerging from a strict application of broken marriage as no-fault. To address this concern, the Supreme Court has started to refine the application of broken marriage, *first* by requiring that all the indicators be seen as 'cumulative' and, *second* by reapplying fault consideration especially when the 'fault' is relevant to a spouse's post-divorce rights.

In its 2018 plenary meeting, the Supreme Court started modifying Circular Letter 4/2014 on broken marriage, by requiring that Islamic court judges prove the indicators of a broken marriage. The 2018 plenary meeting formulates a guideline, which reads as follows: "Judges should be careful about granting a divorce, because it will terminate a sacred marriage, turning something legal into something illegal, and having not only a wide impact on social structure but also consequences in this world and the hereafter (*dunia* and *akhirat*). For these reasons, divorce should be accepted if a marriage is already broken, and the indicators are proven". This letter shows that the Supreme Court's primary concern is not acceptance of the broken marriage ground. Instead, the court emphasises proper use of this ground. In this way, the Supreme Court tries to refine the application of broken marriage by requiring the indicators to a broken marriage to be proven. However, it is hardly possible to infer that all the indicators shall be seen as cumulative. Whilst the nature of these indicators remains unclear, the Supreme Court is well aware of the necessity of proper and cautious use of these indicators. Further research is required, to observe the judges' attitude towards all the indicators.

In a recent development, the Supreme Court started to reapply fault consideration to broken marriage. The reason behind this move is growing concern about the strict application of broken marriage as no-fault. Judge Husseini, as Van Huis cited, suggested that the increasing popularity of broken marriage as a no-fault ground has gradually transformed the Islamic court into a mere divorce registration office (*kantor isbat cerai*), referred to

only for divorce formalisation. Without establishing who was at fault, the court was perceived as disregarding the feelings of a neglected or abused spouse and, in general, the feeling of justice in society (van Huis, 2015, pp. 242–243). In response, the Supreme Court judges started to reapply fault consideration to broken marriage divorces. In this manner, a question of fault is dealt differently from the general norm of broken marriage that continues to be treated as a unilateral and no-fault divorce ground. In other words, the broken marriage ground is still 'unilateral' in nature, and the person responsible for the breakdown of the marriage can use this ground. Yet the judges, mainly to secure or protect an injured party (the victim), can still employ fault consideration to such cases. This development appeared in Judgement 266K/Ag/2010, which is summarised below:

> On 8 April 1995 Sutrisno Baskoro married Tri Hastuti. From their marriage they had two children, a 13-year-old son and a 10-year-old daughter. However, dispute and discord had occurred frequently since the third year of their marriage. This conflict reached its peak on 9 November 2008, when the husband evicted the wife from their house. For a long time prior to her eviction the wife had not been being provided with *nafkah* (maintenance support) - since 1997. Besides, their joint-marital property (*harta-sepencarian*) came from her income as a lecturer and consultant in a private university in Yogyakarta. On 20 August 2009 she filed a single lawsuit at the Bantul Islamic Court, asking for a divorce on the ground of *taklik talak* violation, custody rights, due maintenance support, and the sharing of joint marital property. After examining the lawsuit, the court finally granted her an irrevocable divorce (*talak bain ṣuġrā*), custody rights to her second child, monthly support of 2,750,000 rupiah for her second child until the age of 21, and a ¾ share of the marital property.
>
> In response, the husband filed an appeal at Yogyakarta Islamic appellate court. The court nullified the decision of the first instance court, deciding to decrease the amount of child support from 2,750,000 to 750,000 rupiah per month, but reinforcing the rest of the decisions. Still unsatisfied, the petitioner appealed for cassation at the Supreme Court, arguing that firstly he was still in love with her under any situation and condition, and second, that their joint marital property should be divided equally between husband and wife. In the judgement, the Supreme Court rejected

this petition, considering that the marriage was already broken, regardless of whether he was still in love or not. The judges also reinforced the existing division of joint marital property by constructing the following legal formulation: "a wife shall receive ¾ of the marital property, because she gained the property, and the husband had not provided his children and wife with maintenance costs (*nafkah*) for 11 years".

In a more recent judgement, 88/Ag/2015, the adjudicating judges allocated a third of the joint marital property to the husband and two-thirds to the wife, considering that the disputed property included her *harta-pusaka* (a matrilineally-inherited property among Minangkabau's Muslim society). In fact, there is a lack of stable case law on the division of joint marital property, but these cases demonstrate that the Supreme Court has started to introduce nuanced interpretations to the equal share of joint-marital property promulgated by the law.

Put it more generally, these developments show how judges from the Islamic Chamber of the Supreme Court has not only invented broken marriage but also refined its application. They refined it by starting to treat all the indicators of broken marriage as cumulative and reapplying fault consideration. I will revisit judgement numbers 266K/Ag/2010 and 88/Ag/2015 in Chapter 4 (Section 4.4.3) when discussing a dispute about joint marital property in the Arga Makmur Islamic Court, in order to assess judges' awareness of this development, notably pertaining to a greater share for a neglected wife. Concerning the 2011 Constitutional Court judgement (see Section 2.3.2.2 of this chapter), the Supreme Court adopted the decision on their existing interpretation of broken marriage. The Supreme Court also developed the ground even further, by refining its application. Nevertheless, the rationale for comparing a marriage to a regular contract, which enables a husband or a wife to review their respective consent to the marriage, is indeed a more secular interpretation than the current stance. Further research is required, in order to see how judges from the Islamic court perceive such secular interpretations.

2.4 Concluding Remarks

The discussion of *isbat nikah* and broken marriage demonstrates increasing judicial discretion in the Islamic court. The judges extended forms of retroactive validation to an unregistered marriage through lenient use of *isbat nikah*. At the same time, they refined the application of *isbat nikah* by establishing certain limits to avoid its arbitrary use. In terms of broken marriage, the judges interpreted the divorce ground of continuous strife as unilateral and no-fault. They also linked this interpretation to one of the purposes of Indonesian marriage, i.e. to realise a harmonious marriage. If a marriage is already broken, it becomes impossible to attain this purpose, and it is therefore unnecessary to maintain the marriage. Given this interpretation, increasing divorce caseloads can be addressed using a more practical procedure.

These developments show how Islamic court judges emerge as an authoritative body for exercising judicial law making, by reforming Indonesian family law. The significance of these developments has been twofold, concerning both the increasing role of legal precedent in shaping Indonesian Islamic family law, and the shift of religious authority to perform *ijtihad* (or *recthvinding*) within Islamic family law, away from traditional *ulama* towards Islamic court judges. These developments confirm Van Huis' argument that, aside from legislation, Indonesian Islamic family law reforms have been the result of a judicial tradition wherein the roles of judges from the state Islamic court are decisive (van Huis, 2015, p. 85, 2019a).

Judicial developments on *isbat nikah* and broken marriage demonstrate the autonomy of the Islamic court. This autonomy manifests in the role of judges from this court in exercising judicial law making and referring to existing legal precedent in order to tackle similar cases. In judicial law making, judges have developed substantive reforms to Indonesian Islamic family law from within, without interference from 'non-legal' actors on the outside. By employing precedent and judicial policy, the judges

not only extend but also refine the application of *isbat nikah*, and invent broken marriage as a unilateral and no-fault ground for men and women. Besides, the judges can disseminate these developments within their institution through different means of communication, such as circular letters, books of guidelines, and the quarterly magazine, *Peradilan Agama*, which are all accessible online. Moreover, Islamic court judges manage to keep their distance from non-legal actors, by cleverly incorporating the authority of traditional *ulama* to perform *ijtihad* on Islamic family law into their legal community. Their incorporation of religious authority appears in the case law discussed above. In this manner, Islamic court judges emerge as state-sanctioned interpreters of Islamic law and promoters of the Islamic court as a domain for their *ijtihad*.

Another important point to note is the way in which Islamic court judges have adapted Constitutional Court judgements to serve their own tradition. Concerning *isbat nikah*, a 2012 Constitutional Court decision allows a child born outside wedlock to establish a legal relationship with his or her biological father. This judgement introduces a concept of biological fatherhood, which is against an equivalent concept in Islam, i.e. a marriage-based *nasab.* In view of this, Islamic court judges adapted the ruling to suit the existing development of *isbat nikah*, by distinguishing a child's 'legalisation' from their 'acknowledgement'. In this manner, the legalisation of a child is conditional on an *isbat nikah* judgement on his or her parents' marriage. An exception applies for the child of a religious marriage, but that type of marriage is an informal polygamy. In this case, the child may obtain legalisation through a separate child origin petition (*asal usul*). Other than these conditions, a child's relationship to his or her biological father may only be acknowledged, not legalised. Concerning broken marriage, the 2011 Constitutional Court judgement compares a marriage with a physical contract with a marriage with a non-physical contract. In this manner, a marriage union is based on mutual consent and love. Otherwise, each party is allowed to

review their respective consent to the union. This judgement introduces a completely secular rationale to the institution of marriage, but its use in this case is a mere restatement of the existing concept of broken marriage.

The ways in which the Constitutional Court judgements have been adapted has shed light on the other side of their autonomy. Instead of adopting Constitutional Court judgements in their entirety, Islamic court judges have adapted them to fit existing developments in their court. In this way, the judges are likely to maintain the balance between the religious nature of Indonesian family law and the possible restrictions placed on its application. This attitude confirms Nurlaelawati and Van Huis' view that reforms of 'core' Islamic family law will attract resistance from Islamic court judges (Nurlaelawati & van Huis, 2020). Alternatively, judges might become more lenient, as happened when the Constitutional Court judgement on the constitutionality of restrictions on polygamous marriage was incorporated. However, this attitude may threaten legal unity, since the Constitutional Court is also part of the Indonesian judiciary. For the time being, it can be inferred that the Islamic court has been autonomous. Next, we will look at how the judicial developments manifest in practice, by presenting the experience of the people of Mukomuko, on the west coast of Sumatera.

3
Presenting Mukomuko and its Multicultural Society

Among the earliest dismemberments of the Minangkabau empire was the establishment of Indrapura as an independent kingdom. Though now, in its turn, reduced to a state of little importance, it was formerly powerful, in comparison with its neighbours, and of considerable magnitude, including Anak-Sungei [Mukomuko], and extending as far as Kattaun [Ketahun]

(The History of Sumatera: Marsden, 1811, p. 353).

3.1 Introduction

The previous chapter demonstrated that judges from the state Islamic court have acted autonomously in maintaining a balance between state-sanctioned Islamic law and a sense of justice informed by different forms of non-state law (such as *adat* and other religious norms) within society. Their autonomy is manifested in their ingenious extension of the application of *isbat nikah* (a retroactive validation of marriage), which allows for the retroactive validation of the unregistered marriages currently pervading Indonesian society. It also appears that their initiative has invented 'broken marriage' as an all-encompassing ground for a judicial divorce that is unilateral and no-fault in nature.[56] Moreover, the latter replaces nearly all the stipulated grounds for a judicial divorce, with the exception of a *taklik talak* (conditional divorce) violation, which still offers exclusive leeway for wives seeking a divorce.

[56] In this context, 'unilateral' means a ground that can be used by either a husband or a wife, to obtain a formal divorce from the Islamic court. Meanwhile 'no-fault' means that both parties can employ the ground, and it is not to be used exclusively against the person who caused the marriage to break down.

To avoid arbitrary use, Islamic court judges carefully refined the new form of *isbat nikah*, so that it would not be used to validate a religiously invalid marriage or an informal polygamy, and (more generally) so that it would not be used to break the law. Likewise, they developed several criteria for the ground of broken marriage and reapplied fault consideration to a broken marriage ground.[57] These breakthroughs allowed the Islamic court to remain an essential influence on the development of Indonesian family law. If some of the less favourable views of its existence had been confirmed (Husaeni, 2012), the court might otherwise have been turned into a mere office for the registration of marriage and divorce (*kantor isbath nikah dan cerai*).

By balancing state law with a sense of justice within society, notably through the new form of *isbat nikah* and the broken marriage ground, judges have managed to accommodate the widespread practice of unregistered marriages, introduce a simpler, more equal divorce procedure for men and women, and bring more people closer to the state agenda, i.e. mandatory marriage registration and judicial divorce. This approach has increased state control of familial affairs, and (more importantly) it has enhanced its own legitimacy and influence within society. Moreover, the approach partly answers the second question raised in this thesis: "What is the 'logic' informing the judicial process (or reasoning) in Indonesian Islamic courts?" To further address this question, this chapter looks at Mukomuko society, on the West Coast of Sumatra. In 2010, Mukomuko society had a population

[57] The widespread use of broken marriage as a unilateral and no-fault ground has elicited concern among critics, who have expressed their concern about the judges' ability to consider the feelings of a neglected or abused spouse, whose marriage has been dissolved via divorce on this ground. This concern has led the judges to reapply fault consideration. In this manner, a question of fault is dealt differently from the general norm of broken marriage that continues to be treated as a unilateral and no-fault divorce ground. By doing this, judges can decide that one party is responsible for the breakdown of a marriage (including the consequences resulting from such a ruling), without becoming trapped in a blame game. This trend appears in a number of divorces granted on the ground of broken marriage, wherein one of the parties was ruled to have committed *nusyuz* or disobedience (van Huis, 2015, p. 244), and in cases where it was ruled that a husband at fault would receive a lesser share of his joint marital property (see Chapter 2, Section 2.3.3.2), regardless of who had filed the lawsuit.

of 155,753, wherein 155,520 (96.64%) people were Muslim.[58] While the population is predominantly Muslim, it is also divided into two categories: native[59] and migrant. The former refers to those who live in *hulu-hilir* villages and observe their matrilineal *adat,* whereas the latter refers to those who are scattered between serval enclaves, and who observe more diverse normative systems, from their place of origin. The unique background of Mukomuko society serves as a perfect site for this research, which seeks to understand the functioning of marriage and divorce law within multicultural Indonesian-Muslim society.

By shifting the discussion from the national to the local level, this chapter and the subsequent chapters seek to answer the following set of practical questions: *(1) How do the people of Mukomuko conclude marriages and obtain divorces? (2) Who are the main actors involved in the process? (3) How do these actors navigate state law and the different forms of local norms in their marriage and divorce procedures? (4) What conflicts and compromises arise from the law and norms, when they diverge from each other?* Serving as background on the research site, this chapter provides a glimpse of local marriage and divorce practices; more detailed information on the practices, and the compromises and conflicts emerging from them, are the subject matter of chapters 4 and 5. The present chapter focusses simply on presenting Mukomuko society. It looks at Mukomuko's historical roots in Minangkabau and its experience under different regimes, i.e. the British East India Company (EIC), the Dutch EIC, and the Independent State of Indonesia. Some moments from this history, such as the mass arrival of state-sponsored trans-migrants, the widespread introduction of large-scale plantations, and the 2003 regional autono-

[58] 3,684 (2.37%) were Protestant, 668 (0.43%) were Catholic, 229 (0.15%) were Hindu, and one person observed a religion other than the six official religions, 599 (0.03%) were unknown, and 10 (0.01%) were not asked about their religion. Retrieved from the 2010 Census of the Central Bureau of Statistics (*Badan Pusat Statistik*, BPS).

[59] The term 'native' refers to traditional villagers who reside at *hulu-hilir* villages, i.e. the former regions of XIX Koto, V Koto, and LIX Peroatin. Therefore, native should not be confused with the same term meaning 'traditional villagers' or '*hulu-hilir* people', when they seem to be used interchangeably. While recognising the colonial implication of the terms native or traditional, I still use the terms to distinguish native people from other locals who are not part of the *adat* community and who reside permanently in Mukomuko.

my of the Mukomuko regency, are of key concern and essential to the makeup of contemporary Mukomuko society. As I will show in this chapter, contemporary Mukomuko society is primarily referred to as being geographical, rather than ethnolinguistic or cultural.

Mukomuko's population is comprised of three community groups. These are: (1) *hulu-hilir* people, who have lived in the upstream and downstream villages since time immemorial; (2) migrants, mostly from the island of Java, who are scattered between several enclaves that are either part of state-sponsored transmigration or a private plantation; and, (3) urban people - a mixture of (1) and (2), who reside in the emerging urban centres. Together, the groups constitute the so-called local contemporary Mukomuko people. In arranging marriage and divorce, the *hulu-hilir* people still refer to their matrilineal *adat* as being from Minangkabau, whereas migrants often bring various norms with them from their place of origin. In the urban centres, the two groups live together side by side, while observing their respective norms. Yet, the Mukomuko people are now experiencing two unprecedented changes: i) an increasing number of cross-ethnic marriages, notably among those in the urban centres; and, ii) increasing state and commercial penetration. This situation has required each community to adapt, and has given rise to contemporary Mukomuko, a cosmopolitan society, even though a great majority of the *hulu-hilir* people and enclave migrants remain exclusively within their respective settlements. Before delving into each category in more detail, I will provide a brief historical background for Mukomuko.

3.2 A Brief Historical Background for the Traditional Structure and Institution of Mukomuko

One of the earliest sources (written in English) to mention Mukomuko was Marsden's masterpiece, *The History of Sumatra*. In his account, Marsden referred to Mukomuko several times, as either *Anak-Sungei* or *Moco-moco*, when describing the southern

part of Indrapura, on the west coast of Sumatra. As Marsden put it, Indrapura was once a peripheral *rantau* (dependent state), whereas Mukomuko was a further secession from this *rantau* (Marsden, 1811, p. 353). Only later, at the end of the 17th century, did Mukomuko declare full autonomy, under the name Anak Sungai Sultanate.

The following discussion begins with an overview of Mukomuko's historical roots in Minangkabau, then proceeds to an important event: the patrilineal revolution which took place at the end of the 18th century. The discussion also looks at the trajectory of Mukomuko's history under different regimes, i.e. the kingdom era, the British era, the Dutch era, the Japanese era, and early Indonesian independence. As we will see in this section, the case of Mukomuko shows how traditional implementing structures have managed to survive different regimes. Meanwhile, people still adhere to their traditional usages and customs (*adat-pegang-pakai*, henceforth *adat*). Henceforth, both the traditional structure and its institutional actors and the significance of *adat* to local people never really disappear, remaining essential to villagers' lives.

3.2.1 Mukomuko as *rantau*: the Minangkabau's matrilineal structure and institution

Minangkabau's sociopolitical structures and institutions developed through a matrilineal system that maintained both genealogical and territorial principles. Under this system, each person belonged genealogically to his or her mother clan. Individuals with the same maternal ties formed a group through the following order: the same mother (*seibu*), the same mother's siblings (*seperut* or *parui*), the same grandmother (*senenek*), the same great grandmother (*seninik*), and the same great grandmother upper (*sekaum*), [60] and the same matrilineal clan (*sesuku*). The clan then multiplied into four clans, namely *Bodi, Caniago, Koto*,

[60] This is a group counting five generations, all descended from one true ancestress. The *parui* members lived together, either occupying several houses or (sometimes) only one. The *parui* was the principal economy and legal unit of Minangkabau society. One might call it a house-community, or "matrilineal extended family" (Maretin, 1961, p. 174).

and *Piliang.* The first two clans formed the *Keselarasan* (a completeness, agreement, or union) of *Bodi-Chaniago*, which maintained an egalitarian relationship among clan members, while the latter two clans developed their own custom of *Koto-Piliang*, which inclined toward hierarchical and aristocratic relationships (Abdullah, 1966, pp. 6–7; de Jong, 1980, pp. 11–12).[61]

The term *suku,* which literally means 'a quarter', was employed metaphorically to denote that no matter how different the clans were, together they constituted a territorial federation called the *luhak nagari* (independent state).[62] The sovereign *nagaris* divided further into smaller groups and developed into several independent states, each led by their own *penghulu*, who was elected to act as *primus inter pares* among clan heads, in his respective *luhak*.[63] Among the earliest *nagaris* were *luhak* Agam, *luhak* Tanah Datar, and *luhak* 50 Koto, which were followed by other *nagaris* throughout the Minangkabau mainland (*darat*).

Alongside the growth of the community, the existing clans started to expand when a number of individuals migrated outside the mainland to create their own *nagari*, called *rantau*. This process began with the establishment of a *taratak* (new land), which developed into a *dusun* (village), a *koto* (territory), and eventually a *rantau* (dependent state). The emerging *rantaus* spread not only in the surrounding regions but also in areas that

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[61] The *Bodi Chaniago* was led by Datuk Perpatih nah Sebatang, and the *Koto-Piliang* was led by Datuk Katumanggungan. Richard Farmers, the translator of *Undang-Undang Mukomuko*, argued that these names were not used to refer to people, but offices. By comparing these names with their equivalents in Java, Tumanggung was likely "the officer entrusted with the general management of the country and still conducting the duties of police and municipal regulation in many Malay states; the Perpati was the minister of the king" (Farmers, 1822, p. 3).

[62] The term *suku* derives from the Sanskrit word for *kaki* (foot), where a single body consists of four feet and the hands are compared to the feet. This metaphor was employed to mean that the four pioneer *sukus* constituted a single tradition, called Minangkabau. Even to this day, the earlier meaning of *suku* as a quarter is commonly used in spoken language (Navis, 1984, p. 122).

[63] "A *nagari* functioned as a genealogical unit with the raja operating as the first among the genealogical units. Each *nagari* was a federation of *kota*, or village groupings, distinguished by a numerical coefficient according to the original number of *kota* it comprised. Effective authority rested primarily with the penghulu *kaampe suku* (customary heads of the four clans) who formed the *rapat penghulu* (council of penghulu), at the lower level with the penghulu kampung." (Kathirithamby-Wells, 1976, p. 66)

were far from the mainland (de Jong, 1980). Among them was Indrapura, situated in the southern part of Minangkabau. The Indrapura *rantau* encompassed *first* the river basin of Airhaji and Batang Indrapura, and *second* the region of Anak Sungai, from the Manjunto river to the Urei river. As a unit, Indrapura was led by a royal representative from Minangkabau, who was designated *raja* or *tuanku*. In theory, the *raja* was responsible for the administration of *rantau*, on a territorial and monarchical basis (de Jong, 1980). However, in practice, Indrapura and nearly all the other *rantau* states were administered according to the genealogical principle, whereby the incumbent acted as a *primus inter pares* among the genealogical heads (Kathirithamby-Wells, 1976, p. 66).[64] In Indrapura, the *raja* was assisted by genealogical leaders who were designated as *Mantris* of XX Koto, comprised of six upstream *Mantris* (*berenam-di-hulu*), six downstream *Mantris* (*berenam-di-hilir*), and eight middle *Mantris* (*delapan-di-tengah)* (Farmers, 1822, p. 9).

At the southern extremity of Indrapura was the Anak Sungai region, which belonged to the southern tribes and only later became part of Indrapura, as a semi-autonomous territory. Integration was possible because migrants of Minangkabau origin had spread across the region, establishing their own *sukus*. An exception applied to people residing in the southernmost regions, such as the Air Dikit, Bantal, Triamang, Ipuh, Air Rami, Seblat, Ketaun and Urei villages, who still inclined towards their tribal traditions under the leadership of a patrilineal chief, called the *Peroatin* (Kathirithamby-Wells, 1976, p. 72; Kathirithamby-Wells & Hashim, 1985, p. 11). As a semi-autonomous territory, Anak Sungai was led by a territorial *raja* from the Minangkabau royal family. The *raja* was the responsible territorial chief, and he cooperated with the regional genealogical leaders: Mantri

[64] The establishment of a *rantau* differs from one place to another. Heinzpeter Znoj suggests that the highland Jambi *rantau* developed a social structure which, in his words, "… is neither clearly matrilineal nor simply cognatic, and neither clearly kin-based nor truly territory-based". He maintains that this structure "has been the result of conflicting processes of adaptation to unsteady economic, political, and religious conditions that have shaped the region since the early modern period."(Znoj, 2009, p. 347).

XIV Koto of Manjunto, Mantri V Koto of Mukomuko, and LIX *Peroatins*.[65] Together, they added three sets of clan federations (or village groupings) to the existing clans of Indrapura, i.e. Mantri XX Koto. In this manner, the territory was administered via two political institutions with shared matrilineal ties to the Minangkabau royal family. One was autonomous Indrapura, the other was semi-autonomous Anak Sungai. Yet the people, partly due to their exogamous and uxorilocal 'clan' marriages, became integrated, and constituted a single unit of social structure, modelled after that of the Minangkabau matrilineal tradition.

In the second half of 15th century, driven by growing friendships with Aceh in the north and Banten in the south, Indrapura declared independence from Minangkabau. However, in 1633 it came under the Aceh domination, only later (in 1660) managing to reclaim its independence with support from the Dutch Eastern Indian Company (EIC) (Kathirithamby-Wells, 1969). The Dutch, who preferred a patrilineal succession, started to interfere with the royal succession by persuading Raja Muzaffar Syah to appoint his biological son, Muhammad Syah, as successor to the Indrapura throne, and his son in law, Sulaiman, as the new territorial *raja* of Anak Sungai. This appointment sparked a strong reaction from the incumbent *raja* of Anak Sungai, Raja Adil, who immediately declared war, with ready support from genealogical leaders in the region and the British EIC. The war ended with the triumph of matriliny and the declaration of Anak Sungai as an independent sultanate. Gulemat (1691-1716) became the first sultan to be assisted by *Mantris* of XIV, V Koto and LIX *Peroatins* (Kathirithamby-Wells, 1976, p. 72 and 81).[66] However, another

[65] The term *Mantri* is a title borrowed from the *Hindus* (Marsden, 1811, p. 354). In Mukomuko: (1) *Mantri* XIV Koto consisted of seven grandmother clans (*tujuh nenek*), five *Suku* clans (*lima suku*), the Sang Pati clan, and the Gresik Ketunggalan clan; (2) *Mantri* V Koto was comprised of the Datuk Rio Manyusun clan, the Datuk Rio Menang clan, the Datuk Rio Melan Putih Bubun clan, the Datuk Rio Sati clan, and the Datuk Rio Batuah clan, and; (3) LIX *Peroatins* was comprised of 59 villages, stretching from south of the Bantal river to the Urei river.

[66] The *Mantris* and *Peroatins* were charged with different tasks, according to their proximity to the royal capital. Menteri XIV Koto was the highest rank after the incumbent *Sultan*, followed by Menteri V Koto, and LIX *Peroatins.* Accordingly, Menteri XIV Koto were to serve the government at the capital, Menteri V Kota were to supply building materials and main-

event contributed to the potential overthrowing of the matrilineal system, when Sultan Kecil Muhammad Syah (1716-1728), under British influence, appointed his own son as his successor. This effort failed, as the genealogical leaders killed the sultan and appointed the rightful successor to the throne instead: Sultan Gundam Syah (1728-1752) (Kathirithamby-Wells & Hashim, 1985, p. 14). Afterwards, the sultanate achieved 'relative' stability and moved the capital to Mukomuko, a more stable location.

The sultanate's sovereignty did not last long, however, as the British increasingly gained control over the region. After a number of failed attempts to interfere with the matrilineal succession, the British eventually agreed to support Sultan Pasisir Barat Syah (1752–1789) in renouncing his sororal nephew, Zainal Abidin, from the next succession. Instead, he appointed his biological son, Khalifatullah Inayat Syah (1789-1816), as the next sultan of Anak Sungai (Znoj, 1998, pp. 106–110).[67] This appointment, as Znoj maintains, was driven by a mutual interest between the monarchical sultan and the declining British EIC against the rightful prince, whose popularity – notably, among hinterland people - had roused their jealousy. The incumbent sultan was now to maintain the *status quo*, whereas the Company, which had been downgraded from Presidency to Residency two years earlier, was to control alternative commodities from the interior (Znoj, 1998, p. 110). In 1811, the alliance eventually defeated Zainal Abidin and matrilineal supporters, but at severe cost. The sultanate became increasingly dependent on the British EIC, and the Company's bid for alternative commodities proved futile, as the hinterland trade

tain security, and *Peroatins* were to lead villages in the southern part region, ranging from Ipuh to Ketaun (Kathirithamby-Wells & Hashim, 1985, pp. 11–14).

[67] According to the official account, the patrilineal revolution occurred earlier, during the appointment of Sultan Pasisir Barat Syah (1752–1789). Zainal Abidin, the heir apparent, was reported to be the oldest son, rather than the sororal nephew of Sultan Pasisir Barat Syah (Farmers, 1822, p. 13; Kathirithamby-Wells & Hashim, 1982; Kathirithamby-Wells & Hashim, 1985; Marsden, 1811, p. 354). In contrast, Znoj suggests that the revolution was likely to have happened later, in 1789, during the appointment to the throne of Khalifatullah Inayat Syah. He further argues that the official account pertaining to this revolution "was part of the symbolic violence they [the British EIC] used to further their interests, which consisted in isolating the circumscribed *patriclan* of the Sultan from the rest of the local elite, the *Menteri Empat Belas*." (Znoj, 1998, pp. 106–110)

and economy shifted to more prosperous trade on the East Coast of Sumatra (Kathirithamby-Wells, 1993, p. 78). More importantly, this succession, i.e. the patrilineal revolution, reduced the sultanate's legitimacy before the genealogical leaders, especially *Menteri Empat-Belas*, as the staunch defender of matriliny.

3.2.2 The collapse of the Anak-Sungai sultanate and persisting traditional structure and institutions at village level

The previous section showed how, once, Mukomuko was a stronghold of the matrilineal system (cf. Hadler, 2010). This system had been shaping the royal succession up until the 1789 revolution, when Sultan Pasisir Barat Syah (1752–1789) appointed his own son, Khalifatullah Inayat Syah (1789-1816), as sultan. Ironically, this patrilineal revolution marked the collapse of the sultanate. In 1804, the British Company prohibited Sultan Khalifatullah Inayat Syah from collecting tributes (*upeti*) from peripheral regions, in exchange for appointing him as a local assistant to the British EIC, with a monthly salary of 600 ringgits (Bastin, 1965).[68] Following the 1825 transfer of this region from the British to the Dutch, the situation worsened, culminating in the sultanate's abolition in 1870.

In order to understand how the traditional structure and institution experienced these important events, this section raises the following questions: How did the 1789 patrilineal revolution affect the sultanate? How did the sultanate adapt to the latter local government system introduced by the Dutch, i.e *marga,* and the sultanate's abolition in 1870? Ultimately, how did the institution of *marga* (the native government at the time) adjust to Law 5/1979, formally abolishing it? As we will see in this section, the matrilineal structure and institutions eventually disappeared at supra-village level, but they managed to survive at the lower level of village and sub-village.

[68] The chief (*kalipas*) of Manna once said of the complementary roles of Company officials and *adat* chiefs that, "*the Law of the Country is in [the chiefs'] hands, and … the power is in the hands of the Company.*" (Kathirithamby-Wells, 1973, p. 251)

During the early period of the British EIC, the Anak Sungai sultanate was both the supreme *adat* and territorial leader. Company participation was limited to external native affairs, such as politics, trade, and defence. It would only interfere by offering advice, if its monopoly over trading was in jeopardy (Kathirithamby-Wells & Hashim, 1985, p. 13). However, the British EIC gradually abandoned this approach by introducing deliberation fora (*bicara*) made up of local elites, including *Tuanku*, *Mantris*, and *Peroatins*. For example, in 1713 the Company arranged a *bicara* with local elites, to resolve a dispute regarding royal succession, and to restore the stability and economy of the region (Ball, 1984, p. 48). In another *bicara*, the Company persuaded Sultan Gundam Syah (1728-1752) to deliver proclamations and orders to his people, which supported forced cultivation. The same *bicara* granted the Company the privilege to make direct contact with village leaders, in order to control cultivators whilst they were working in their respective fields. The Company even interfered directly with *adat*, notably in criminal matters, when it initiated a *bicara* to abolish the application of *bangun* (blood money). Further, the Company stipulated that territorial chiefs were no longer free to attend a customary *bimbang* (wedding feast), in case they neglected their fields (*ladang*) as a result (Kathirithamby-Wells & Hashim, 1985, p. 16). These interferences undoubtedly reduced the native authority, but the sultanate remained a self-contained government.

In 1789 the native government underwent a patrilineal revolution, influenced by the British. This made the sultanate increasingly dependent on the British administration, following the loss of support from genealogical leaders who were opposed to the revolution. In exchange for British support, the sultanate was no longer allowed to arrange deliberations (*bicara*) or settle crucial matters without involving representatives from the British EIC (Ball, 1984, p. 144). As mentioned above, in 1804 the British EIC appointed the incumbent sultan as a salaried local assistant and, in exchange, prohibited him to collect tributes; such tributes had formerly symbolised central-peripheral unity

(Bastin, 1965). This appointment brought two major setbacks for the incumbent sultan. One concerned the loss of support from his people at the bottom, and the other concerned him increasing his peoples' subjugation under the British administration. At the lower structural levels, genealogical and village group leaders remained the symbolic guardians of *adat*, but they were less involved with the British administration. Meanwhile, village leaders (*kepala dusun*) managed to secure important positions. In their respective villages, they simultaneously became *adat* leaders and the main British front-collaborators in supervising the forced cultivation system (Kathirithamby-Wells & Hashim, 1985, p. 16). Figure 3.2.2.1, below, details the local structure before and after the 1789 revolution.

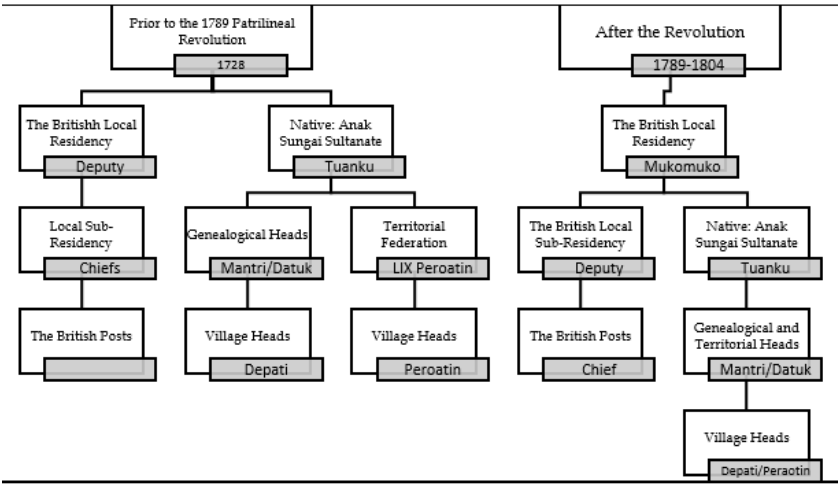

Figure 3.2.2. 1: Native government after the 1789 patrilineal revolution

This figure shows how increasing British interference subjugated the native government to the British administration. It restricted the positions of the sultan and the upper-village federation leaders, i.e. *Mantri*, *Datuk* and *Peroatin*, to the *adat* sphere, the only exceptions being the village leaders. This condition lasted until the British EIC withdrew its deputy and chiefs from Mukomuko in 1820, in an attempt to reduce financial expens-

es. The Company appointed lower officers as replacements, i.e. a supervisor and agents. Ironically, this withdrawal trapped the new administrators in an uncomfortable position. In addition to their predecessors' policy, which weakened the native government, they were poorly equipped, both financially and institutionally. This situation caused a 'vacuum' of power, which led to instability that lasted until the British EIC ceded Bengkulu to the Dutch colonial state in the Anglo-Dutch Treaty of 1824. Even a decade after the transfer, the economics and sociopolitical situation in Mukomuko remained unstable. A number of villages were burned by the inhabitants, plantations were destroyed by cultivators, and the inhabitants themselves were scattered throughout the woods, hindering the monarchical sultanate (Bogaardt, 1958, pp. 30–31). Stability was only restored later, in 1836, when people returned to their home villages and the Mukomuko markets started to attract traders again.

In restoring stability, the Dutch colonial state began by establishing Mukomuko *onderafdeling* as part of the Lebong *afdeling*, while retaining Anak Sungai sultanate as a separate administration for the natives. The Dutch adjusted the sultanate to its *onderafdeling* administration, by dividing the region into five administrative districts and several sub-districts. Given this adjustment, the sultan appointed a *pembarab* in each district, a *depati* or *Peroatin* in each village, and a *pemangku* in each sub-village, under his direct command. Meanwhile, the genealogical heads (*Mantris*), and probably also the leaders of village groupings (*Peroatins*), became less involved and their presence in the sultanate court was merely symbolic (Bogaardt, 1958, pp. 26–27). In this manner, the sultan in power, who was becoming more monarchical, emerged as the sole authority for the natives within the Dutch administration of Mukomuko *onderafdeling*—a status which had been heavily reduced during the time of British interference. Later, in 1862, the colonial state introduced the institution of *marga* to this sultanate as a pseudo-federation of villages headed by a *pasirah*, albeit in Mukomuko the old denomination

of *Mantri* was retained for the position of *pasirah*. This policy revived the old institution of *Mantri* as an intermediary position between the sultan and the villages (Adatrecthbundel VI, 1913, p. 330 and 332); together, they now constituted a hierarchical native government.

Under the *marga* system, the native government remained exclusive and separate from the Dutch administration. Later, the Dutch started to promote *Mantris* as their main local collaborators, rather than choosing the acting sultan or village leaders. This strategy arose from the Dutch bid for a more effective approach, and their lack of sympathy for the existing sultan. Accordingly, the Dutch administration privileged the *Mantris* over village leaders (*depati* and *Peroatin*) whose positions had become less central. As a result, the monarchical sultan, who no longer had the sympathy of either his people or the colonial government, started to lose power, culminating in its dissolution in 1870. From that point onwards, the native government became integrated with the Dutch administration. Meanwhile, the *Mantris*, leading a group of villages and sub-villages, managed to maintain their roles in their respective territories. Nonetheless, little is known about whether the appointment of *Mantri* was arranged according to the traditional succession of *Mantris* and *Peroatins*, or according to the Dutch appointment procedure. If the former were true, the adoption of *marga* was a shift in authority from the sultanate to genealogical and territorial leaders. If the latter were true, the *Mantri* was a mere local assistant to the Dutch. Further research is required on this matter.

In the second half of the 19th century, the institution of *marga* had transformed into a fixed territory with boundaries, under the direct coordination of the Dutch *onderafdeling* of Mukomuko (Colombijn, 2003, p. 2010; Galizia, 1996, p. 41). Figure 3.2.2.2, below, portrays the native government shift from separate to integrated administration.

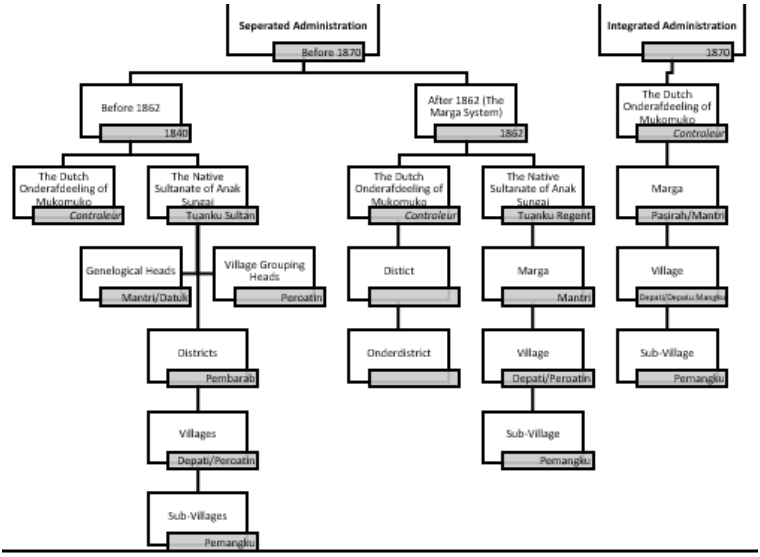

Figure 3.2.2.2: The native administration before and after the sultanate abolition

After this integration, the *marga* leaders served the Dutch *controleur* as their master, up until the Japanese occupation (1942-1945), when the Japanese appointed *gunco* to replace the *controleur*. The *gunco* was responsible for *Gun*, which was 'equivalent' to the Dutch *onderafdeling* and subsumed into the Japanese army zone at Bukit Tinggi. Little is known about the impact of their presence on the native government, but it is likely to have been only slight, considering their 'weak' presence in Bengkulu (Soebadio, 1978, p. 93). After the 1945 proclamation of Indonesian independence, the institution of *marga* was supposed to become integrated with the Indonesian government. However, integration never really happened, because the government perceived it as a feudal and colonial remnant. As a result, the institution of *marga* was gradually done away with. In 1956, the registration of marriages, and the resulting revenues, were transferred from being handled by *marga* to being arranged by the Office of Religious Affairs (KUA). In 1960, the South Sumatra *adat* court, which had been formerly under *marga* jurisdiction, was formally abolished (Lev, 2000, p. 31). In the same year, indi-

vidual and *adat* rights to claim land ownership were overridden by the state, in the name of the public interest, which undoubtedly reduced the economic significance of *marga* (Galizia, 1996). The institution of *marga* eventually disappeared in 1979, when Village Administration Law 5/1979 came into force.

Law 5/1979 replaced the institution of *marga* with *desa* (village), shifted local authority back to village leaders (*kepala desa*), and divided each *desa* into smaller units of *dusun* (sub-village). This denomination, as Galizia suggests, caused much resentment among the people of South Sumatra, because *dusun* was the term they had always used for a whole village. By employing this term to mean a sub-village, they felt that the law devalued their villages. The introduction of *kelurahan* to mean the lowest administrative category in urban areas was even worse, because it symbolised the ongoing *Javanization* of Indonesia (Galizia, 1996, p. 144). In Mukomuko, the terms *kepala desa* (for the leader of a village) and *kepala dusun* (for the leader of a sub-village) were equally misleading. The closest equivalents were *depati* (for *kepala dusun*) and *pemangku* (for a sub-unit leader under *kepala dusun*). Theoretically, the enactment of Law 5/1979 would imply the elevation of *depati* to the rank of *kepala desa* and *pemangku* to the rank of *kepala dusun*. Yet, according to the 1822 *Undang-Undang* of *Moco*, the position of a *pemangku* was 'optional', being appointed to assist a *depati* and not necessarily the head of a sub-unit of *dusun* (Adatrecthbundel VI, 1913, p. 326); therefore, Village Administration Law 5/1979 posed a threat to local elites. However, the 'late' presence of the state enabled leaders of traditional villages to continue their function without much intervention.[69] They remained the *dusun* leaders, in the traditional manner, and the election of a completely new *kepala desa* rarely occurred.

The late presence of the state to Mukomuko and the persisting roles of village elites made the transfer of authority from

[69] Prior to the regional secession of Mukomuko, in 2003, only two sub-regencies and a few village administrations covered an area of 4,037 km^2.

marga to *desa* relatively smooth. Compared to Rejang tribes from the southern hinterland, the Dutch invention of *marga* meant shifting local authority from an autonomous village to a 'pseudo' federation of villages, under the leadership of a single person called the *pasirah*.[70] As a result, local elites disappeared at village level, and the enactment of Law 5/1979 dealt a deadly blow to the institution of *marga* as representing the last remnant of local structures and institutions. Moreover, the Dutch administration, in collaboration with the *pasirah*, codified and introduced several reforms to their customary norms. At first, this codification was rarely used, but later, "along with the major setback of elders and the bureaucratic tendency to rely on written records," it was increasingly perceived as an objective representation of the 'old good' (Galizia, 1996, p. 137). Hence, as well as being estranged from their traditional implementing structures and institutions, the villagers were also estranged from their own norms. However, this was not the case in Mukomuko, where the leaders of traditional villages still played considerable roles under the system of *marga.* This background, coupled with strong genealogical ties between traditional villagers, enabled the villagers and their elites to survive the Village Administration Law 5/1979.

Under the Village Administration Law, the existing *adat* structures and institutions were 'transplanted' into state administration. This appeared (among other things) in the election of *kepala desa* and the appointment of *kepala dusun,* which usually involved elite *adat* members. The involvement of *adat* somehow resulted in mutual benefit. While the village leaders gained legitimacy within *adat*, the elite *adat* members secured their position within the state institution. Such cooperation was crucial for village leaders, who were not only expected to be political leaders but also administrators representing the central government. These expectations were problematic, because state presence in this area was considerably weak, and financial and institutional

[70] Galizia maintains that: "most of the authority ascribed to the *Pasirah* was taken over from a former council of elders (*Tuai Kutai)* where one of them was considered to be wiser and elder but certainly not their ruler." (Galizia, 1996, p. 136)

support was inadequate for supporting both political leadership and administrative representation. Therefore, village leaders would cooperate with the elite *adat* members. Conversely, elite *adat* members would support an incumbent village leader, in exchange for their place within a village administration. However, this mutual cooperation met with challenges when the local government established *Lembaga Adat* (LA, or an *Adat* Institution) in every village, in an attempt to eliminate the influence of *adat* on village administration. We will return to this issue in Chapter 4 (Section 4.2.2). For the time being, this section limits discussion to the trajectory of Mukomuko history, as summarised below.

	The Kingdom Era	The British EIC Era			The Dutch State Era		The Japan Era	The Indonesian Independence				
The Ruling Regimes	Prior to 1691	1691 – 1728	1729 – 1786	1816 – 1825	1825 – 1870	1870 - 1945	1942-1945	1946	1950	1967	1976	2003
	Indrapura Kingdom	The British EIC's Non-Interference Policy	The British EIC's Non-Interference Policy	The British EIC's Interference Policy	The Dutch State's Interference Policy	The Sultanate Abolition	The Japanese Occupation	South Sumatra State	South Sumatra Province	Bengkulu Province	North Bengkulu Regency	Mukomuko Regency
The Status	A Semi-Autonomous Region	An Autonomous Region	Anak Sungai Sultanate	An Occupied Sultanate	An Occupied Sultanate	An *Onderafdeling*	A *Gun*	*Marga* or an Equivalent Institution			Sub-Regencies	A Regency
The Capital	Manjunto	Manjunto	Mukomuko	Mukomuko	Mukomuko	Mukomuko	Mukomuko	Mukomuko			North and South Mukomuko	Mukomuko
Persons in charge	The Minangkabau's Royal Representatives	Raja Adil	Anak Sungai Sultanates			The Dutch *Controleurs*	The Japanese Gun-Tyo	*Pasirah* or *Mantri*			Sub-Regents (*Camat*)	A Regent (*Bupati*)

Figure 3.2.2.3: The trajectory of Mukomuko's history under different regimes

This figure shows how the collapse of the sultanate in 1870 marked a turning point for Mukomuko, as it became a region of little importance. Mukomuko became a 'neglected' *onderafdeling*, supervised by a Dutch *controleur* (G. F. Davidson, 1846, pp. 78–79).[71] The region then became increasingly marginalised under subsequent regimes: the Japanese era (1942-1945), and the early years of Indonesian independence. For nearly 60 years following independence, Mukomuko was a mere sub-regency (*kecamatan*) of North Bengkulu. The pejorative term, *pulau di atas*

[71] In 1919 Mukomuko was an *Onderafdeling* under Lebong *Afdeling (Ingevolge* St. 1991 No. 533), and in 1922 this status was restored (*Ingevolge* St. 1922 No. 66). Apart from being neglected, local affairs were likely dealt with by *pasirahs* and *depatis*, in collaboration with the genealogical representatives (*kaum*) in each sub-village.

pulau (an island upon an island) was often used to highlight its isolation from the surrounding regions. As such, Mukomuko was barely accessible from either Bengkulu in the south or the capital of West-Sumatra in the north. Stretching along its western edge was the Indian Ocean, and its eastern part was Kerinci-Sebelat National Park. This condition enabled the *adat* to remain in full operation among the natives, without much intervention from outside. In Talang Buai village, for instance, even though a village leader was appointed via an election, the elected candidate had to arrange a *bicara* council, in order to gain legitimacy in the eyes of elite *adat* members, by slaughtering a goat and delivering a *khutbah tengah padang* (an *adat* sermon). The village leader would otherwise have remained a mere administrative head, with limited political influence on local people.

Figure 3.2.2.4: A bicara *(deliberation) council to legitimise an elected candidate of* kepala desa*, according to the* adat *(right-hand image: Talang Buai village at noon)*

The unique encounter between the *adat* and the village institution representing the state, was no longer the only feature of Mukomuko. The situation changed when a number of important events started taking place, ranging from mass transmigration, to large-scale plantation development, to the establishment of the Mukomuko regency. As we will see in the following section, these events would all contribute to shaping a contemporary Mukomuko society that is comprised not only of the *adat* community but also a staggering number of migrants, notably from the island of Java.

3.3 Contemporary Mukomuko: Society and Settlements

The previous section has shown that being isolated and neglected was advantageous to the preservation of *adat* among traditional communities in the upstream-downstream (*hulu-hilir*) villages. However, in the final two decades of the 20th century the communities were exposed to a wave of mass migration due to a number of unprecedented events. In the 1980s, Mukomuko became a mass transmigration destination as a result of a number of state-sponsored programmes. In the 1990s, when many private companies started to invest in oil palm and natural rubber, the region experienced rapid growth in large-scale plantations, which attracted migrant workers to settle in the plantation enclaves throughout Mukomuko. In 2003, after a lengthy process starting as early as 1971,[72] Mukomuko gained regional autonomy (*pemekaran daerah*) through the passing of Law 3/2003. This autonomy accelerated the development of the region and attracted even more migrants as job seekers, traders, and the like. As a consequence, Mukomuko has become home to a large number of migrants. According to the 2010 census, 40.37% (or 62,878) of the population were migrants, and 59.63% (or 92,875) were natives.[73] Together, they constitute the so-called local population of contemporary Mukomuko.

Following the establishment of the Mukomuko regency, the existing villages started to grow and most transmigration enclaves became villages. Nowadays, there are 15 sub-regencies, which are divided into 152 independent villages across the region: 148 official villages, three *Kelurahan* (the lowest administrative category for urban areas), and one *Unit Pemukiman Transmigrasi* (Transmigration Settlement Unit, henceforth UPT). In addition, a number of strategic areas have been transformed into market and administrative centres. According to the 2020 census, there are now 43 market centres, with Ipuh, Penarik, Kota Mukomuko

[72] Interviews with Hendra Cipta, a native and learned activist involved in the early days of Mukomuko's secession, Mukomuko, 13 May 2017.

[73] The number of 'migrants' is likely to be even higher, since the second generation of migrants, who were born in Mukomuko, were considered to be natives in this census.

and Lubuk Pinang (and seven more) being the most developed (*Mukomuko Dalam Angka* 2021, p. 187). The developed units eventually became urban centres, where people of different backgrounds live side by side. Therefore, apart from the *hulu-hilir* and enclave settlements, the emerging urban centres are an important feature of Contemporary Mukomuko. By employing these geo-spatial characteristics, Figure 3.3.1 (below) divides the population of Mukomuko into three categories: (1) natives, who live in the upstream-downstream (*hulu-hilir*) villages; (2) migrants, mostly from the island of Java, who are scattered in newly-established villages within the former transmigration enclaves; and, (3) a mixture of categories 1 and 2, residing mostly in the emerging urban centres.

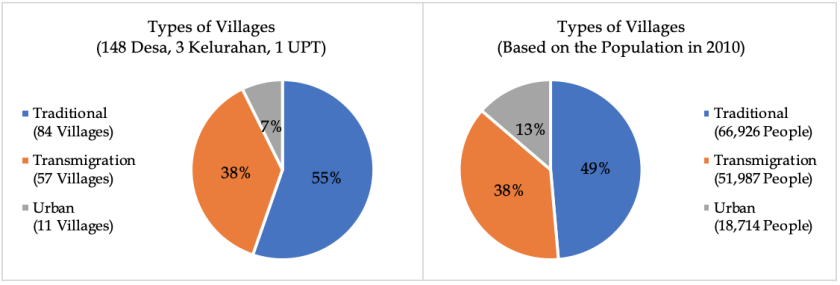

Figure 3.3.1: Typologies of the Mukomuko population (residents of 10-years old and over)

This figure shows that traditional villages constitute more than half of the total villages in contemporary Mukomuko. However, when it comes to the combined population in each village, the 2010 former transmigrant enclaves and urban centre population already outnumbered that of the *hulu-hilir* villages.[74] Unfortunately, I could not confirm this number by using the recent 2020 census, since the equivalent data (including the population in each village) have not been made publicly available. Further

[74] The data I obtained from BPS Mukomuko includes the following criteria: never married; married; divorcees (*cerai hidup*); and widowers and widows (*cerai mati*). This source excludes 18,126 people, who were under ten-years-old at the time, but it still provides a general picture of the spread of the Mukomuko population in each village, over time.

research is required, but I assume that the ratio remains the same, considering the relatively steady rise of the Mukomuko population over the last 10 years. In 2020, the Mukomuko population increased by 22.3 percent, from 155,753 people in 2010 to 190,498 in 2020. This number constitutes 9.47% of the whole population of Bengkulu (or 2,010,670 people) and Mukomuko is the 5th most populous regency out of the ten regencies in Bengkulu (*Mukomuko Dalam Angka* 2021, p. 33). For the time being, this number and trend will suffice to depict that, no matter how different its geo-spatial territories may now be, Mukomuko society can still be classified according to them, as follows: traditional *hulu-hilir,* migrant enclaves, and urban centres. These classifications will help us gain a better understanding of the way in which people conclude marriages and obtain divorces.

3.3.1 The natives and their *hulu-hilir* villages

The *hulu-hilir* geospatial territory is a unique feature of the Malay world. The word *hulu* conveys the meaning 'upstream', and is usually associated with hinterland. Meanwhile, the word *hilir* means 'downstream', designating strategic river-mouth (*kuala*) locations. Etymologically, the word *hulu* is associated with the 'handle' of a *kris*, knife, axe, or similar. This association is perhaps more than coincidental, considering the vital role of the *hulu* for the *hilir*, just like the handle for the *kris* (Kathirithamby-Wells, 1993, p. 80). In the past, *hulu-hilir* integration was maintained through political-economic exchanges in the forms of *serah* and *larangan diraja*. The former constituted "a fixed proportion of a variety of marketable products surrendered to chiefs and appanage (*jajahan*) holders functioning as the ruler's representatives", whereas the latter was "the imposition of a royal monopoly over exotic and valuable forest products" (Kathirithamby-Wells, 1993, p. 82). Apart from being the centre of a polity, the *hilir* was therefore dependent on *hulu* territories, which constituted its appanages but were also relatively autonomous. Thus, *hulu-hilir* unity was fundamental to the viability of the Malayan polity. Otherwise, the central polity at the *hilir* would not be able to extend

its monopoly to include the resource-rich *hulu*, and the *hulu* territories would channel their resources toward a different *hilir* outlet.

By adapting Bronson's hypothesis (Bronson, 1977) to the East Sumatran polities before the mid-19th century, i.e. the Batang Hari river of Jambi, the Musi river of Palembang, Kampar, and the Indragiri rivers of Siak, Kathirithamby-Wells argued:

> "…temporary disruption of upriver-downriver relations was offset by initiatives from the *hulu*. Alternate routes via adjoining river systems were utilised by *hulu* communities to sustain coast-interior trade during periods of tension. Equally, *hulu* co-operation proved imperative for restoring the effective functioning of the *negeri*. These factors contributed to the less coercive and more egalitarian structure of the Malay polity, relative to the mainland agrarian states" (Kathirithamby-Wells, 1993, p. 92).

She adds that, unlike the earlier interpretation of the monopoly that *hilir* had over *hulu* territories (Gullick, 2020), *hulu-hilir* interaction was not mutually exclusive and was in fact "fundamental to the political economy of the Malay world, spanning territories from as far as Barus in west Sumatra to Banjarmassin in Kalimantan" (Kathirithamby-Wells, 1993, p. 91). By shifting the focus on the West Coast of Sumatra, we will encounter the same composition of *hulu* and *hilir* territories, even though their interaction has been shorter and less complex than their equivalents on the East Coast. One aspect specific to Mukomuko is that it was once an alternative outlet to the Jambi hinterlands. Later, however, following the decline of the British EIC ports on the West Coast in the 18th century, Mukomuko became less commercially viable, as people from the hinterlands preferred to channel their resources toward more prosperous market outlets on the East Coast of Sumatra (Kathirithamby-Wells, 1986; Znoj, 1998, 2009). As we can see in Figure 3.3.1.1, below, smaller scale *hulu-hilir* integration remained a defining feature of the geospatial polity of Mukomuko.

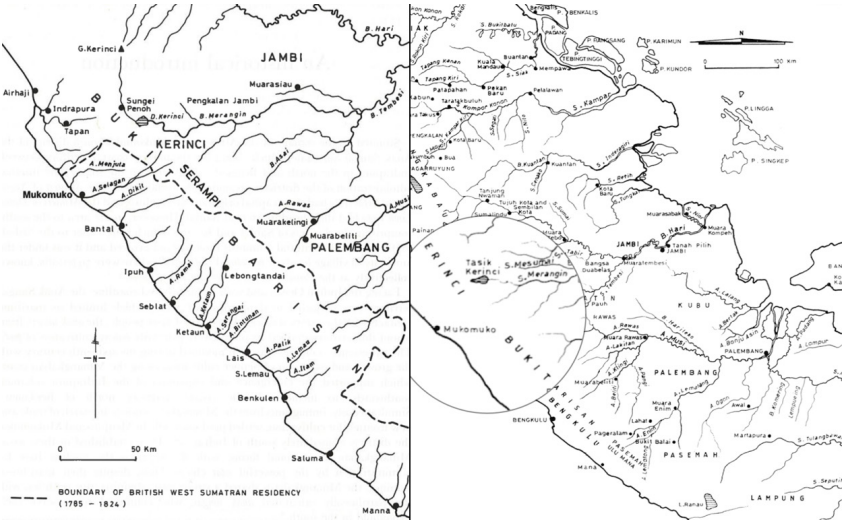

Figure 3.3.1. 1: Smaller scale of hulu-hilir *relations in Mukomuko on the West Coast (lefthand) and the main* hulu-hilir *polities on the East Coast (righthand)*[75]

This figure shows that contemporary Mukomuko can be projected back to the former region of the Anak Sungai sultanate. The name 'Anak Sungai', which means 'a watercourse', reflects the geospatial territories of this region as comprising 'little' *hulu-hilir* units, spanning from the Manjunto river in the north to the Ketahun river in the south. Together, following Hall's line of argument on the formation of Samudra Pasai (Hall, 2001),[76] they fused with Mukomuko into a single polity, the estuary of Selagan river as the capital and its upstream, and the other small *hulu-hilir* units as its appanages. Representatives of each unit were to serve an incumbent sultan, who acted as a *primus inter pares* between them. Meanwhile, the representatives were divided according to their proximity to the royal capital. *Mantri* XIV of the *hulu-hilir* of Man-

[75] The lefthand map was retrieved from "The Syair Mukomuko" (Kathirithamby-Wells & Hashim, 1985, p. 12). The righthand was retrieved from Kathirithamby's adaptation of Bronson's working hypothesis on *hulu-hilir* relations (Bronson, 1977, p. 42; Kathirithamby-Wells, 1993, p. 79).

[76] Writing on Samudra Pasai as the first Islamic polity in Southeast Asia, Hall argued that the newly converted Sultan of Samudra Pasai managed to integrate disparate upstream and downstream clusters into a single polity by mediating (among other things), between Islamic and local beliefs (Hall, 2001).

junto was the first rank after Sultan, while *Mantri* V Koto of Selagan river upstream and the Bantal river *hulu-hilir* was the second rank. The *hulu-hilir* of Ipuh, extending as far as the Ketaun river, were represented by a village leader, i.e. *Peroatin* LIX (see Section 3.2.1 of this chapter; Kathirithamby-Wells & Hashim, 1985, pp. 11–14). This central-peripheral unity started to decline when the British EIC increased its interference in the sultanate, and ended when the Dutch administration abolished the sultanate, in 1870. However, as mentioned above, the elites of *adat* and the *adat* community both managed to survive at village level.

Nowadays, 84 of the 153 villages (54.9%) are *hulu-hilir* villages, whose inhabitants adhere to traditional *adat* (customary norms). In fact, one village does differ from all the others, but overall, and notably in the upstream (*hulu*) villages, *adat* remains strongly observed. In arranging a marriage, for instance, male and female adults perform different tasks, which usually take place on a Friday, when the villagers have a day off work (see Figure 3.3.1.2, below).

I observed a number of wedding rituals, such as *nanam kelapo* (planting a coconut tree) and *khataman* (a final test of Quranic recitation) for the bride (see Figure 3.3.1.3, below). *Nanam kelapo* is a procession, where a bride and a groom exchange coconut seeds and plant them near their future house, not only to symbolise their union but also to provide a sustainable source for the local cuisine that uses considerable amounts of coconut cream. After completing this ritual, as in a registered marriage, the elite members of *adat* invite a Penghulu KUA (an official marriage registrar) to witness the pronouncement of *akad* (a marriage covenant, or contract). Afterwards, usually the night after the *akad*, the 'bride', since she is still not married according to the *adat*, will be required to demonstrate her proficiency in reciting the Qur'an before her tutor. Next, the guests will celebrate her *khataman* with supper and prayer. Only then will the elites of *adat* invite the bridegroom to have a customary title bestowed upon him and formalise the wedding culturally (*bersanding duo*).

Figure 3.3.1.2: Preparation for a wedding feast

While the proper steps of *nanam kelapo*, *khataman*, and *bersanding duo* are usually observed in a first marriage (*cara-gadis*), it is common to bypass them in a second marriage (*cara-randa*). The *cara-randa* refers to the marriage of a widow or divorcee to a bachelor, a widower, or a divorced man. Meanwhile, the marriage of a widower or a divorced man to a maiden still counts as a first marriage. In another village, situated next to a private company estate, weddings are often arranged on weekends, so that the villagers who work at the private estate can participate. In some downstream villages, as in the capital and several market centres, weddings are usually simpler, as the community is already heterogenous, but we will discuss this category later (in Section 3.3.3 of this chapter, on emerging urban centres).

However, no matter how simple the wedding is, membership of a particular clan (*kaum*) is still mandatory for traditional villagers, and their reliance on the *kaum* leader throughout the process is strong. The villagers' reliance on *kaum* and the elite members of *adat* is also observable when marital disputes are resolved and divorces are formalised for daughters. Further, village *Imams*, as a *pegawai syarak* (or a religious functionary), and the elite members of *adat*, will offer help in terminating marriages out-of-court. We will address these subjects in more details in Chapter 4.

Figure 3.3.1. 3: Nanam kelapo and a bride's *khataman*

In the following section, we will discuss another category of Mukomuko society, i.e. migrants, who are scattered throughout transmigration and plantation enclaves. Just like the *hulu-hilir* villagers, enclave migrants have become another unique characteristic of Mukomuko's local population.

3.3.2 The migrants and their enclave villages

The first mass migration in Indonesian history can be traced back to the Dutch colonisation programme, which can be divided into an experimental period (1905-1929) and a post-experimental period (1930-1941). This programme aimed to distribute people from the dense island of Java to more sparsely populated islands, either to develop agriculture (as in Lampung), or to address a shortage of workers in plantations and mines (as in East Sumatra). In Bengkulu, specifically, the migrants were sent to open up uncultivated land, not only in remote areas but also in areas around existing plantations and mines. Therefore, their presence served both purposes: a boost for agriculture and a supply of "coolies" for plantations and mines (Lindayanti, 2006, p. 301).

During the experimental period, migrants in the Bengkulu colonies were dominated by Sundanese people, who arrived between 1907 and 1929 and settled in the Rejang hinterlands and Kepahiang tea plantations, as well as in the Lebong mines.[77] During the post-experimental period, migrants in Bengkulu were

[77] The population of the Sundanese colony increased from 282 people in 1914, to 496 people in 1918 (Lindayanti, 2006, p. 305).

predominantly Javanese. Unlike their predecessors, the Javanese migrants, who arrived between 1930 and 1940, were only involved with agriculture in the Rejang, Lebong, Lais, and Bengkulu regions.[78]

During Japanese occupation (1942-1945), no additional migrants arrived in Bengkulu. People's mobility in Bengkulu only occurred voluntarily within the existing colonies and Japanese forced-labour centres. For instance, many migrants left their colony to seek a job in the Rejang-Lebong gold mines. Otherwise (as experienced by those who stayed), they risked being drafted into Japanese forced labour to build a railway in Palembang (Lindayanti, 2006, p. 307). This situation lasted until the declaration of Indonesian independence in 1945.

From 1945-1950, Dutch (and other European) planters immediately started renovating their plantations. During this period, migrants came from the poorest parts of the *kabupaten* (regency); some from neighbouring *kabupaten*, but no further away. In 1950, Sukarno started dealing with plantations. The main problem with this was that the management was usually still Dutch, and most Indonesians worked in positions below the level of *mandur*. After the nationalisation of Dutch plantations and other foreign companies in 1957/1959, the military (TNI) was recruited to manage the plantations because local people had no training in running a business, even though they knew a lot about the plants. Sugar and tobacco were the first important crops to be nationalised, and other plantations followed (Houben et al., 1999; Sutter, 1959; Wasino, 2018).

In parallel with the nationalisation of national assets (mainly the foreign plantations), the newly independent state of Indonesia, also known as the Old Order (1945-1968), resumed its dispatch of migrants to Bengkulu by launching the 'transmigration' programme in 1950. This period, known as *Pra-Pelita*, ran from 1950 to 1968. Under the New Order (1966-1999), the transmi-

[78] In 1940 there were 31 colonies throughout Bengkulu, with a total population of 7,749 (Lindayanti, 2006, p. 310).

gration programme developed into six batches of *Pembangunan Lima Tahun* (*Pelita*, or the five-year development).[79] Over the course of this period, different groups of people were brought to transmigration enclaves (UPT) outside Java. The dispatching of transmigrants to Bengkulu up until 1985 can be seen in Figure 3.3.2.1, below, but their initial arrival in Mukomuko began during the third batch of *Pelita* (*Pembangunan Lima Tahun,* see the yellow dot in Figure 3.3.2.1). Yana, one of my interlocutors, and other elders from Mukomuko confirmed this; they welcomed the first group of transmigrants in 1980s. Yana told me during my interview: "I still clearly remember their first arrival, when a military shipping plane (Hercules) landed at the emergency airport in Mukomuko, around 1980, carrying transmigrants from Java".[80]

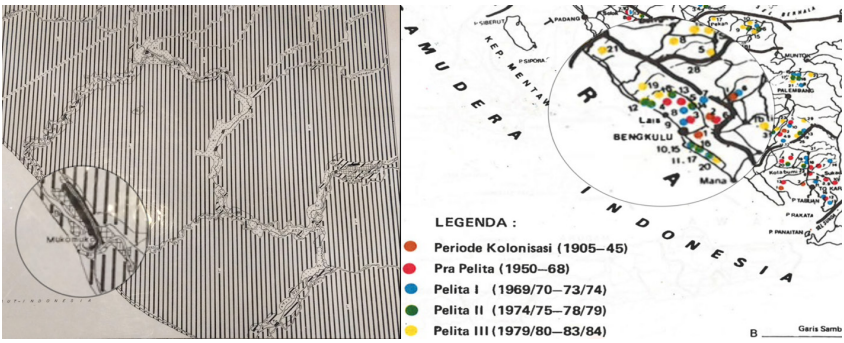

Figure 3.3.2.1: Mukomuko in 1970 and transmigrant expansions 1905-1984[81]

During the subsequent period of Indonesian independence, a number of transmigration units evolved all over Mukomuko via various schemes,[82] from Pelita IV to Pelita VI (1984-1999),

[79] Pelita I (1969-1974), Pelita II (1974-1979), Pelita III (1979 -1984), Pelita IV (1984-1989), Pelita V (1989-1994), and Pelita VI (1994-1999) (*Departemen Transmigrasi* 2008, 20-30).

[80] Interviews with Yana and some elders from Mukomuko and transmigrant villages, on 19 March 2017.

[81] This lefthand map was retrieved from *Direktorat Landuse Departemen Dalam Negeri* 1970, and the shaded part is considered to be forest. The righthand was retrieved from *Transmigrasi di Indonesia, 1905-1985* (Swasono, 1985).

[82] Among these are the Ordinary, Social (a disaster evacuation), *Bedol Desa* (the resettlement of an entire village), *Bangdep*, and Plasma (smallholders within the NES model, or Nucleus Estate and Smallholders – PIR, in Indonesian, or Perkebunan Inti-Plasma for local people, and PIR Trans for migrants) transmigrations.

Reformation (1999-2000), *Gotong Royong* (2001-2003), and Indonesia Bersatu (2004-2014). The most recent unit established (in 2011) is Trans Lapindo, which was created for the victims of the Lapindo mud flow disaster.[83] However, this plan did not work well, following a disappointing visit to the location by victims' representatives. To reach the location, as I experienced myself during my fieldwork, people had to make an at least eight-hour road trip: four to five hours from Bengkulu airport to the nearest intersection, and three hours to the nearest village (Gajah Makmur), then another hour to the settlement. In heavy rain, the journey would require more hours (or even days) to complete, as the road connecting the intersection and the unit would be blocked by mud. Consequently, people refused to migrate to this unit. This led the government to offer the settlement to the general public, under the name of Lubuk Talang. The complexities regarding establishment of this unit are best described in the following figures, which criticise the shortage of productive land in Mukomuko and provide a portrait of Lubuk Talang as a poorly developed transmigration unit.

Figure 3.3.2.2: Lefthand image: Criticism of the large-scale plantation. Righthand image: The Lapindo transmigration unit

In addition to poor access, critics of the establishment of Trans Lapindo have expressed concern about the lack of prior studies on the feasibility of Mukomuko as a destination for more transmigrants. Long before Trans Lapindo, Mukomuko had al-

[83] The disaster was named after the operating company which triggered the mud flow, Lapindo Brantas Ltd. In fact, there was controversy over whether the mud flow was caused by the company's drilling activities or by a natural disaster. Management of the disaster fell to central government, and especially to the company's owner, Aburizal Bakri, who at the time was serving as Indonesian Minister of Welfare (McMichael, 2009).

ready experienced a shortage of uncultivated land, because of the rapid growth of its population and the massive investment of private companies in palm oil and natural rubber plantations. Figure 3.3.2.3, below, shows that 63% of the productive land in Mukomuko in 2019 was already being cultivated by either the inhabitants or private companies. The remaining 37% was not necessarily uncultivated land, because it included public facilities, government assets, and people's residences. The land 'owned' by private companies continued to expand via *Kebun Masyarakat Desa* (KMD, or village plantation) schemes and illegal expansion.[84] Hence, the actual amount of uncultivated land might even be smaller than the previous estimation. As a result, many participants of Trans Lapindo left their units and returned to their places of origin. Those who stayed managed to cope, but they frequently complained about their situation.[85]

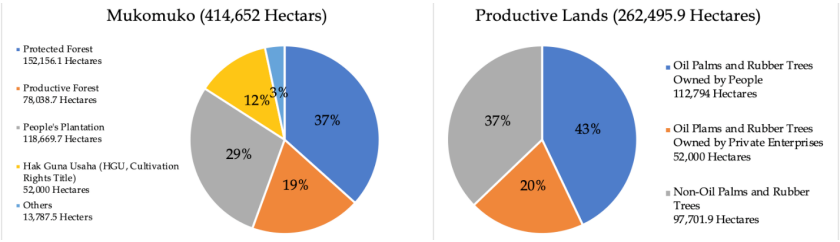

Figure 3.3.2.3: Land use in contemporary Mukomuko (2019)

In parallel with massive transmigration, Mukomuko is home to many migrant workers who came to take up jobs at large-scale plantations owned by private companies. The plantations are dominated by two multinational companies, i.e. *Société Internationale de Plantations et de Finance* (SIPEF), and Anglo-Eastern Plantations (AEP). SIPEF is a Belgian company, which first arrived in 1990, and it controls 22,450 hectares of plantation through a subsidiary company, Tolan Tiga Ltd. This company has two regional management units, namely Agro Muko

[84] For example, an illegal palm oil plantation owned by PT Bina Bumi Sejahtera (Akar Global Inisiatif, 2021).

[85] Complaints were voiced by participants from Central Java, via an online platform (*Lapor Gubernur*), warning people from the province not to come to Mukomuko (Pemerintah Provinsi Jawa Tengah, 2014).

and Mukomuko Agro Sejahtera, which together run 12 palm oil and natural rubber estates (SIPEF, 2022). AEP is a London-based company, which controls 18,525 hectares of palm oil plantations in Bengkulu through a subsidiary company, Alno Agro Utama Ltd. This subsidiary runs two estates in Mukomuko and one estate in North Bengkulu.[86] Together, SIPEF and AEP operate 14 estates across Mukomuko. Each estate designates at least one enclave as a workers' residence.

In addition, several Indonesian companies operate in palm oil, natural rubber, and lumber production.[87] Little is known about the exact size of their respective land and how many estates they run, but in 2019 the local government estimated that one-third (no less than 52,000 hectares) of all plantations in Mukomuko were under the control of private companies.[88] Hence, next to the transmigrant enclaves, Mukomuko has many plantation enclaves.

The spread of migrant enclaves in Mukomuko has introduced a distinctive population group. Unlike the natives, who reside in the *hulu-hilir* villages and adhere to matrilineal tradition, the enclave migrants constitute a unique mixture of people with different sociocultural and religious backgrounds. While adapting to their new settlements, they observe various traditions from their place of origin. In the Pondok Batu village, for instance, the villagers comprise three main groups residing in sub-enclaves: one is made up of migrants from Bali, who adhere to the Hindu religion and Balinese tradition; another is made up of migrants from Java, who are predominantly Muslims and who observe different types of Javanese tradition; and the last is near the Selagan river and is home to natives who are Muslims and observe *adat-pegang-pakai* (traditional usages and customs).

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[86] 2020 Annual Report of Anglo Eastern Plantations Plc.

[87] Including PT. Sapta Sentosa Jaya Abadi, PT. Daria Dharma Pratama, PT Bina Bumi Sejahtera (1,889 hectares), PT Asririmba Wira Bhakti (1,046.31 hectares), Bukit Daun Mas Mukomuko (24.35 hectares), and many others.

[88] In 2014, the local government's request that *Badan Pertanahan Nasional* (BPN, the Ministry of *Agraria*) obtain the actual number of HGU was rejected, because the request was not accompanied by a court instruction (Arianto, 2014).

What a transmigration unit might look like is usually shaped by the type of transmigration occurring, i.e. whether it is *bedol-desa*, *bangdep*, ordinary, social, or plasma (plantation-scheme) transmigration.[89] As an example, *bedol desa* is often more organised than the other types of transmigration. This difference can be attributed to the fact that the *bedol desa* migrants had already developed an 'established' social structure before arriving in Mukomuko, with their own leader and respected figures, and (more importantly) they already knew each other; thus, their migration was more or less a matter of relocation.

Regardless of their differences, all transmigrants share the same struggle to survive hard times in the early years of their arrival, when land needs to be cleared and crops cultivated. However, some plantation migrants have had a slightly different experience, because some companies have provided supportive facilities, such as access to school for children, regular income via a permanent job,[90] and other public facilities. Yet overall, plantation migrants have all been through the same struggles, since they are not landowners. Unlike their fellow transmigrants, who develop in line with the growth of their community and agriculture, plantation migrants remain 'lowly labourers'[91], either as harvesters of palm oil or natural rubber tappers, no matter how long they have been working on the plantation. This is the reason why many plantation workers to stay in their enclaves for as a short period as possible. Among them are newly-married couples seeking a temporary living until they can afford to buy their own land or receive a better income from other sources. The fol-

[89] *Bedol desa* is a transmigration scheme which is usually intended to resettle an entire village due a development project, such as the relocation of a village on Gajah Mungkur Lake in Central Java. *Bangdep* stands for *Transmigrasi Bantuan Departemen* (a ministry-sponsored transmigration), which is intended to increase the populations of existing but sparsely populated villages.

[90] The permanent jobs are usually held by husbands, who are legally required to provide support for their families (as head of the family), while their wives are given casual jobs that are secondary to those of the husbands. This is also observable in West Java, and in many other parts of Indonesia (see Mies Grijns, in her forthcoming PhD thesis).

[91] Palm oil and natural rubber plantations often use family workers, the male head of the household receiving a salary, while his wife and children help to harvest the palm oil fruit. This often happens when people are paid for each piece of work they do (*pekerja lepas*).

lowing story presents an example of how an enclave migrant's background matters and contributes to the way in which they might conclude a marriage.

> During my visit to the KUA of Kota Mukomuko on 21 March 2017, I met Tri and Fitri who were attending a course for candidate spouses or *Kursus Calon Pengantin, Suscatin* (cf. Alimin & Nurlaelawati, 2013, p. 105). The course was presided over by a senior employee, Ibu Yana, who delivered a sermon on proper Islamic marriage and the importance of religion in sustaining a marriage. It turned out that this sermon was her strategy to test the participants' proficiency in basic Islamic teachings. While observing, I was a bit surprised that the bridegroom, Tri, was not able to pronounce a *Šahādah* (statement of faith) properly, or to recite the first *Sūrah* from the Qur'an completely.[92] Not only are the *Šahādah* and the *Sūrah* central to Islam, but it is also common for Indonesian Muslims (and even for their children) to be proficient in reciting and memorising them. After promising Ibu Yana that he would learn on his own, the couple completed the course and managed to proceed to the next step. They would pass the 'test' anyway, since the course was merely a complementary procedure to a registered marriage. This encounter led me to interview the couple after the session, to get to know their background.
>
> Tri was born in 1989 to Javanese parents. The youngest of three siblings, he spent his childhood in a transmigration village in Lampung, until the age of five. In 1994, his entire family migrated to Mukomuko, seeking a better living through a state-sponsored transmigration programme. Soon after the migration, his parents began cultivating palm oil on a two-hectare plot of land, one of which was provided for every household. On a daily basis, Tri's parents worked the land from 7.00 a.m until 5.00 p.m. Meanwhile, Tri and his elder brothers attended the elementary school near their house. Therefore, the children spent their days without the meaningful presence of their parents, who were 7 km away from the house, taking care of the plantation. This routine lasted for at least five years, until the palm oil was ready for its regular harvest. Only then could Tri's parents spend more time at home, but by then Tri was about to graduate from elementary school.
>
> After completing elementary school, Tri attended a junior high school in 2000 and graduated three years later. He then left

[92] *Šahādah* is a declaration in Arabic of *Ašhadu an lā ilāha illa Āllāh wa ašhadu anna Muḥammadan rasūlu Āllāh* ("I bear witness that [there is] no God except Allah, and I bear witness that Muhammad is the messenger of Allah"), whereas the first *Sūrah* from the Qur'an consists of only seven short verses.

school and helped his parents to take care of their land. Apart from helping his parents, he did a number of non-tenure and casual jobs. At the age of 28 Tri proposed to Fitri (23), whom he had been seeing for three years. Fitri is the daughter of a transmigrant mother from Boyolali, Central Java, but her father was born in Mukomuko to transmigrant parents from Java. Just like her fiancé, and to help her parents, Fitri did not pursue senior high school, because her parents as could no longer afford the cost of her education. Besides, the school was quite far away, around an hour from the house. Instead, she worked in different casual jobs in Mukomuko and Pekan Baru, Riau province. She returned to Mukomuko for the proposal and marriage. A week after attending the *Suscatin,* Tri and Fitri had their marriage registered at the KUA in Kota Mukomuko, then stayed with the bride's parents while seeking more stable incomes.

Tri's story is a portrait shared by many children of first-generation migrants, whose parents were 'absent' during their childhood. To capture this phenomenon, Lies Marcoes, in her study on underage marriages in Lombok, coined the term *Yatim Piatu Sosial* (or 'social orphans') to describe such kids (Marcoes & Putri, 2016). They have parents, but they are mainly 'absent' and the children must look after themselves. Compared to the ritual of *khataman* that I attended during an *adat* marriage among the *hulu-hilir* people, Tri's lack of proficiency in reciting Qur'an highlights his poor access to religious education. His parents were busy with their work, and their community had not developed an alternative to the parents being absent. The *khataman* and Tri's case are indeed an extreme comparison. The *khataman* was performed by the daughter of parents from a well-established community, whereas Tri was the son of parents from a less-established transmigrant village. As we have mentioned, there were some transmigrant units where the community was better established and children had access to an informal education, e.g. *TPA, Sanggar,* and *Persantian*,[93] as well as a better formal education.

[93] TPA stands for *Taman Pendidikan Al-Qur'an* (a facility for learning Islamic tenets), whereas *Sanggar* means a studio for learning culture. Besides, there were also TPA-like facilities, i.e. *Persantian,* among the Balinese who adhered to Hinduism. These informal facilities usually helped parents living in villages to ensure that their children were accompanied while they were away working.

Yet, those privileges were absent in Tri's case. Despite the possible differences, the difficulties in the early days of transmigration were shared by all the first generation state-sponsored transmigrants. The survivors were always either the 'fittest', or those who had a greater access to various forms of capital, whether that was economic, cultural, social, or symbolic. As we will see, better access to such capital would contribute to their survival and success in their new land.

By pointing out the issue of class, it is apparent that even though the transmigrants were predominantly a disadvantaged group, some participants were more privileged than others. Among them were civil servants, who were sent as part of a package along with a group of migrants or transmigrants who had family support at their place of origin. While the former had more economic capital, in the form of a regular income, the latter enjoyed greater social capital, in the form of membership of a more privileged and supportive family back home. Therefore, unlike the less privileged transmigrants, the privileged migrants had an alternative option to send their children to more favourable places, early on in their resettlement in Mukomuko. Some sent their children to pursue education in a *pesantren* (an Islamic boarding school), or an academic institution in Java. Others preferred to leave their children with their extended families. Consequently, as Bourdieu suggests, regarding the convertibility of the various forms of capital (Betensky, 2000; Bourdieu, 2011, p. 24; Terdiman, 1987, p. 812), privileged parents managed to concentrate on their land and those with a regular income could even expand it by taking over other people's land at a low price. Meanwhile, their children, having obtained a better education, would someday return to the already established settlement with another form of privilege, i.e. *institutionalised*[94] cultural capital, in the form of an educational qualification. Thus, a transmigration programme must not be viewed as migration to a land of hope

[94] Bourdieu divides cultural capital into three forms, i.e. the *embodied* state, the *objectified* state, and the *institutionalised* state, and educational qualifications belong in the institutionalised category (Bourdieu, 2011, p. 17).

that offers an equal chance for everyone, because it always involves class issues.

The following section looks at places where the natives and migrants, i.e. transmigrants, plantation workers, government employees, and traders, live together side-by-side. Unlike native *hulu-hilir* villages and the transmigration enclaves, this type of settlement is a melting pot for people from different sociocultural backgrounds, religions, and religious sects.

3.3.3 The emerging urban centres

The dispatch of transmigrants across Mukomuko's enclaves was not intended as an exclusive relocation. In establishing a transmigration unit, the government invited the natives to move to these units as well, by allocating them a special quota. At first, the natives were barely interested, but later, as both the population and a shortage of productive land grew, some started to accept the invitation. Their participation generated so-called 'local migrants', who also enjoyed a two-hectare plot of land and an emergency shelter. However, unlike their fellow transmigrants, who perceived the unit as their new home, the natives were only attracted by the land and therefore continued to stay in their village of origin. As a result, integration between the transmigrants and the local migrants failed. Instead, it roused 'false' jealousies and suspicions, with local migrants accusing the transmigrants of causing a shortage in productive land, and the transmigrants becoming suspicious that the native claim on the land was the reason why their unit was so remote. In fact, as already discussed, the natives and transmigrants were both victims of large-scale plantations run by the private companies (as a good comparison, see Paser, in East Kalimantan Bakker, 2009). In this sense, especially since the expansion of private companies in the 1990s, the involvement of natives must be viewed as a government strategy to win local support, rather than to promote integration.

The government's failure to promote integration has caused the natives and migrants to remain exclusively separated. In ad-

dition to the expansion of large-scale plantations, this condition was exacerbated by the construction of modern roads, which did not consider the geospatial aspects of existing settlements. Thus, the transmigration enclaves and the natives' *hulu-hilir*, notably the upstream villages, became even more isolated. In one extreme case, the people of Urei, who lived near the southern border of Mukomuko, became increasingly cornered by the river mouth, following the massive expansion of large-scale plantations and the construction of new roads behind their villages. Unlike the fishermen of the northern regions, the people of Urei were traditional farmers, unfamiliar with making a living from the sea. Consequently, the villagers suffered from the shortage of land and expressed their disappointment to passers-by. During difficult seasons (*musim peceklik*), my research assistants and myself were often stopped by these 'frustrated' villagers, who would ask us for money on our way into Mukomuko. Luckily, we had the advantage of belonging to the same ethnic group, so they allowed us to pass their village safe and sound, after hearing that we spoke their language. This unfriendly experience would have been avoided, if the government had taken the development programme more seriously.

Regardless of the failure to promote integration, the wave of mass transmigration since the 1980s and the expansion of large-scale plantations since the 1990s have brought rapid growth to the population and economy of Mukomuko. In 2003 Mukomuko gained its autonomy, which generated an increase in regional funds, an improvement in public facilities, better access to the surrounding regions, and the establishment of new villages. This autonomy also promoted the establishment of new urban centres, where people of different backgrounds could live side-by-side, in one place. The 2020 census recorded the emergence of 43 market centres across Mukomuko regency, and 11 of them have developed into urban centres (*Mukomuko Dalam Angka* 2021, p. 187).[95] However, long before the establishment of the regency, a

[95] These areas; Tanjung Harapan, Pasar Ipuh, Pulai Payung, Pasar Baru, Pasar Bantal, Penarik, Pasar Mukomuko, Koto Jaya, Bandar Ratu, and Lubuk Pinang.

number of early urban centres existed, including Kota Mukomuko, Ipuh, Lubuk Pinang, and Penarik. While the first three centres originated in downstream native villages, the latter evolved from surrounding transmigration enclaves. Kota Mukomuko and Ipuh were originally the capitals of the former North Mukomuko and South Mukomuko sub-regencies (*kecamatan*). In this manner, the 2003 regional autonomy was merely an accelerating factor for ongoing growth. Together, these emerging urban centres have provided a melting pot for both natives and migrants.

The emergence of urban centres across Mukomuko has caused an inevitable intersection between natives and migrants. On the one hand, the natives had to adapt to the urban situation by making their *adat* adjustable and more inclusive. In doing so, a number of *adat* rituals—such as *tunangan* (courting), *bicara*/*mufakat* (deliberation), *bimbang* (wedding), *khataman*, *masuk* or *terang kaum* (naturalisation), and the appointment of elite members of *adat*—were simplified, so that the fellow members of *adat* would not feel a burden to observe them. Likewise, the natives developed a specific clan, namely *Kaum Gresik*, for general migrants, whereas those with a Minangkabau connection could integrate with the natives by entering (*terang-kaum*) the local clan group (*kaum*) corresponding to their clan of origin. Only then could a migrant's full membership of the *adat* community be acknowledged. In fact, in performing several rituals, such as reciting a particular prayer,[96] a member of one clan was sometimes more privileged than the others, but in general they enjoyed equal rights. In this respect, the malleability of their *adat* and the development of naturalisation as an inclusive procedure allowed both natives and migrants to integrate voluntarily into urban centres.

Meanwhile, internally, the spread of urban settlements also witnessed a number of urban natives challenging the *adat.*[97]

[96] For example, the people of Talang Buai give the *Beginde* clan the privilege of leading an *adat* ceremony, because the clan was the first group to make the land open in the past.

[97] The elite members of *adat* consist of three elements: (*orang-tigo-jenis*), i.e. leaders of *kaum*; *pegawai syarak* (religious functionaries); and a *penghulu*, who acts as *a primus in*

Among them were 'puritan' Muslims, who questioned the competence of *pegawai syarak* (the *adat*'s religious functionaries) in performing their tasks. During an interview, my interlocutors complained that the members of *pegawai syarak* from their urban village hardly appeared in the mosque, and were only interested in religious ceremonies that yielded revenue for them. Unlike their *hulu-hilir* counterparts, the members of *pegawai syarak* in the urban areas were elected arbitrarily, and they were not necessarily the most pious and learned members.[98] Some of the urban natives also began to deviate from their *adat*. Justice seekers, mainly male members, appeared before the state Islamic court to obtain a greater share of their joint-marital property (*harta-sepencarian*) or inheritance. This deviation must be viewed as an attempt to gain greater benefit by shifting a claim from matrilineal *adat* to the state's patriarchally-inclined law. We will return to these subjects later, in subsequent chapters, i.e. Chapter 4 (on the native, or Mukomuko, matrilineal community and their *adat*) and Chapter 5 (on Mukomuko's local population and the competent Islamic courts).

On the other hand, migrants have developed different strategies to adapt to living alongside urban natives. Some prefer to mingle with the natives through naturalisation, either through a *masuk kaum* or *terang kaum* (further discussion on this subject is available in Chapter 4). Others prefer to establish their own ethnic group. Among such groups are Minangkabau migrants, who assembled in *Ikatan Keluarga Minang* (IKM, an association of Minangkabau families), and several other emerging ethnic groups: the Javanese, Sundanese, Batak, Lembak Delapan, South Sumatran, and Pasma Serawai associations (Bengkulu Eskpress, 2020). There are also individuals who prefer not to join any group, such as migrant workers who live in exclusive urban clusters (*perumahan*), excluded from native social affairs.

In 2020, the Mukomuko local government introduced an ambitious policy to transform the existing *Badan Musyawarah*

pares between them. We will discuss the evolution of the *orang-tigo-jenis* later in Chapter 4.

[98] An interview with the Madani mosque's congregation on 22 March 2017.

Adat (BMA, a Deliberative Council of *Adat*) into an umbrella organisation. In doing so, the government preferred to appoint a representative of *Kaum Gresik*, a clan designated for migrants, as leader of the BMA, instead of a representative from one of the native clan groups. However, rather than accelerating the integration, this policy received refusals from the natives (mainly their elites), who perceived the move as symbolic violence against their *adat*.

Figure 3.3.3.1: Lefthand image: A Reog dance performance (originally from Ponorogo, East Java) in present day Mukomuko. Righthand image: The 2020 BMA
(retrieved from Referensi Publik, 2020)

Another salient feature from the urban centres is the widespread practice of cross-ethnic marriages, either between a native and a migrant, or between two migrants of different ethnic backgrounds. Concerning native-migrant marriages, it makes a difference whether a person gets married to a native's daughter or a native's son. The difference is that the former usually means a greater chance for the native to integrate with the migrants than the latter. This can be attributed to the nature of the marriage, which adheres to matrilineal and uxorilocal (matrilocal) principles. According to these principles, genealogy descends through the maternal line, and a husband is required to live with his wife's family. The husband is like a guest, overshadowed by the male members of his wife's family. Consequently, this causes female members of the *adat* community to prefer marrying either a native or a naturalised native; otherwise, she will lose her cultural privilege. The other way around, it allows a male member of *adat* to enjoy greater

freedom to choose either to marry a native, a naturalised native, or a migrant, without necessarily losing his privilege in his maternal family. However, following the growth of urban centres and more sources of income, it is increasingly accepted for wives to follow their husband, if the husband has the better job.

From this description it can be inferred that urban centres are more inclusive in terms of the diversity of their population, when compared to the exclusive *hulu-hilir* and enclave settlements. Moreover, the interaction between such diverse people appears more often in cross-ethnic marriages and the emergence of cosmopolitan Mukomuko, which comprises many different cultural backgrounds and traditions. For a glimpse of its heterogeneity, see Figure 3.3.3.1 (above) on the Javanese origin performance of a Reog dance in contemporary Mukomuko.

3.4 Concluding Remarks

This chapter has shown the heterogeneity of Mukomuko's society. Its population is comprised of natives from *hulu-hilir* villages, migrants from transmigration and plantation enclaves, and a mixture of natives and migrants from emerging urban centres. Apart from being diverse, these communities adhere to different forms of local norm, which have been developed and maintained throughout the course of their respective histories. While the natives observe their matrilineal *adat*, which was derived from Minangkabau, the migrants—comprising transmigrants from state-sponsored transmigration units, migrant workers from large-scale palm oil and natural rubber plantations, and more recent migrants arriving at Mukomuko for jobs, trading, and the like—observe more diverse non-state norms, from their place of origin. Meanwhile, with the exception of non-Muslims, both the natives and migrants are governed by the same state law for marriage and divorce. In this manner, Mukomuko's society is mixed in nature, and it is shaped by different forms of non-state norms and state law for marriage and divorce. The unique composition of Mukomuko society, and its pluri-norms for

marriage and divorce, provide a perfect case for my sociolegal study on how the corresponding state law functions at local level.

As I have discussed, the *hulu-hilir* villagers and enclave migrants remain exclusively bound by their respective local norms. While the former concludes their marriages and obtain their divorces according to the native matrilineal *adat*, the latter adheres to more diverse local norms, informed by their own *adat* from their place of origin, religious provisions, or simply the state law. Exceptions are arising in emerging urban centres, where people of different backgrounds live side-by-side. The mixture of natives and migrants in these centres has made an intersection between them inevitable. This intersection leads to integration through naturalisation and gives rise to a number of (structural) conflicts concerning marriage and divorce. There are conflicts between different forms of local norms, and conflicts between the existing local norms and state law. The first occurs at societal level and involves local elites, whereas the second mainly occurs at the state Islamic court and involves state actors. With regard to the state's agenda, the unique case of Mukomuko shed light on the necessity to consider local conditions to promote legal reforms in the field of marriage and divorce. I will return to these subjects in great detail later on, in chapters 4 and 5.

In subsequent chapters I will look at how the people of Mukomuko conclude marriages, resolve marital disputes, and obtain divorces. I will also look at prominent actors, who are involved throughout the process. The discussion will predominantly focus on the natives, in relation, *first*, to their local peers in Mukomuko and, *second*, to their use of state laws and institutions.

4

Semendo Tradition: Marriage and Divorce among *Hulu-Hilir* People in Contemporary Mukomuko

4.1 Introduction

The previous chapter showed that Mukomuko is primarily defined geographically, rather than ethnolinguistically or culturally. Mukomuko's population comprises: (1) *hulu-hilir* people, a blend of Minangkabau descendants from the north and southern Mukomuko locals,[99] who live in the *hulu-hilir* (upstream-downstream) villages; (2) migrants, mostly from the island of Java, who are scattered throughout several enclaves that are either private plantations or state-sponsored for transmigration; and (3) urban people, a mixture of the former and latter, who reside mainly in emerging urban centres. Together, they constitute the so-called local people of contemporary Mukomuko. In arranging marriage and divorce, the *hulu-hilir* people predominantly refer to their matrilineal *adat* as being from Minangkabau, while migrants often bring various traditions from their place of origin with them. In urban centres the two groups live side by side while observing their respective traditions, but encounters between them are inevitable. Their encounters mostly occur in cross-ethnic marriages, meaning a marriage between a *hulu-hilir* inhabitant and a migrant, or a marriage between two migrants with different ethnic backgrounds. While the former is usually an Islamic marriage, since the *hulu-hilir* people are Muslims, the latter may occur between non-Muslims and is therefore not necessarily an Islamic marriage.

This background shows that, other than being diverse and adhering to a different set of norms, the local people of Mukomu-

[99] The *hulu-hilir* people are traditional villagers from the former regions of XIX Koto, V Koto, and LIX Peroatin, and they adhere to a *semendo adat*. Henceforth, the term *hulu-hilir* must not be confused with the term 'traditional villager', although the terms are used interchangeably in this chapter.

ko may intermingle with one another cross-ethnically. Their customary norms, notably the matrilineal *adat* observed by the *hulu-hilir* people, serve as living laws, which are distinguished from the state law that is intended to apply nationwide. This context means possible (structural) conflicts may arise from the diverging norms or laws. With regard to marriage and divorce among the *hulu-hilir* people, conflict revolves around how customary norms which are equivalent to the state law, i.e. *semendo adat*,[100] manifest in practice. In other words: How do the *hulu-hilir* people adjust their own norms to the presence of both migrants and the state? And: What are conflicts might arise from the diverging norms or laws? As we will see in this chapter, the people of Mukomuko remain partly matrilineal. Matrilineal tradition, as manifested in the *semendo adat*, continues to shape marriages and divorces among *hulu-hilir* villagers. Nonetheless, some of the traditional villagers are beginning to deviate from this tradition, particularly when they no longer live in their village of origin.

To further understand this phenomenon, this chapter delves into the experiences of traditional villagers in concluding a marriage and obtaining a divorce. In doing so, I look at two main concepts, i.e. a *semendo* marriage and a *semendo* divorce. These concepts will be linked with some important elements of matrilineal tradition, such as *antaran* and *mahar* (bride price), *harta-sepencarian* (joint-marital property), and alimony. Each concept and element will be discussed chronologically, by featuring relevant cases I encountered during my fieldwork. While the chronological overview examines continuities and changes, the cases featured provide a picture of their manifestation in everyday practice. This discussion leads to a conclusion that *semendo* marriage and divorce are living (discursive) 'traditions'[101] among the *hulu-hilir*

[100] The term *semendo adat* refers to customary norms observed by the *hulu-hilir* people of Mukomuko. Equivalent terms are *adat-pegang-pakai* (usages and customs) and matrilineal *adat*. Although other terms, (notably, matrilineal *adat*) may sound more familiar, the term *semendo adat* has often been used specifically to mean matrilineal *adat* in Mukomuko, in literature on the customary norms of Bengkulu (Adatrecthbundel VI, 1913; Bogaardt, 1958; Marsden, 1811; Moyer, 1975).

[101] Discursive tradition is a concept adapted by Talal Asad, who wrote about the anthropology of Islam. As he put it, "a tradition consists essentially of discourses that seek to instruct

people in their villages, and are 'differentiated'[102] from state law and other non-state norms. However, *semendo* marriage and divorce are now increasingly being contested. In addition to some villagers already beginning to deviate from them, the local government is trying to eliminate *semendo* elements and figures from the village administration, by imposing *Lembaga Adat* (LA, or an *Adat* Institution) at every village, which will undoubtedly reduce recognition of the *semendo adat* as a living tradition.

The following discussion begins with the institutionalisation of *Adat-Pegang-Pakai* (customs and usages) in traditional villages, and the recent invention of *Lembaga Adat* in each village. Next, the discussion deals with the functioning of *semendo* marriage and *semendo* divorce among traditional villagers. Before exploring these topics in more detail, a brief overview of the *semendo* tradition will first be presented.

4.2 *Semendo* Tradition and *Adat-Pegang-Pakai* in Traditional Villages

The earliest source I could find regarding Mukomuko *adat* is the *Undang-Undang* of *Moco*, dating back to the period 1696-1760.[103]

practitioners regarding the correct form and purpose of a given practice that, precisely because it is established, has a history. These discourses relate conceptually to a past and a future through a present."(Asad, 2009, p. 20) In this respect, *semendo* marriage and divorce can be perceived as discursive traditions, because not only can they be linked conceptually to the past through current practice among traditional villagers, but they can also be useful in anticipating the future.

[102] The term 'differentiated' is adapted from a concept within the sociology of law, i.e. differentiation, which means "the existence in a social group of secondary rules creating social roles for the performance of a particular task" (Griffiths, 2017, p. 103). By employing this concept, the *semendo* tradition is perceived as a living law, differentiated from other sources of social control of marriage and divorce, such as a state law, religious law, or other customary laws. Together, they operate in a continuum scale - from the ultimate zero point of 'less differentiated' to the infinite point of 'more differentiated'. I use this concept to avoid a binary approach, which often divides empirical laws (norms) into merely formal v. informal or legal v. non-legal, rather than treating them as a continuum scale (Abel, 2017; Griffiths, 2017; Platt, 2017).

[My] operational adaptation from this concept is available in Figure 4.3.1.1. Here, the concept of differentiation is distinguished from another concept with the same naming, i.e. 'legal differentiation', used by Bedner. He defines legal differentiation as "a process in which an official attaches different consequence to the same act or the same constellation of facts for one group of persons or an individual than for another" (Bedner 2017). While Griffith aims to conceptualise an object of empirical study in law, Bedner focusses on a process, or how to consider different forms of laws, i.e. customary and state laws, in practice.

[103] The *Undang-Undang* source is dated as having been written during the reign of Raja Pa-

This source was written in Malay, from a recitation by Singa Maharajah of Munjoto, the oldest *mantri* at the time and the only person capable of reciting the *Undang-Undang* in its entirety. This writing comprises measured prose, broken into stanzas and recited as verse. In 1822, this source was translated into English and published as *The Undang-Undang* of *Moco* (Farmers, 1822, p. 1). This *Undang-Undang* emphasises the worldly nature of a custom that evolved alongside human development under the sovereign of Minangkabau.[104] By 'custom', this *Undang-Undang* means the Minangkabau traditions of *Katumanggungan* and *Parpatih-nan-Sabatan*, and those related to *Tuanku* (*raja*) decrees (Farmers, 1822, p. 6). In the latter source, a *Tuanku* maintains the balance between an 'absolute' power and a 'propriety' ethic, when delivering a decree. This balance is best described in the following excerpts from this *Undang-Undang*:

> *"Tuanku (raja) is the key to the law. If he calls black white, it is white. On the contrary, if he calls white black, it is black." However, in exercising his 'absolute' power, a Tuanku maintains what is proper. "He is required to seek what is just and right, to lean toward the law of the 'Shuroo'." As an allegory, this source describes several of the qualities of a Tuanku. "He is skilled in the science of physiognomy and the knowledge of character, sagacious in comprehending the real object of all that is said, whether open or secret, seeing that the great are envious, and the old are malevolent." (Farmers, 1822, p. 6).*

An example of *Tuanku's* decree mentioned in this source was the collection of a yearly tribute from *peroatin* villages (*dusun*). Each village from this region had to present one bamboo of rice, one bowl of poultry, a one dollar bill, and a packet of *siri* and betel nuts to the *Tuanku* in power at the end of year

sisir (1696-1760), the son of Padusi of Indrapura, "...the mother of the present Tuanku." The content of this *Undang-Undang* shows that it was recited before a transmitter from the British East India Company during the reign of Sultan Hidayatullah (1816-1832), not long before its publication in 1882 (Farmers, 1822, p. 14; Kathirithamby-Wells, 1976, p. 79).

[104] "While the humankind's condition is from God, custom is from Adam" (Farmers, 1822, p. 1). In other sources, Minangkabau's *adat* is divided into several categories: *Adat sebenar adat*, *adat yang diadatkan*, *adat yang teradat*, and *adat istiadat*. While the first category is taken from and granted by God, the remaining categories are human-made (BMA Mukomuko 2005; Navis, 1984).

(Farmers, 1822, p. 12; Marsden, 1811, p. 353). This tribute was made mandatory as compensation for the death of the Raja of Indrapura, who had been killed at Urei, one of the *peroatin* territories. For this deed, all *peroatin* territories were collectively held responsible, which justified the collection of a tribute. If this had not been the case, the tribute would be considered arbitrary and against the very principle of their *adat*, i.e. deliberation (*bicara*), through which a decision was agreed by the *Tuanku* himself, as well as the *mantris* and *peroatins*. It was mentioned in this source that "… (the tribute) is not an innovation or new institution, but agreeable to a custom of ancient standing derived from the Darat (Minangkabau mainland)" (Farmers, 1822, p. 12). This example sheds light on the communal nature of Mukomuko *adat*. A clan bore the responsibility for the deeds of its members, while recognition for an individual subject depended on his or her membership of a clan (Navis, 1984, p. 109). Equally important to such communality was the institution of *bicara* serving as a means for decision making.

The institution of *bicara*, which literally means a 'talk', was a means of deliberation for the local elite, and it was comprised of the *tuaku*, *mantris* and *peroatins.* The *tuanku* held symbolic authority as 'the key to the law', but he did not have the power to enact laws on his own. Instead, he relied on the above-mentioned elites and *bicara* assembly (Ball, 1984, p. 144). In this manner, the institution served as a source of legitimacy for the *tuanku*, who had to collaborate with other elites to enact new laws. During the British EIC presence, the *bicara* assembly became liable to British intervention as mediator, and later it became increasingly co-opted and placed under British influence. In arranging an assembly, for example, the incumbent sultan had to ask for approval from the British chief, acting as their 'lord' at the time, but who would have been a mere mediator prior to the 1789 patrilineal revolution (Ball, 1984, p. 144; Veevers, 2013, p. 696). Despite the British increasing their control of the region, their interference was mostly concerned with economic and criminal matters, such

as the introduction of forced cultivation and the abolition of *bangon* (or blood money). This attitude allowed local elites to remain in charge on *adat* matters, such as marriage and divorce, even though (in some ways) *adat* remained subject to intervention by the company, as seen in the restriction of people's participation in royal weddings.

The company's increasing penetration posed a serious threat to the existence of *adat* assembly (*bicara*), but the nature of this institution as a bottom-up assembly allowed it to survive outside of this interference. By bottom-up, I mean that such assembly existed not only at the sultanate and supra-village levels, but also at the lower village level (*dusun*). Even though the sultanate eventually died out in 1870, *bicara* assembly managed to survive as an authoritative body among the natives. It survived at the village level via an assembly of '*orang adat*' (elite *adat* members), comprising *kaum* (clan) heads and elders, sub-village heads, and religious functionaries. Together, they became the guardians of *adat-pegang-pakai* (traditional customs and usages). Their roles are still observable to this day, among people in traditional villages. Not only do they preserve the application of customs and usages, they also adjust them to changing needs and situations. In this sense, their *adat-pegang-pakai* appears to be a lived *adat*, preserved and adapted to changing situations in their respective village. This explains the emergence of different modes of usages and customs in different villages, although most still refer to the traditional *adat-pegang-pakai*, descended from past Mukomuko. The preservation of *adat* also manifests in the application of *kerja-baik-kerja-buruk* (good and bad social events).

The concept of *kerja-baik-kerja-buruk* has become the core of Mukomuko *adat*. It serves as a general guideline for how a community should deal with important events, such as birth, marriage and death. These events are divided into two categories: one is *kerja-baik* (good events, such as birth and marriage), and the other is *kerja-buruk* (bad events, such as death). In the first category public participation tends to be passive, while in

the second category participation is active. In celebrating a marriage ceremony, for instance, people will not participate unless invited, but people will get involved automatically in taking care of a dead person. To arrange such events properly, a host—such as a bride or groom (for a marriage), or a widow or widower (for a funeral)—should involve *kaum* (genealogical) leaders, who act on his/her behalf. Supposing that the host arranges one such event without involving the *kaums*. In that case, the public will not participate and the host (and his or her clan) will not be allowed to arrange the event according to proper village customs. Furthermore, the whole clan will be excluded from *adat* events, and their participation will be restored only if they redeem the sanctioned *adat* fines.[105] In this regard, *kerja-baik-kerja-buruk* serves as a form of social legitimacy, which is instrumental to the preservation of *adat* among traditional villagers.

The perpetuating roles of *orang adat* and people's dependency upon them in arranging *kerja-baik-kerja-buruk* have contributed to the unique practice of *adat* in contemporary Mukomuko. In light of their unique tradition, I will look in particular at how the traditional villagers conclude a marriage and how they obtain a divorce. Their experiences in this regard will be viewed from the matrilineal tradition, such as *semendo* marriage and divorce, bride-price (*mahar*), *antaran*, uxorilocal, duo-local, and *harta-sepencarian* or joint-marital property. The discussion will also consider their encounters with migrants, and the state's increasing presence. These inquiries will shed light on the ways in which traditional villagers practice their *adat* and how they adapt to the changing situation. Beforehand, we will look at an overview of one of the traditional villages, and a recent debate that occurred there concerning the 'invention' of BMA (at regency level) and LA (at village level).

[105] In the case of a death, people will participate only in the compulsory processions of a funeral, such as the burial, but will not be involved in non-compulsory processions, such as congregational prayers (*tahlilan*) and praying at the host's house (*shalat jamaah*).

4.2.1 Ethnographic evidence: a view from Talang Buai village[106]

Talang Buai is a traditional village, located upstream (*hulu*) on the Selagan river. The river has long served as a transportation route, connecting the village with downstream (*hilir*) areas, which now form the capital of Mukomuko. Lying at a distance of 45 km from the central regency of Mukomuko, nowadays the village can be reached by motorbike or car in 1.5 hours.

In the past, Talang Buai was the name of a plateau which served as farmland for people living on the lowland banks of the Selagan river, now known as Old Jerinjing village. The village was often hit by floods, and in 1983, a year after flash flooding, the inhabitants were relocated to a new place, called New Jerinjing, via state-sponsored social transmigration. Yet, New Jerinjing's position was not geographically strategic, as the villagers now had to cross the river and walk for quite a distance to reach their farms and rice fields. In 1989, this situation led half the population to migrate to the Talang Buai plateau, which was right next to their fields. A year later, this new settlement was integrated, as a sub-village, into the New Jerinjing village. Afterwards, Talang Buai sub-village developed into two sub-villages (Talang Buai I, and Talang Buai II), but it remained part of New Jerinjing. Only later, in 2007, did these sub-units separate from New Jerinjing to form an independent village called Talang Buai village, which now comprises three sub-villages with a population of 1,181.

Prior to the establishment of this village, the people had developed a unique composition of sub-village structures and institutions. Each person belongs to one of 11 extended families, called *kaum*.[107] Their membership is determined genealogically, according to a 'simplified' principle of Minangkabau matriliny, in which an individual is a member of his/her mother's family,

[106] Interviews with Maadas (the elder in Kaum Datuk Baginde), Muslim (the elder in Kaum Datuk Koto Bayan), and other elders in Talang Buai, 15 April 2017.

[107] Namely: *Kaum Koto Pinang I, Kaum Koto Pinang II, Kaum Koto Pinang III, Kaum Koto Pinang IV, Kaum Koto Pinang V, Kaum Datuk Beginde I, Kaum Datuk Beginde II, Kaum Datuk Bayan atau Kaum VI di Hulu, Kaum VI di Hilir, Kaum XIV*, and *Kaum Suko Rajo.*

called *seibu*. Above this group is a broader matrilineal grouping, called (*se*)*perut* (womb). Several *peruts* constitute a *kaum*, which is led by the *kaum* leader and guided by an *orang-tua-kaum* (a *kaum* elder). The *kaum* leader was appointed by all the members of the *kaum*, whereas the *orang-tua-kaum* position was often held by a former *kaum* leader. In this way, the *kaum* leader served as a ' cultural broker' for its members when arranging a marriage, funeral, feast, or when resolving disputes, etc. (cf. Geertz, 1960; Horikoshi, 1987). The *orang-tua-kaum,* who is usually the most respected and learned person regarding *adat*, but not necessarily the oldest person in the community, provided guidance for the incumbent head of *kaum.* At the sub-village level, the existing *kaums* appointed leaders of sub-villages and *pegawai syara* (religious functionaries); the latter position is held by each of the representatives of the 11 *kaums* in turn (*bergiliran*). The representatives are selected internally, through deliberation within each *kaum* at their respective house.[108]

As concerns the sub-village leadership posts, namely *dusun* I and *dusun* II, the representatives on duty served their terms for three years before they were replaced by the remaining representatives. With regard to religious functionary posts, there were four main functions: *Imam*, *Khatib*, *Bilal Muhsin*, and *Bilal Jum'at*.[109] These positions were arranged hierarchically. The representatives from the 11 *kaums* rotated their positions after a three-year term in each position, but the appointed representative on duty would serve these positions step-by-step, for a total of 12 years, starting with *Bilal Jum'at, Bilal Muhsin*, *Khatib*, and eventually *Imam*. At the village level, the *kaum* heads and elders, the sub-village heads, and the religious functionaries constituted a 'triangle' of *orang adat*, symbolically led by the village leader of New Jerinjing. The triangle of *orang adat* was comparable to the Minangkabau's *orang tigo*

[108] Each *kaum* has its own house, now in Talang Buai and separate from the private houses of its members. The shape of a *kaum* house resembles that of a *mushallah* in a Javanese village.

[109] Interviews with Maskur (the current *Imam*), Syska Aranto (the current *Bilal Jum'at*), Sukri (the former *Imam*), and other elders in Talang Buai, 1 May 2017.

jenis institutional actors, which were three types of people): the Penghulu, the *Imam-Khatib* (the religious dignitaries), and the *orang banyak* (the mass). This triangle, as Abdullah maintained, became increasingly assimilated after the Padri movement became widespread in the early 18th century, because the movement formalised the religious dignitaries as an integral part of the *orang tigo jenis* (Abdullah, 1966, p. 15, 2010, p. xxxii; Huda, 2013, p. 231). Yet, in Talang Buai, the religious functionaries were appointed from among the genealogical groups or *kaums*, not from a separate social entity.

Since the establishment of Talang Buai village in 2007, the elite members of *orang adat* have adapted their positions to the new administration. Now, the leader of the village is elected directly by individual voters, but the candidate who wins the election is considered a mere administrative representative. To gain legitimacy as a leader of people, especially among *orang adat*, the elected candidate must perform an *adat* sanction ceremony, by slaughtering a goat. He must also relinquish the appointment of sub-village heads to *orang adat* who will distribute these posts among *kaum* representatives. Only then does the leader of village gain political legitimacy among the people. After completing the *adat* ceremony, the village leader will deliver a speech in *khutbah tengah padang*, held a day after the celebration of Islamic Eid, symbolically representing the higher authority, just like a local *raja* (king). Meanwhile, the existing religious functionaries remain the same as in former times, appointed to serve a three-year term in each post hierarchically: *Bilal Jum'at, Bilal Muhsin*, *Khatib*, and eventually *Imam*. Together, the *kaum* heads and elders, religious functionaries, and the village and sub-village leaders constitute the highest authority in the village, with the village leader acting as *primus inter pares* between them. Together, they participate in *Badan Permusyawaratan Desa* (the BPD, or village parliament), as well as in marriage ceremonies, divorces, dispute resolution, etc. Their engagement in the fields of marriage and divorce will be addressed later.

The hybrid mode of *adat* and the village government is still observable to this day. For example, with the support of *orang adat*, the village leader might expand the application of an *adat* sanction – namely, an exclusion from *kerja-baik-kerja-buruk* - to those who have not paid off their arrears on a village-owned cash loan. In one case, an individual who had threatened the village leader was subjected to an *adat* fine, despite the fact that the individual and the village leader himself had reconciled. The individual was still subjected to the fine, because the threat was perceived as going beyond the village leader, to offend the whole village community and the dignity of its *adat*. In this sense, support for *orang adat* is instrumental to a village leader's (political) legitimacy. Conversely, elite members of *adat* gain benefit through their involvement in village administration. Both the religious functionaries and the sub-village leaders receive regular income from the state,[110] and from the *kaum* leaders involved in preparing the administration of marriages and receiving the resulting revenue. Nevertheless, such hybrid structures and institutions are now at a crossroad, because of increasing intervention from the Mukomuko regency local government. The local government intervened by imposing a single institution, *Badan Musyawarah Adat* (the BMA, or deliberative council of *adat*), across the region.

4.2.2 The invention of *Badan Musyawarah Adat* (BMA)

Every traditional village develops its own distinctive approach to reconciling its *adat* with outside influences. In this manner, *adat* as a living norm evolves within the community and develops through encounters with the changing regimes and policies from outside. Following the 2003 secession of Mukomuko, the local Mukomuko regency government transformed several *dusun* (sub-villages) into self-contained villages. This transformation led the people (notably, the *orang adat*) to adjust their position to the new village administration. The Sibak and Pondok Baru villages, for instance, developed a unique method for select-

[110] Peraturan Daerah (Bylaw) 5/2012 of Mukomuko formally allocated a monthly income for religious functionaries and sub-village leaders, but Peraturan Daerah 5/2019 later revoked this allocation.

ing village leader candidates. They rotate the candidacy among the existing *kaums*, implying that the election is a competition between candidates from the same *kaum*. Thus, members of the remaining *kaums* have to wait their turn and, for the time being, participate as voters only. By contrast, in Penarik, Bandar Ratu, and Ipuh villages (which now form market centres and the administrative capital of Mukomuko), *orang adat* are becoming less involved in the village election process. Yet, *orang adat* still have considerable daily influence on villagers, because they secure their traditional position in tandem with the village administrators.[111] Either way, i.e. integrated or separated, there are always two authoritative bodies in every traditional village. One is the *orang adat*[112], and the other is made up of village officers.

The state-*adat* unique encounter in traditional villages has strengthened the state's legitimacy for the villagers and preserved *adat* as a lived custom. Nonetheless, this situation is about to change, as the first Regent of Mukomuko, Ichwan Yunus (2005-2015) invented the BMA institution for the regency and sub-regency levels. An appeal to form *Lembaga Adat* (LA, or *Adat* Institution), for each village, followed. The formation of LA means the introduction of an alien institution, rather than accommodation of the existing institution of *adat.* In fact, as a lived institution, Mukomuko *adat* grew from the bottom up and developed as a hybrid institution, through unique cooperation between the village politicians and village administrators. By contrast, the institution of LA derives from above, imposed and projected by the local government as a separate institution from the village administration. Thus, the institutionalisation of LA poses a serious threat to the autonomy of individual villages' *adat*. In migrant villages the creation of LA is equally problematic, because the equivalent institution for *adat* is not available. Hence, the government's ap-

[111] Interview with H. Bustari at Bandar Ratu village, on 19 March 2017.

[112] Concerning the reference to *orang adat*, some traditional villages (such as Bandar Ratu and Pasar Mukomuko) retain the former terminology, i.e. *Penghulu Adat*. Unlike *orang adat* - an assemblage of *kaum* leaders and representatives – an appointed *Penghulu Adat* is the supreme *Adat* leader, who serves as a *primus inter pares* among the existing *kaum* leaders within a traditional village, or *kelurahan*.

peal to create BMA and LA, coupled with inadequate financial support,[113] is no more than lip service from politicians, and it evaporates immediately without making any significant impact.

The invention of BMA and LA demonstrates the ongoing unification of *adat* in Mukomuko. It occurs through "an imposition of 'official' *adat* on a 'living' *adat* (cf. Pirie, 2013, p. 50)."[114] Ironically, this policy was driven by inadequate understanding of the functioning of *adat* among villagers. In a deliberation I attended on 1 January 2018, at Talang Buai, there was intense debate concerning the position of *orang adat* within the village administration. The debate was triggered by the village leader's bid to appoint sub-village leaders on his own, by invoking the Village Organisation Government Law 6/2014, which requires all village functionaries to hold (minimum) a senior high school diploma. Accordingly, the village leader argued that the incumbent heads of sub-villages (who represent *adat*) should be replaced, because they did not hold a high school diploma. He added that better qualified candidates, i.e. candidates of the younger generation, who do not necessarily represent *adat*, should be prioritised. After the debate, it was decided that the existing sub-village leaders would serve until the end of their terms. Afterwards, they would be replaced by someone the village leader would choose, and *orang adat* would shift to the institution of LA. All expenses arising from LA institution would be charged to the village apparatus, implying that *orang adat* (the acting LA at the time) would no longer receive a regular income.

The outcome of this meeting disappointed the *orang adat.* One of them told me, "*Kito ini dapat kerjonyo bae dan jangan sa-*

[113] In Article 1 point (L) of the Regent Regulation 6/2011 the BMA institution is associated with other semi-governmental organisations, such as PMI (the Indonesian Red Cross), *Pramuka* (the Scouts), Dharma Wanita, etc. This regulation stipulates (in Article 5) that the government may support these organisations financially, via *hibah* (grant), *bantuan sosial* (*bansos*, social assistance), or other mechanisms, which are deducted mainly from regional budgets (ABPD). However, the allocation is just a programme, rather than a sustained form of support, and it may change according to the wishes of the incumbent regent.

[114] In Peter Just's review article (Just, 1992, p. 379; Vincent, 1990), Joan Vincent employs two terms for the same purpose, i.e. 'customary law', and 'folk law'. While the former is equivalent to the official *adat*, the latter corresponds to the lived *adat* (see also an excellent discussion on "adat law" and "living law" in Bedner, 2021, pp. 378–380).

lah kalau besok ado yang minta tolong kito suruh ke kades" ("We just get the work. Don't blame us if someday we refuse to get involved and instead let people ask the village leader for help"). Basically, the village leader could have avoided the debate, by maintaining the established cooperation with *adat* when appointing sub-village leaders, while also introducing a required qualification. However, it was apparent from the outset that the village leader's intention was to discharge *orang adat* and to promote the institution of LA instead, as compensation. His administrative superior, the leader of Selagan Raya sub-regency, who delivered an opening speech at the meeting, said "*sekarang orang dusun sudah pintar-pintar dan bisa memisahkan urusan adat dengan desa*" ("now, people are becoming smarter and managing to separate *adat* from village affairs"). His statement associates the villagers' strong adherence to *adat* with backwardness; it is a stereotypical and degrading statement. The statement reflects the government's lack of understanding of the functioning of *adat* in traditional villages, which ultimately resulted in their inclination to create LA as a separate institution. This misunderstanding will be demonstrated in the following section, on the roles of *adat* and its elite members in arranging marriage and divorce in traditional villages.

4.3 *Semendo* Marriage

The British 1822 *Undang-Undang* of *Moco* does not explicitly mention any practical guidelines for marriage. Nevertheless, according to the Dutch 1840 description of Mukomuko by Bogaardt, the natives' inclination towards Minangkabau tradition suggested that the nature of their marriage was *semendo* and adhered to clan-exogamous, uxorilocal, and duo-local principles. Under this type of marriage: *first*, an individual might only marry heterosexually with a person from outside of his or her own clan (clan-exogamy); *second*, the groom should settle at the house of the bride's parents, after the marriage (uxorilocality); *third*, the husband remains attached to his maternal family and works in

his ancestral family in the daytime, but it is also common that he shares his labour between the two families and returns to his wife's house in the evening (duo-locality).

As an exception, there was also another mode of marriage, called *sando-gong.* In this type of marriage, "a husband took a pledge and his wife was bound to him by debt, in which case he alone had the right to sue for the divorce and the children were his. In the event of death, he could give the woman her freedom, but if he had not made this known promptly before his death, then the woman and children remained in debt to the husband's family" (Bogaardt, 1958, p. 35). In this sense, as Bogaardt put it, *"sando-gong* can be called slavery in the broadest sense of the word since under this designation the lord of the pledge has the power to do with his pledgee whatever he chooses …. then neither the family of the lord nor the judge has any recourse against the master, as he has claim to the *bangon* or the blood money" (Bogaardt, 1958, pp. 31–32). This option was often preferred by a groom, to avoid possible disagreements arising from a *semendo* marriage. As a result of this marriage, the wife would follow her husband to live in his *dusun*, and she was no longer entitled to matrilineal claims to her family. Accordingly, Article 73 of the 1862 *Undang-Undang* of Moko stipulated that a wife who lived at her husband's *dusun* belonged to him, and the children resulting from the marriage were also his alone. If the husband passed away, the wife was expected to remain in her husband's *dusun*. If the widow remarried, she had to follow her new husband, and the children would be returned to their biological father's family.

In this manner, a marriage by *semendo* appeared to the norm while a *sando-gong* marriage was the exception. This corresponds to the 1910 *Oendang-Oendang* of *Onderafdeeling Moeko-Moeko*, which clearly stipulated (in Article 7) *semendo* as the proper form of marriage.[115] Even though the 1962 *Un-*

[115] This *Oendang-Oendang* is an amendment to the 1862 *Undang-Undang*, made in 1909 on the initiative of O.I. Helfrich, an incumbent resident of Bengkulu. The reason for this amendment was to accommodate critics of the 1862 *Undang-Undang* that was considered to go against living usages and customs (Hoesin, 1985, p. 229).

dang-Undang is no longer in force for contemporary Mukomuko, elements of *semendo* marriage are still observable as a general norm, whereas marriage by *sando-gong* is perceived as a deviation from *adat*. Moreover, if a couple prefers to marry either according to the state law only, or religiously without reference to *adat* procedures, they will not be allowed to arrange the wedding publicly in their village. Their parents, notably the bride's parents, will be excluded from *kerja-baik-kerja-buruk* and only after paying an *adat* fine will their social rights be restored. However, it should be noted that the level of adherence to *adat* differs from one place to another. Still, the majority of people observe proper *adat* by considering the marriage itself not only a matter between the couple themselves, but also between their two extended families. A couple may easily avoid *adat* by concluding their marriage at an Office of Religious Affairs (*Kantor Urusan Agama,* KUA) and residing outside the bride's village after their marriage, but the bride's parents will bear both the shame and the *adat* fines.

The following sub-sections look at how *semendo* marriage manifests among the *hulu-hilir* villagers in contemporary Mukomuko, who are Muslims abiding by *semendo-adat* (which is at once matrilineal and Islamic). The first section provides an overview of *semendo* marriage, the institution of *masuk kaum* (naturalisation), and different types of *semendo* marriage. The discussion then proceeds with some important concepts, such as the position of *antaran* and *mahar* in *semendo* tradition*.* The last section discusses a case concerning the interpretation of *mahar* and *antaran.*

4.3.1 An overview of marriage in traditional villages

The previous section suggested that one of the key principles of *semendo* marriage is clan-exogamy. According to this principle, a proper marriage is between individuals of different clans, but membership of a particular clan is mandatory in order to make such marriage possible (cf. "nagari-edogamy", the term used by F. von Benda-Beckmann & von Benda-Beckmann, 2013, p. 13). Given this restriction, the *semendo* marriage is ex-

clusive to members of the existing matrilineal clans. However, a foreigner, who does not belong to any *kaum*, may be naturalised via a *masuk kaum* institution. This institution serves as a means to accommodate a foreigner - notably, a prospective groom to a daughter of one of the *hulu-hilir* people - by integrating him into *adat*.[116] After completing the *masuk kaum* processions, the foreigner's *kaum* host will bestow an *adat* title on him, which is necessary to make him eligible for an *adat* marriage. As a result, *semendo* marriage becomes both 'closed' and 'open'. By closed, I mean that clan exogamy remains the general norm. By open, I refer to the possibility of an outsider being naturalised into an *adat* community through the institution of *masuk kaum.* In this manner, the institution of *masuk kaum* keeps the very principle of clan-exogamy intact, as well as malleable in terms of possible encounters with outsiders in cross-ethnic marriages.

In theory, there are three types of *masuk kaum* (naturalisation), i.e. *ameh bertopo, lukah,* and *mencekam*.[117] *Ameh bertopo* is a ceremony of allegiance between people of different clans. The parties are to utter an oath "not persecute each other", and to slaughter a goat which is then served with *punjung kuning* (turmeric rice, topped with grilled chicken) and *punjung putih* (glutinous rice and curry). *Lukah* is a ceremony designed for an individual who is willing to become a member of a particular *kaum*. The ceremony is held by serving a banquet like that for the *ameh bertopo*, and uttering an oath of allegiance to the *orang tua* (respected elders) of the *kaum* he is about to enter. After completing the procession, he is bestowed with a customary title from the host *kaum*. *Mencekam* is an option for a person who is seeking temporary shelter. The person is required to slaughter a chicken which is then served with *punjung kuning punjung putih,* but he/she is not entitled to a customary title, unless the person already bears a matrilineal title from his/her own origin. In naturalising

[116] I observed these procedures being applied to a male migrant before his marriage to a woman of Mukomuko origin. However, there is also a trend for candidates of political parties to go through these procedures, in order to gain people's sympathy, i.e. their electoral favour.

[117] BMA Mukomuko 2005, 6.

a foreign bridegroom, *adat* offers either *masuk kaum* (by *lukah*) or *masuk kaum* (by *mencekam*). While the former is available for foreign bridegrooms, in general the latter is only for prospective grooms of Minangkabau descendants. Nowadays, people simply refer to the former as *masuk kaum* and the latter as *terang kaum*. In some cases, mainly to reduce expenses, the ceremony is simplified, and the usual banquet for *terang kaum* (*mencekam)* is considered sufficient for *masuk kaum* (*lukah)*, while the person is still eligible for a customary title.

The institutionalisation of *masuk kaum* has reduced the exclusivity of clan-exogamy in *semendo* marriages. It enables the *adat* of *semendo* to survive as a general norm, as well as accommodating cross-ethnic marriages between female clan members and outsiders. In addition, the *adat* sets out several steps for *semendo* marriage: *batanyo* (visit), *batunang* (engagement),[118] *rembuk ninik-mamak* (deliberation), *bimbang* (wedding), *balik makan* (dinner), and *doa nanggal-subang* (final prayer). The *batunang* step is optional, although it is not customarily recommended to skip this form of engagement in a first marriage. Regarding *bimbang*, the *adat* introduces three options: i.e. *bimbang kecik* (small), *bimbang menengah* (medium), and *bimbang gedang* (large),[119] and it is up to the bride's family to decide which to choose. Regardless of the types of *bimbang*, the *adat* of *semendo* requires a first marriage (namely, *cara-gadis*) to meet all the prescribed steps above. Nonetheless, the *adat* also enables a more simplified procedure for a second marriage, which is known as *cara-randa.* In this second option*,* a widow or divorced woman may remarry directly after she and her family have accepted a bridegroom's proposal, without necessarily arranging an engagement or celebrating a wedding or *bimbang*.

[118] This step, which is also known as *terang* (declaration), used to be very popular, albeit not mandatory. Accordingly, the 1862 *Undang-Undang* of Mukomuko formulated several provisions on this matter, from Articles 80 to 84 (Adatrecthbundel VI, 1913, pp. 348–349).

[119] In a small *bimbang*, the host arranges a banquet with chicken on the main menu, and the celebration is only for one day. In a medium *bimbang*, the host serves a feast for the guests, with goat as the main menu, and the celebration takes one to two days. In a large *bimbang*, the host slaughters a buffalo and serves it as the main menu, and the celebration takes one to seven days (BMA Mukomuko 2005, 3).

While *cara-randa* appears to make a second marriage easier, it is important to note that this procedure still requires the marriage to meet *semendo* principles. A bridegroom must be part of an outside *kaum* (clan-exogamy), and a divorcee bride must be properly divorced, either in court or in *adat*. Only then will the members of *orang adat* be able to proceed their marriage. In one unusual case, there was a divorced woman who had obtained neither a judicial nor an *adat* divorce. She wanted to get married for the second time, to a man from an outside village, but the man did not belong to a *kaum*. *Orang adat* refused to proceed her marriage, but she insisted on the marriage by asking for help from her relatives. Eventually, some elders from her *kaum* agreed. On the date of the marriage, which I attended, she prepared a modest banquet for the guests, and the elders were ready to solemnise the marriage, but unfortunately the bridegroom did not show up. One of the elders told me when we left her house, "If had observed *adat*, the bride's host *kaum* would have been accountable for his disappearance". However, this was not the case, since the marriage plan had been against *adat* in the first place. She was both disappointed by the bridegroom and blamed by her *kaum* for being reckless and disrespecting *adat*.

Another aspect of *adat* marriage concerns the different fees set for the *cara-gadis* and *cara-randa* procedures. In Talang Buai village, the *orang adat* council determines a sum of 1,350,000 rupiahs for a *cara-gadis* marriage, which includes 600,000 rupiahs for a registration fee to KUA, and 1,000,000 rupiahs for *cara-randa*, excluding the registration fee. In this regard, the *adat* fee for a *cara-randa* is more expensive than the equivalent for a *cara-gadis.*[120] The village *Imam* explained that the higher fee for

[120] While the amount for each functionary differs from time to time, and from one village to another, the recipients mostly correspond to the functionaries stipulated in the 1910 *Oendang-Oendang Adat Lembaga* of *Onderaafdeeling Moeko*, in Article 34 (Hoesin, 1985, p. 219). The following allocations specify the fees for *cara-randa* marriage in the present-day Talang Buai:

The total fee for *cara-gadis* to *orang adat* is 750,000 rupiahs. It includes: (1). *Pegawai syara'*: 80,000 rupiahs for Imam, and 120,000 rupiahs for *Khatib*, *Bilal Muhsin*, *Bilal Jum'at*, and *Gharim* (30,000); (2). Village Officers: 75,000 for *Kades*, 75,000 rupiahs for three *Kadus* (IDR. 25,000), 20,000 for *Channang*; (3). *Kaum*: 120,000 rupiahs from the bride and groom to the *kaum* leaders (IDR. 60.000); 30,000 rupiahs for Imam *Kaum* (a

cara-randa is attributed to the higher risks involved, because the majority of *cara-randa* marriages are not registered. According to Articles 1 (2) and 3 (3) of Law 22/1946, only a *penghulu* (registrar) appointed by the Ministry of Religious Affairs (MoRA) may act as a registrar in a Muslim marriage, and an informal *penghulu* will face either imprisonment (of a maximum period of three months) or a legal fine of 100 rupiahs. Given the devaluation of rupiahs from the 1950s onwards, the established fine is now very low and has ceased to have a deterrent effect. Nonetheless, there was a case in Agung Jaya village (an example of a migrant village) in which a religious figure was brought before local police after he solemnised an unregistered marriage.[121] The police warned him not to repeat the action, then released him. However, since then, he has refused to act as an informal *penghulu.*

Despite the legal risk, some informal *penghulus* (notably, in traditional villages) continue to solemnise unregistered marriages (cf. Alimin & Nurlaelawati, 2013, p. 85; Rais, 2019). In 2016, the Regional Office of MoRA in Mukomuko recorded 2,031 unregistered couples for an *isbat nikah massal* (a mass retroactive validation of marriage), 67 of which originated in Talang Buai village, but unfortunately the programme was cancelled because of funding shortages.[122] Another survey I conducted in 2017 revealed that 83 couples in Talang Buai were in marriages that were not their first marriage, although none had obtained a formal divorce from the Islamic court prior to remarrying.[123] In the period 2016-2020 the court recorded only two divorce cases in this village. Both cases were filed by civil servants residing in the village, but they were no longer residents at the time of survey. The survey

female), 50,000 for a fixed *mahar*; (4). Wedding functionaries: 40,000 rupiahs for two *akad* witnesses (IDR 20,000) and 40,000 rupiahs for the village elders who were present; and, (5). 100,000 rupiahs for a donation to the village mosque.

[121] Interviews with Wahib and his father, a religious figure in Agung Jaya village, 13 April 2017.

[122] Interview with Hermaini, the leader of the Mukomuko BIMAS (*Bimbingan Masyarakat*), 09 March 2017.

[123] It is possible that some people were on their second marriage because their first spouse had died, rather than because they had got divorced. Nonetheless, my interlocutors, i.e. the *dusun* leaders, assured me that the couples had all concluded their current marriages by divorcing their previous spouse.

suggested a higher number of unregistered marriages, because there were couples who had registered their previous marriage but had divorced out-of-court and, for legal reasons, could not participate in the mass *isbat* programme. The actual number was probably even bigger, considering that some divorcees had remarried more than twice. In Talang Buai village, this account proved the role of the local *Imam* as an informal *penghulu*, given the villagers' reliance on him to solemnise an unregistered marriage according to either *adat* or *cara-randa*.

The perpetuating role of the local *Imam*, in this regard, concerns not only solemnising an unregistered marriage but also 'formalising' an out-of-court divorce. Prior to the procession of *cara-randa*, a woman (usually a neglected wife) must ask the incumbent *Imam* to terminate her previous marriage; only then may she proceed to an *adat* or *cara-randa* marriage (for more detail, see Section 4.4 of this chapter). In this case, the *Imam* argued that his role is to provide help, not to gain benefit from those who are unable to remarry formally, by law.[124] He would indeed receive a higher fee from a *cara-randa* than a *cara-gadis*, but (as he put it) the difference was not significant when it came to the actual cost. *Cara-gadis* requires much more expense at each step – notably, for the arrangement of a *bimbang* (wedding) - whereas *cara-randa* already includes all expenses. In this sense, the risk is higher than the benefit. At a societal level, the practice of *cara-randa* as an unregistered marriage is also socially acceptable. Solar, one of my interlocutors, once told me about his step-daughter, "We feel helped if there is someone willing to marry and support our divorced daughter".[125] At the time, his step daughter was on her third divorce, and he did not want to complicate matters for her, by going through all the stages of *cara-gadis*, were she to remarry in future.

From this overview, it can be inferred that a *semendo* marriage, notably *cara-randa,* provides an alternative for those who cannot afford a registered marriage, because of either legal or

[124] Interview with Maskur, the incumbent *Imam* of Talang Buai, 6 May 2017.

[125] Interview with Solar, at Talang Buai, 5 May 2017.

non-legal barriers. Concerning such legal barriers, an example is given of leeway being offered to an out-of-court divorcee who wanted to remarry, but could not access the Islamic court. It serves the same function for those who are in their first marriage, but who are constrained by restrictions prescribed by the marriage law, such as legal restrictions concerning underage marriage and informal polygamy. Concerning non-legal barriers, a *semendo* marriage becomes a shortcut for those who cannot access the proper registration procedure (i.e. the registration costs and other administrative requirements), or those who perceive registration to be unnecessary, such as people who are on their second marriage or are elderly. Either way, registered or unregistered, a *semendo* marriage proffers a social legitimacy that is not necessarily contrary to state marriage. Moreover, *semendo* marriage is distinct from a mere informal marriage. As *semendo* marriage is religiously and customarily valid, it is more 'differentiated'[126] than a mere religious marriage or informal union, in general. The following figure illustrates the status of *semendo* marriage compared with other types of marriage.

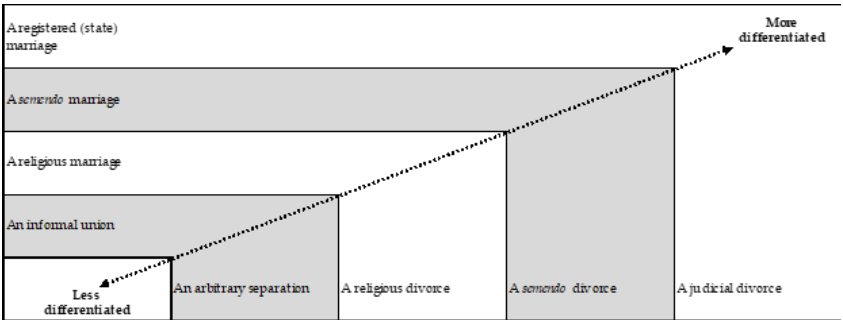

Figure 4.3.1.1: Different types of marriage and dissolution, on a continuum

This figure suggests that a registered or state marriage is different from other marriages, but that a *semendo* marriage is also different from a mere religious marriage and an informal union, and so on. Nonetheless, the distinction is not always clear.

[126] Here, the term 'differentiated' is used to mean "the existence in a social group of secondary rules creating social roles for the performance of a particular task" (Griffiths, 2017, p. 103).

Since the Islamic court has extended the application of *isbat nikah* to validate unregistered marriages retroactively, registration is not the only means via which a marriage can be recognised even though not all unregistered marriages are legible for such retroactive validation (see the limits of *isbat nikah* in Chapter 2 Section 2.2.3.2). In line with this development, the Civil Registry Office in Mukomuko will now accept a *Surat Pernyataan Tanggung Jawab Mutlak* (SPTJM, or 'letter of absolute responsibility') in exchange for a marriage certificate.[127] This policy enables the office to issue certain civil documents, such as birth certificates and family cards, without being constrained by an applicant's marriage status. Conversely, *hulu-hilir* villagers often choose *semendo* marriage as a popular alternative, for being culturally and religiously valid. Therefore, to better understand the various types of marriage in Mukomuko, they must not be reduced to a binary of formal versus informal marriages.

To avoid the binary approach, I distinguish the various types of marriage in this society according to their level of 'differentiation' (cf. Abel, 2017; Griffiths, 2017). Together, they operate on 'a continuum scale' (Platt, 2017, pp. 6–9), from the ultimate zero point of 'less differentiated' to the infinite point of 'more differentiated'. In this manner, an informal union and a registered marriage must be viewed as the least and the most differentiated marriages, respectively, whereas religious and *semendo* marriages both fall between the two extremes. It is important to note that I draw this level of differentiation based on my observations of local culture that appears in the everyday practices of marriage among members of Mukomuko's matrilineal community. Contrary to this local-based classification, a different classification would emerge supposed the various types of marriage I present in Figure 4.3.1.1 were classified according to a common and accepted part of the state legal system. For instance, a registered

[127] This policy is based on the Ministry of Home Affairs Regulation 9/2016 *jo.* Regulation 108/2019. Before this regulation was passed, the issuance of a birth certificate, family card, and other important civil documents depended on whether or not a person's marriage was registered. Now that this condition has been revoked, one can obtain these documents simply by presenting a SPTJM to the Civil Registry Office.

marriage between members of the same clan will not be culturally accepted in Mukomuko but fully recognized within the state legal system, if in accordance with Islamic norms. Likewise, a religiously unregistered marriage between members of the same clan will not be culturally accepted either even though such marriage is recognizable to the state law through a cumulative proses of *isbat nikah* at the Islamic court and registration at the KUA.

Departing from this overview of marriage in traditional villages, the following section deals specifically with *semendo* marriage among traditional villagers. It looks at some important elements of *semendo* marriage, and how these actually manifest in practice.

4.3.2 *Antaran* and *mahar* ('bride price')

One important feature of *semendo* marriage is that the position of *mahar*. Bogaardt posits the non-existence of *mahar* in *semendo* marriage. In his account, the strict application of *semendo* marriage was observed in royal marriages, in which a man would propose to the daughter of a raja. In this case, the bridegroom would have to pay nothing, and would live with his bride and her family after the wedding. However, an exception applied for a man proposing to a commoner, and he would customarily be required to provide *antaran* for his bride. He was to provide eight chickens, a fighting cock, one guilder, 10 kulaks (equivalent to 30 litres) of white rice, and ƒ4, for his future wife. Alternatively, the separate expenses could be replaced with the sum of ƒ8 (Bogaardt, 1958, p. 34). The word *antaran* derives from *antar belanjo*. While *antar* means 'carrying' or 'bearing', *belanjo* means 'expenses'. In this sense, the term could have been shortened to *belanjo* (expenses), but the term *antaran*—with an additional syllable 'an' to make it a noun in the Malay language—was perceived to be more proper, and better for maintaining a sense of politeness (Adatrecthbundel VI, 1913, pp. 290–292). This choice was likely attributed to the nature of *semendo* marriage, which does not put price 'tags' on daughters, even though, in practice,

the expenses were sometimes 'comparable' to *mahar* (a 'bride price') in non-*semendo* marriages. However, compared to the usual amount of *mahar* in a *jujur* marriage among the southern tribes,[128] the above amount of *antaran* was still nominal, or very low.

Regarding the amount of *antaran*, in 1862 the Dutch codified several rules for the people of Mukomuko, under the name of *Undang-Undang* of *Moko Moko*. Although the code retained the British moniker from the 1822 codification, its content was completely different. The Dutch colonial state modified several existing usages and customs, and stipulated some new *adat* laws.[129] Among the reforms were restrictions on the maximum amount of *antaran,* which in this source was used interchangeably with the term *mahar*.[130] The restrictions hardly make sense, since the 1840s description regarding Mukomuko revealed that the amount of *antaran* was already very nominal. However, the reason for enacting these rules becomes clear when we look at the 1807 description of the native *adat* for Bengkulu, rather than looking at Mukomuko, which at the time had its own law (Adatrecthbundel VI, 1913, p. 290). This account described three kinds of marriage in Bengkulu: *semendo*, *jujur* and *semendo-ambil-anak*.[131] In a *semendo* marriage it was customary for a man to send a sum of money to his bride, as *antaran.* The amount was determined according to the rank of the bride's family: $100 for a royal family (such as *Pangeran*, *Diong*, and *Radden*), $40 for *Datuk* families, and $20 for families of lower rank. In this regard, Dutch

[128] "The *jujur* is a certain sum of money, given by one man to another, as consideration for the person of his daughter, whose situation, in this case, differs not much from that of a slave to the man she marries, and to his family" (Marsden's History, 1811, p 257).

[129] The term *adat* law refers to the codified local usage and customs. This term was first used by C. Snouck Hurgronje, and further elaborated by Van Vollenhoven to mean "the totality of the rules of conduct for natives and foreign Orientals that have, on the one hand, sanctions (therefore: law) and, on the other, are not codified (therefore: adat)" (Adatrecthbundel VI, 1913; F. von Benda-Beckmann & von Benda-Beckmann, 2011, p. 171).

[130] *Empat puluh rupiah* (ƒ 40) for the daughter of a raja (in Article 59), *dua puluh rupiah* (ƒ 20) for the daughter of a *mantri* who was proposed to by a man of lower rank (in Article 60), *lima belas rupiah* (ƒ 15) for the daughter of a *mantri* (in Article 61), and *sepuluh rupiah* (ƒ 10) for the daughter of a commoner (in Article 62).

[131] Thorough explanations of *jujur* and *semendo ambil anak* marriages can be found in Moyer's structural analysis, in *'the logic of the laws'* (Moyer, 1975).

restrictions on the maximum amount of *antaran* for Mukomuko people were likely based on a false generalisation between *semendo* marriage in Bengkulu and the equivalent in Mukomuko.

This false generalisation also blurred the distinction between the payment of *antaran* and *mahar*. The concept of *antaran* is based on the idea that all *bimbang* (wedding) expenses should be borne jointly by a bride and bridegroom. Assuming that their respective share had already been agreed in an *adat* council, they had to abide by the agreement. If such an agreement was not available, it was also customary to divide wedding expenses as follows: 1/3 for a bridegroom and 2/3 for a bride. In this manner, all bridegroom expenses represented *antaran.* His portion was further classified, according to the time of payment. The payment was called *boontal kadoot* if a bridegroom paid his portion before the wedding, but it was called *charroh* if he postponed the payment (Adatrecthbundel VI, 1913, p. 293). If a marriage ended in divorce, a husband had no claim to the *antaran* he had paid, but a wife could claim payment of *charroh* (deferred *antaran*) if the separation was initiated by her husband. In this sense, the logic behind the concept of *antaran* was completely different from that of *mahar*. *Antaran* is compensation for wedding expenses, whereas *mahar* is compensation for consummating a marriage. This is why, according to the dominant view in *fikih* (Islamic law), a husband may claim half of the *mahar* if his divorce occurs before consummation of his marriage, which is never the case regarding payment of *antaran*.

By confusing the concept of *antaran* with *mahar*, the 1862 *Undang-Undang* imposed an unfamiliar rule on the natives. It is likely that the community was already familiar with the concept of *mahar*, given that the people had embraced Islam before the British arrival in the second half of the seventeenth century,[132] but little is known about to what extent they had incorporated *mahar* into their usages and customs. Later, the 1910 *Oendang-Oendang*

[132] Writing in the early 19th century, Syair Mukomuko recorded that people were already observing *sharia*, but this does not necessarily suggest that *mahar* had replaced *antaran* (Kathirithamby-Wells & Hashim, 1985).

of *Onderaafdeeling Moeko Moeko* did stipulate the amount of *mahar (emas kawin)*, i.e. f10 for a non-royal daughter, and f40 for a royal daughter, as distinct from *antaran* (Articles 1-6 and 32 in Hoesin, 1985, p. 219).

In the 2005 BMA decision, *mahar* is an example of *adat-yang-diadatkan,* or a custom which was incorporated into *adat* through an agreement among the *orang adat*. This means that *mahar*, which is not compulsory in Islam, has been institutionalised through a deliberation that involves penghulu *adat*, *ninik-mamak*, the *kaum* leaders and their elders, and learned scholars. In Talang Buai village, the village council sets a minimum threshold for *mahar*, i.e. 50,000 rupiah (equal to 3 euros).[133] The amount is very low, reflecting the 1991 compilation of Islamic law that maintains the 'trivial' nature of *mahar*, which is neither compulsory nor a determinant of the validity of a marriage.[134] In this sense, the institutionalisation of *mahar* does not necessarily mean that it replaces *antaran,* which is still agreed consensually between the respective families of the bride and groom (cf. an "equivalent" concept of 'ampa co'i ndai' for antaran among Bimanese in Wardatun, 2018). The following case provides ethnographic evidence of how *mahar* and *antaran* are perceived in contemporary Mukomuko.

4.3.3 Abbas v. Dini: negotiating *mahar* and *antaran*

In 2015, Abbas (24) met Dini (15) during his visit to a friend who happened to be Dini's brother. Following this first meeting, Abbas, who immediately fell in love with Dini, started to pay more visits to get to know her and her family. After two years, he obtained the blessing of Dini's family, and they agreed to arrange a marriage immediately after Dini had celebrated her 17th birthday. Dini, who had actually been dating another man from a neighbouring village, initially refused but eventually, after several

[133] Interviews with Pak Maadas and Pak Muslim on 14 April 2017.

[134] The compilation of Islamic law—serving as the substantive law for Indonesian Muslims—determines neither the maximum nor the minimum amount of *mahar*. Article 31 of the compilation stipulates that the amount of *mahar* shall be based on simplicity (*kesederhanaan*) and convenience (*kemudahan*), as suggested in Islam.

efforts to persuade her, gave her consent. Following her approval, Abbas and Dini's family started to prepare the marriage according to the proper procedure of *bujang-gadis* marriage, involving the nuclear families from both sides, and the *orang adat* (the elite *adat* members*)*, the latter comprising the *dusun* (sub-village) leaders, *pegawai syara'* (religious functionaries), *adat* officials, and the *kaum* leaders*.* They also registered their marriage at the state penghulu via the Office of Religious Affairs.

Abbas, who came from an outside village, began the *terang kaum* process, to find a local guardian (*induk semang*) who would act on his behalf in proposing to the prospective bride. He had to pay expenses for this process, which was arranged according to the *lukah* ceremony, considering his origin as a Mukomuko descendant. He also paid the host *kaum* - a compulsory donation of 500,000 rupiahs (around 30 euros), which was set and agreed within this particular *kaum*. Then, the *kaum* leader in Koto Pinang I arranged a formal proposal and an engagement with the *kaum* leader from the bride's side. The *kaum* leaders, after listening to the request from both the bride's and the groom's families, agreed to arrange the marriage on 29 March 2017. Afterwards, the *kaum* leader from the bride's family organised the wedding preparation and ceremony (including the paperwork) at the village government and the Office of Religious Affairs (*Kantor Urusan Agama,* KUA), in order to register the marriage. His duties ended when he returned the bride's family's mandate to arrange the wedding on the last day of community service, after the wedding feast.

After the wedding, the newlywed couple lived at the bride's mother's house, but they still slept in different rooms. It turned out that Dini kept avoiding her husband and refused to consummate the marriage. This situation lasted for more than two weeks, until Abbas discovered, in Dini's smartphone, pictures showing that his wife was having an affair with her ex-lover. Equipped with the evidence, he excused himself from the house and stopped by at the house of his local guardian, to complain about the problem. Before

leaving for his home village, he left a message with his local guardian for the attention of the *kaum* leader in Koto Pinang I (who would act on his behalf), stating that he was willing to terminate the marriage amicably, on the condition that the bride's family compensated him for what he had spent on the wedding. Otherwise, he would bring charges of adultery to the local police.[135] Dini's brother tried to intervene, by bringing his sister to the house of Abbas' parents, but they were told to leave since Abbas himself was not willing to reconcile. To solve the problem, the *kaum* leaders from both sides agreed to arrange a meeting.

On 27 April 2017, representatives from both sides held the first meeting, with *Kaum* Koto Bayan representing Dini, and *Kaum* Koto Pinang I representing Abbas. The representatives of *Kaum* Koto Pinang I delivered the accusation and evidence and (on behalf of Abbas) demanded reimbursement for the expenses Abbas had incurred from the time of engagement up to and including the wedding, which turned out to be around 21,930,000 rupiahs (or 1,279 euros).[136] In response, *Kaum* Koto Bayan's representatives doubted the validity of the evidence and argued that it was possible that the smartphone pictures had been taken before the marriage. The debate continued, and the meeting ended when *Kaum* Koto Bayan requested a three-day recess to discuss the claim with Dini's parents.

The second meeting was held on 1 May 2017, without Abbas. Deliberation revealed that the evidence was valid, when Dini admitted that she had taken the pictures during their marriage. "*Bulih suamiku menceraikan Aku* (… so that my husband would divorce me)", said Dini. From an *adat* point of view, her strategy was quite clever, considering that a man cannot reclaim his

[135] According to Article 284 of the Indonesian Criminal Codes, adultery committed by a married man or woman is a criminal offence (*delik*), carrying a maximum charge of nine months in prison. This charge is a *delik aduan* (a petitioned offence), which is contingent on a complaint having been filed by the betrayed partner.

[136] This cost comprises 1,600,000 rupiahs for the *bujang-gadis* marriage fixed fees, 4,000,000 rupiahs for furnishing the wedding room, 2,000,000 rupiahs for purchasing a mobile phone for the bride, 450,000 rupiahs for purchasing cosmetics for the bride, and the remaining 13,880,000 rupiahs for jewellery (a gold necklace and ring) and wedding expenses at both the bride's and the groom's house.

expenses in a *semendo* marriage, neither *antaran* nor *mahar*, especially if the husband is the one divorcing his wife. According to *adat*, a divorced wife is entitled to the payment of *charroh*, if the divorce was initiated by the husband. The meeting ended without result, because Dini's parents refused to compensate Abbas' expenses.

In the third meeting on 3 May 2017, Abbas repeated his demand and again threatened to report Dini to the police if she and her family kept refusing to pay him compensation. In response, Dini's parents said they did not mind if Abbas wanted to take all the remaining goods. However, they still objected to financial compensation, stating that "*jangankan 21 juta, 1 juta saja kita tidak mampu* (we could not afford 1 million, let alone 21 million)". Abbas refused the offer and demanded financial compensation. Dini's parents gave up and let Abbas decide if he wanted to report their daughter to the police. The meeting ended without the parties reaching an agreement. Up until the last day of my stay the case remained unresolved, but later, during my second visit the following year, I heard that Dini was already married (unregistered) to another man, and that Abbas never filed a report with the local police.

This case reveals several aspects. Among them are the distinction between *antaran* and *mahar*, the role (and limits) of *kaum* leaders as intermediaries, and the invocation of state institutions (i.e. the local police) to assist with the conflict. Concerning *antaran* and *mahar,* Abbas' claim for reimbursement of the expenses he had incurred was problematic. The claim was too general, because it included the wedding expenses at the bride's house, the wedding expenses in his home village, the gifts to the bride, the furniture for the bride's house, and the marriage fees, which included 50,000 rupiahs for a fixed *mahar*. From an *adat* point of view, none of his claim was recognisable, except the wedding costs at the bride's house, which could be classified as *antaran*. Nonetheless, his claim to *antaran* was customarily inapplicable, because such a claim is exclusive to a wife who may

claim unpaid *antaran* or *charroh* if her husband was the one initiating divorce. As a result, Abbas' claim was customarily invalid. His claim may be partly valid according to Islamic law. In Islam, a husband may reclaim half of *mahar*, if he did not consummate the marriage. In his case, such a claim was only applicable for half of the fixed *mahar,* namely 25,000 rupiahs, which was a very small amount of money.

The *kaum* leaders from both sides intervened as intermediaries, when they were invited by the couple and their families. Initially, they tried to reconcile the couple and when this failed they suggested that the husband repudiate his wife. However, none of these options were agreed to. The intermediaries did not manage to reconcile the couple, since the marriage was already 'broken', and neither the husband nor the wife were willing to accept each other. It was also difficult to terminate the marriage, since the husband had asked for compensation which the bride could not afford. Guntur, a former *kaum* leader in Koto Bayan, told me that it would have been easier to solve this problem if the lover had come from the same village. He added: *"If I was the head of kaum, I would catch the lover, impose customary fines on them, and use the fines to compensate the husband".* Guntur, and other *kaum* elders, told me that similar cases had occurred in the past, where they had caught the adulterer red-handed and imposed *adat* fines upon both perpetrators. The perpetrators had to obey the sanctions, or face exclusion from *kerja-baik-kerja-buruk* for both themselves and their family.[137] However, this was not the case, since the lover was not from this village and Dini's affair was proven only by digital photos. In this sense, the territorial nature of contemporary *adat*, which is only effective among traditional villagers settling in the same village, becomes the limit of *adat* jurisdiction. The *kaum* leaders could not extend their authority beyond their own village.

[137] Any affair with a married woman is punished with a severe fine, called an *utang terbang* fine, which is determined through *adat* deliberation - interviews with Guntur and Jareh, 8 May 2017. The 1862 *Undang-Undang* of Mukomuko stipulated several types of punishment (Articles 87-92) concerning 'inappropriate' actions toward either married or unmarried women (Adatrecthbundel VI, 1913, pp. 350–351).

Another aspect of this case was Abbas' threat to file a report with local police on the grounds of adultery, if his demand was not fulfilled. This turned out to be a false threat, since he did not file the accusation within a period of six months after the presumed affair. In this respect, his accusation, which is categorised as a *delik aduan* (a petitioned offence), had passed the expiration period set by the Indonesian Criminal Codes.[138] Yet, Dini is still liable for similar accusations, considering her current unregistered marriage. The fact that she remarried before obtaining a formal divorce is theoretically a valid ground for Abbas to file another accusation. In practice however, filing such a report is rare, as an officer from the local police station told me, "an out-of-court divorced woman is usually the one who was abandoned. Thus, she might marry another man without fear of having her ex-husband enlist the help of the police. If the husband was the one who remarried before obtaining a formal divorce, his second marriage would not be considered adultery, but instead an informal polygamy" (cf. the state official's ambivalence toward the status of unregistered polygamy in Wirastri & van Huis, 2021, p. 19).[139] This also corresponds to the high percentage of unregistered marriages and out-of-court divorces (see statistical data in Section 4.4.1). Thus, traditional villagers can easily divorce and remarry according to *adat*, without involving the relevant state institutions and officers. Besides, the validity of *adat* is rarely questioned in either a *semendo* marriage or a *semendo* divorce.

In fact, an unusual case had occurred in a neighbouring village several years ago, when Herman (a pseudonym) was detained for committing an informal polygamy. He was a member of a traditional village, which adhered to the same *adat-pegang-pakai*, and was serving as a member of Mukomuko's *Dewan Perwakilan Rakyat Daerah* (DPRD, or Regional House of Representatives). His first wife reported him to the local police, accusing him

[138] Article 74 of the Indonesian Criminal Codes sets six months as an expiration period (*daluwarsa*) for filing an adultery complaint with local police. The expiration period may be extended to nine months, if the betrayed husband or wife lives abroad.

[139] Interview with Bripka Siska, an officer from the *Pelayanan Perempuan dan Anak* (PPA, Child and Woman Services) unit at Mukomuko police station, on 3 March 2018.

of adultery. In his defence, Herman claimed that he had divorced the accuser out-of-court and remarried afterwards according to *adat*. Herman's case was not common. He and his first wife were socially and economically above average. This background provided her better opportunity to bring action against her husband. However, this was not the case in *Dini v. Abbas*, who both came from modest families. For them, involving police would not have been advantageous for either party. Dini was not afraid of being imprisoned and Abbas would never reclaim his claimed expenses by doing so. Besides, the two cases are also different in nature. While Herman's case concerned mostly an informal polygamy,[140] *Dini v. Abbas* concerned a refusal to consummate the marriage and eventual withdrawal from it.

This case analysis demonstrates how *semendo* marriage serves as a general norm in traditional villages. A *semendo* marriage operates either complementarily or alternatively to state marriage. In doing so, it maintains some key elements of matrilineal tradition, such as clan-exogamy and a trivial amount of *mahar*, which distinguishes this type of marriage from a mere religious marriage or informal union. The following section will address another question regarding how traditional villagers, observing *semendo* marriage, obtain a divorce. The question then seeks, using a relevant case, to understand some key elements of *semendo* divorce, and how these elements manifest in practice.

4.4 *Semendo* Divorce

According to the *adat-pegang-pakai* (traditional customs and usages) of Mukomuko, *semendo* divorce is less well established than *semendo* marriage. While *semendo* marriage is an important part of *kerja-baik,* the institution of *semendo* divorce is neither *kerja-baik,* which requires 'passive' participation from the public, nor *kerja-buruk*, which requires 'active' participation (see Section 4.2, in this chapter). This ambiguity can be attributed to the private nature of this institution, as opposed to the

[140] A further discussion on judicial developments in treating informal polygamy as a felony is available in Chapter 2, Section 2.2.3.2 (see also van Huis & Wirastri, 2012, p. 12).

communality of *semendo* marriage. Given this difference, the community will avoid getting involved in a divorce, and both the husband and wife are advised to reconcile their marital strife internally, within their nuclear family. However, if they fail to reconcile, the wife may complain to her close relatives, who then invite *kaum* (extended family) representatives from both sides to intervene. The *kaum* representatives may also invite *orang adat* as a third party, but this rarely happens, since involving more strangers will bring shame upon their respective *kaum.* At a glance, the institution of *semendo* divorce seems to be a mere internal affair within the two nuclear families and *kaum,* but it does not necessarily imply that this institution is beyond the reach of *adat.* As we will see in this section, a *semendo* divorce is integral to the institution of *semendo* marriage, and together they constitute a distinctive and differentiated institution compared to other divorce options, such as judicial divorce, Islamic divorce, or arbitrary separation.

When a marriage is already irretrievably broken, a married couple may terminate their marriage consensually or the husband may simply leave his wife by uttering *talak*. If the husband has left without pronouncing *talak*, the wife may request divorce validation from a local *Imam* in her village. This procedure, locally known as *minta-sah*, is designated for an abandoned wife, either to formalise or to validate her divorce. It formalises a divorce if her husband has uttered *talak* before leaving, but it can also be used to grant a valid divorce for an abandoned wife, if her husband left without pronouncing *talak*. In either case *minta-sah* is compulsory, unless the wife has already obtained a formal divorce from the Islamic court. In this case she can immediately remarry, according to *semendo* marriage. In the *minta-sah* procedure, an abandoned wife - usually before she marries with another man - presents the local *imam* with a symbolic offering of *siri-secerano (serrano*, or *cerano)*,[141] while uttering: "*Aku naik ber-*

[141] A brass bowl with feet, in which *sirih* (betel leaves) and other confectioneries are presented (Description in the 1862 Undang-Undang Mukomuko in Adatrecthbundel VI, 1913, p. 334). It is used symbolically for several occasions, such as *persembahan* (offerings), *pen-*

suami dan turun tidak bersuami lagi (I ascended with a husband and I am descending without one)". Afterwards, she lays down the offering and leaves the *imam's* house, before he can answer her. Only then is the *imam* willing to be involved in solemnising her new marriage.

At first glance, this procedure seems to be one-sided. However, Maskur, the incumbent *imam* of Talang Buai,[142] told me that such impression is not completely true, because normally a woman who comes to him has already met all the 'required conditions' of *minta-sah* without necessarily expressing them. Otherwise, Maskur added, he would not open his door to her and would refuse to solemnise her marriage in future. Indeed, she could still remarry informally if she insisted on it, but the marriage would not be customarily accepted. If something went wrong, the *imam* and *orang adat*, which includes village officers, would refuse to help her. For a villager, their help means many things. If a woman needs a letter explaining her marital status, such as *Surat Pernyataan Tanggung Jawab Mutlak* (SPTJM, a letter of absolute responsibility) for a civil registration and other purposes, the village leader will gladly issue the letter to her (see the last paragraph of Section 4.3.1). However, he will be reluctant to do so if her marriage is against *adat*. In an example presented earlier (see the fourth paragraph of Section 4.3.1), a divorced woman was condemned by her relatives for arranging an informal marriage. The condemnation escalated when the bridegroom did not show up as none to take responsibility and to blame but herself. This is why, even to this day, traditional villagers (notably, female villagers) will avoid marrying to contradict *adat*.

Concerning the conditions required for *minta-sah*, an abandoned wife must ensure that her request for *minta-sah* does not violate any provisions prescribed by Islam. *First*, her husband

yambutan (welcoming), and *penyelesain syara'* (religious settlement) (BMA Mukomuko, 2005).

[142] Interview with Maskur on 6 May 2017, and with several divorced women in Talang Buai village, in 2017.

must have pronounced *talak* before leaving,[143] there must have been competent witnesses (at least two male adults) to the *talak* pronouncement, unless it was already known by the public, and the wife must have properly observed her waiting period (*idah*). *Second*, if the husband abandoned her without uttering *talak*, the wife must convince the local *Imam* that her husband neglected his duty to provide obligatory support (*nafkah*), for a period of at least three months. This condition corresponds to the second point in the official formulation (*sighat*) of *taklik talak* (conditional divorce) by the Ministry of Religious Affairs (MoRA), which serves as a conditional ground for a judicial divorce.[144] The difference is that, among the traditional villagers, this condition is made applicable out-of-court, regardless of whether or not the marriage has been registered at KUA or was only concluded according to *semendo*. Moreover, the *taklik talak* agreement applies to every marriage, irrespective of whether a husband has pronounced it or not. Thus, the Mukomuko *adat* has not only adopted the Indonesian *taklik talak*, it has also adjusted it to its own needs, i.e. by making it a customarily valid ground for a *semendo* divorce. In this sense, the institution of *taklik talak* becomes mandatory among the Mukomuko.

Basically, incorporation of *taklik talak* into the Mukomuko *adat* is not new. The 1862 *Undang-Undang* of Mukomuko stipulated (in Article 93) that a bridegroom shall make an agreement with his bride prior to their marriage, which reads as follows: "*Jika laki-laki berjalan meninggalkan istrinya semusim lamanya tidak menanggung makan dan pakaiannya, perempuan itu meminta 'pasakh' [saraq] dengan lakinya, maka nyata kebenaran perempuan itu hendak 'pakti'* (if a husband leaves his wife for a minimum period of one season, without providing her with any

[143] The pronouncement of *talak* does not have to be in the form of direct speech. It may also be delivered in a conditional or figurative sentence, such as, "*jatuh talakku saat matahari terbenam* (you are divorced at sunset)", instead of saying "I repudiate you".

[144] The official formulation of *taklik talak* mentions (in point two) that his wife may file a divorce "if her husband did not provide the obligatory support (*nafkah*) for three months". The pronouncement of *taklik talak* is basically not mandatory, and is applicable only as a valid ground for divorce by a wife (*Cerai Gugat*).

food or clothing, his wife is customarily entitled to a divorce if she asks for it" (Adatrecthbundel VI, 1913, p. 351). This formulation is almost identical to the second point of the official *taklik talak* by MoRA. The only difference between the two is the duration. While the contemporary *taklik talak* clearly sets a minimum period of 'three months', the 1862 version mentions 'one season', which might generate different interpretations, such as three months, four months, or even six months. However, in an agricultural society such as this one, one season normally means four months. In this respect, the difference is trivial, but for the easier and shorter period of negligence. However, it should be remembered that the remaining three conditions of *taklik talak*, formulated by MoRa, are not popular grounds for a *semendo* divorce.[145]

Another aspect of *semendo* divorce concerns the central position of *antaran* and *mahar* in a *semendo* marriage. According to Bogaardt's account of Mukomuko in 1840, a husband who wilfully repudiated his wife, without giving any reason for it, had to compensate her with *charroh*, or unpaid *antaran.* The compensation was ƒ400 for the daughter of a raja, and ƒ58 for a daughter of local origin. In contrast, the husband would not have to pay anything if his wife was the one who initiated the divorce, or if she was the daughter of a foreigner and did not belong to any *kaum*. Nevertheless, as Bogaardt put it, the *charroh* form of compensation rarely happened, since husbands who were unable to make the payment usually preferred to leave their wife (Bogaardt, 1958, p. 34). This account suggests that a *semendo* divorce is inseparable from the general norm in a *semendo* marriage. Normatively, a wife may employ the institution of *charroh* as a bargaining tool, to protect her from arbitrary divorce by her husband. However (as already indicated in the past), to this day, a husband who wants a divorce usually prefers to abandon his wife until she initiates a divorce herself, by requesting validation

[145] According to the latest official formulation from MoRA, there are four conditions for *taklik talak*: (1) The husband left his wife two consecutive years ago; (2) The husband did not provide the obligatory support for his wife (*nafkah*) for three months; (3) The husband subjected his wife to physical maltreatment; (4) The husband neglected his wife for six consecutive months.

(*minta-sah*) from the local *Imam* at some point over the course of her life. Hence, in practice, *semendo* divorce is identical to divorce initiated by a wife.

Last but not least, it should be noted that in the past a *semendo* divorce did not solely depend on the will of the husband and wife. Brothers, nephews, uncles, and other male relatives of the wife, up to the third degree of consanguinity, might get involved in initiating a divorce (Bogaardt, 1958). Although this is no longer relevant in contemporary *semendo* divorce, the predominant tradition of uxorilocality, which requires a bridegroom to reside with the bride's family, nevertheless enables her close relatives and *ninik-mamak* to interfere with her household. Thus, as Bargain et al. suggest, the strong presence of the wife's relatives allows the wife to benefit from greater intra-household decision making power, including the decision to divorce, compared to wives in patrilocal ethnic groups (Bargain et al., 2022). It can therefore be inferred that *semendo* divorce and some important elements from the tradition have provided traditional villagers, notably female members, with a 'differentiated' institution of divorce (Griffiths, 2017, p. 103). It serves as a popular option that can be distinguished from both judicial divorce and informal divorce (as an illustration, please see Figure 4.3.1.1).

The following sub-sections begin with divorce statistics, then proceed to a discussion of the position of *harta-sepencarian* (or the properties acquired during marriage) in a *semendo* divorce. The last part will present a relevant *harta-sepencarian* case that I encountered at the Islamic court during my fieldwork.

4.4.1 An overview of divorce statistics in traditional villages

The poor reliability of basic statistics on demography and important events, such as marriage and divorce, has long been seen as a barrier in Indonesia. The barrier revolves around the lack of any integrated and reliable source for the actual number of divorces. Divorce statistics are scattered throughout

different sources, ranging from *Badan Pusat Statistik* (BPS, the Central Bureau of Statistics), *Badan Kependudukan dan Keluarga Berencana Nasional* (BKKBN, or the National Family Planning Coordinating Agency), *Kependudukan dan Pencatatan Sipil* (*Dukcapil*, the Civil Registry Office Service), to the yearly divorce records in Islamic courts and general courts. Despite the number of sources available, they do not provide reliable data regarding the number of divorces occurring over time in Indonesian society, because of their different scopes and timespans.

First, the 2010 BPS decennial census provided the total number of divorcees (*cerai hidup*) in every village, but unfortunately this number is no longer accurate, and the latest decennial census (2020) is not yet accessible to the public. In addition, the existing BPS statistics I could access did not mention their religion of the divorcees, which became a barrier for my research as it focusses only on Muslims. More importantly, the statistics were limited to the number of divorcees that year, and were hardly relevant to the situation ten years later.

Second, the BKKBN statistics basically provide a more up to date account, through the 'single-headed' family (a nuclear family with only one parent) monthly survey. The survey is conducted by BKKBN cadres in every village, mostly by the wives of sub-village leaders, coordinated by the wife of the village leader for a fee of 50,000 rupiah (around 3 euros), per individual, in each survey. Yet, as is often complained about, the lack of financial support causes the survey quality to be poor. This barrier, coupled with classification which does not distinguish a divorcee from a widower (*cerai mati*), also makes the survey rather useless.

Third, fortunately the *Dukcapil* records, i.e. *kartu keluarga* (KK, or 'family cards'), provide a more comprehensive account, by specifying the marital status and religion of all the members of each household. In spite of this, the records require deep reading and further analysis. By looking at KK from my research sites, i.e. the Talang Buai, Agung Jaya, Penarik, and Sibak villages, I was able to identify not only the number of Muslim divorcees (male

and female divorcees) for these villages, but also the divorcees who had remarried, by looking at their children's biological parents. The following table portrays the number of divorcees or single-headed families from the above-mentioned sources.

RESEARCH FIELD	BPS 2010			BKKBN 2017			DUKCAPIL 2017		
	Individual Divorcees	Total Population	%	Single-Headed Families	Total Household	%	Divorced Families	Total Muslim Household	%
Talang Buai Village	13	946	1,4	34	303	11	39	419	9,3
Agung Jaya Village	8	1281	0,6	46	431	11	55	690	8,0
Penarik Village	47	3828	1,2	94	1.012	9	158	1572	10,1
Sibak Village	59	3517	1,7	69	736	9	97	1108	8,8
MUKOMUKO REGENCY	2052	137627	1,5	4494	43384	10			

Figure 4.4.1. 1: The number of divorcees, according to different sources

Figure 4.1.1.1 shows that the number of Muslim divorcees in the *Dukcapil* record, which excludes widowers and widows, is more than the single-headed family total in the BKKBN data for the same year. The gap is even bigger when existing records are cross-checked by a mini survey which questions the marital history of each family. The survey looks at whether each couple's current marriage is their first (*bujang-gadis*) or second (*janda-duda*), so as to establish the minimum number of divorces that have occurred in a village. The mini survey, which was held in Talang Buai village only (see figure 4.4.1.2, below), discovered that 96 out of 419 Muslim households were in their second marriage, either for the husband or wife only, or for both. The remaining 323 families consisted of 289 couples who were in their first marriage and 43 couples whose status was either unmarried or unidentified. This account suggests that the occurrence of divorce in this village was almost twice the that given by the in-depth reading on KK, even before considering the number of remarriages that might have occurred more than once. The following chart shows the gap between the in-depth reading on *Dukcapil* records and the marital history survey.

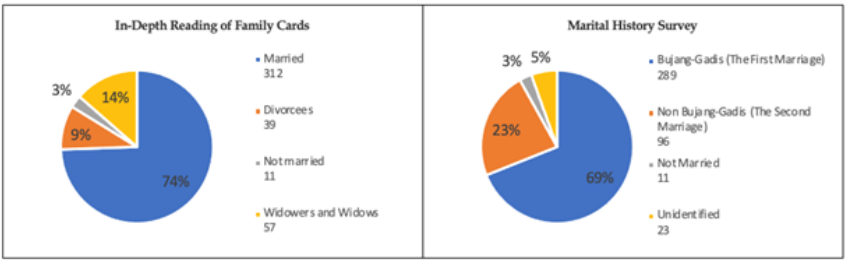

Figure 4.4.1. 2: The number of divorcees from Talang Buai

This chart shows that the ratio of second marriages to first marriages is one to three. Compared to the Islamic court records in the last five years, this ratio suggests a wide gap between in-court and out-of-court divorces. For a period from 2016 to 2020, the Islamic court only recorded two cases from this village, both of which were filed by civil servants who, according to the law (namely Government Regulation 10/1983), were bound by a stricter divorce rule. In the remaining three villages, i.e. Agung Jaya, Penarik and Sibak, the number of in-court divorces were equally low (see the comparison in figure 4.4.1.3, below). However, it was basically not possible to compare the *Dukcapil* records with the Islamic court registry. The *Dukcapil* records contain information about all the divorces that have occurred either in-court or out-of-court, whereas the Islamic court registry only records judicial divorces for each year. In spite of these differences, we can still assert that out-of-court divorces have outnumbered in-court divorces over the last five years (2016-2020).

Another worthwhile finding from the KK analysis concerns where children reside after their parents separate, either by divorce or death. In the four villages, there were 60 families (86%) where the children lived with their mother and followed her when she remarried, and only ten families (14%) where the children lived with their father. This account corresponds to a customary norm of *semendo* divorce, where children with divorced parents are considered to belong to their mother's

family. According to this tradition, the children are supposed to live with their mother or mother's family, even after she has remarried. Hence, the remaining 14% serves as an exception, and most likely, as I encountered during my fieldwork, these children have deceased mothers. Indeed, the children were customarily supposed to live with their deceased mother's family, but there were situations (notably poverty) where siblings of the deceased mother preferred not to nurture their sister's children. Thus, the only feasible option for the children was to live with their biological father.

Research Sites	Total Muslim Households (KK)	Out-of-court Divorces				In-court Divorces					
		DUKCAPIL 2017		Mini Survey		The Last Five Years (Until June 2020)					
		Divorcees (Males and Females	%	Widowers and Widows	%	2016	2017	2018	2019	2020	Total
Talang Buai Village	419	39	9.3	96	22.9	2	0	2	0	0	2
Agung Jaya Village	690	55	8.0			0	1	1	7	3	14
Penarik Village	1572	158	10.1			8	4	12	7	3	25
Sibak Village	1108	97	8.8			4	3	7	4	3	17
MUKOMUKO REGENCY						171	203	177	257	240	1045

Figure 4.4.1. 3: Out-of-court and in-court divorces

This overview shows the staggering number of out-of-court divorces in Mukomuko, compared to in-court divorces. This gap corresponds to the popularity of *semendo* marriage among traditional villagers, as well as to the lack of adequate access to the Islamic court. It should be noted here that the Mukomuko regency established its own Islamic Court at the end of 2018. Further discussion on the establishment of this court will be addressed in Chapter 5, but we now turn to another important concept in divorce: namely, *harta-sepencarian*.

4.4.2 *Harta-sepencarian* (Joint-marital property)

The previous discussion in section three suggested that the institution of *semendo* divorce distinguishes divorce according to who initiates it. A divorce by the husband is non-consensual, but it is contingent on who caused the divorce. A husband may divorce his wife freely, if she was at fault. Otherwise, the husband has to settle *charroh* (a deferred *antaran*) before pronouncing his *talak*. Nonetheless, a husband rarely initiates such a divorce

and usually prefers to leave his wife in limbo. She is still formally his wife, although he is no longer present as her husband, providing support for her and for their children. Ultimately, the wife always has to be the party proposing divorce. Conversely, divorce by a wife is supposed to be consensual. She may get a divorce if her husband has agreed to it. However, if the husband has refused his consent, she can still get a divorce via *adat*, provided that her husband has violated one of the conditions in *taklik talak*. Either way (i.e. either a consensual or a *taklik talak* divorce), the wife must relinquish her rights to *charroh*. In this respect, the institution of *charroh* merely serves as compensation for a wife undergoing an arbitrary divorce initiated by her husband, while *semendo* divorce still privileges the husband by retaining a unilateral divorce for him alone.

This general *semendo* divorce norm can be linked to an aspect of Islam (i.e. the prescribed provision of *talak* as a husband's prerogative right) that has been incorporated into *adat*. Yet, the privilege reverses when it comes to two post-divorce rights: one concerns child custody, and the other concerns *harta-sepencarian*.

First, concerning custody, all children belong to their mother and their mother's family, regardless of their age (Bogaardt, 1958). As already mentioned in the previous section, an exception applies only if separation is caused by the wife's death, and the family of the deceased wife is not capable of nurturing her children (for the number of such exceptions, see the 5th paragraph of Section 4.4.1). *Second*, concerning *harta-pencharian,* Ali Kasan,[146] a former member of Mukomuko BMA in 2005-2019, explained that all the property acquired during a marriage is divided in two (50:50). He further added that one half belongs to the wife, and the other half belongs to the husband, unless there is one child or more from the marriage. In that case, half the husband's share is allocated for the child(ren). As a result, the actual share for a divorced husband who has a descendant will be no more than a quarter of the *harta-sepencarian.*

[146] Interview with Ali Kasan, on 9 March 2017.

This division shows a greater share for the wife and children via *harta-sepencarian*. A husband will receive an equal share only if there is no child from their marriage. In fact, this norm still applies, even if the separation was caused by the wife's death. In this respect, the deceased wife's share belongs to her children, or her share returns to her maternal family (if she has not had children). A husband may get a greater share, if he has arranged a so-called *perjanjian harta-sepencarian* (a joint-property agreement) with his wife during her lifetime. The 1862 *Undang-Undang* of Mukomuko did mention that a couple may arrange an agreement to distribute an equal share via *harta-sepencarian*.[147] If the wife passes away, this agreement enables her husband to gain half of their property, and the remaining half belongs either to their children or to the deceased wife's relatives. Unfortunately, I did not encounter a single case of this agreement being used during my stay in Mukomuko. Ali Kasan, who had been serving as *kepala kaum* in Mukomuko for more than 20 years, also confirmed my observation. In practice, the division of property is much simpler when a divorced husband leaves his wife carrying only some moveable goods, such as a motorbike, clothes, etc. If a conflict about improper division then arises, the institution of *harta-sepencarian* prevails as the general norm.

From this overview, the institution of *harta-sepencarian* appears to be consistent with some important elements in *semendo* tradition; notably, uxorilocal and duo-local principles. These principles require a husband to constantly balance opposing responsibilities within a household. He is to reside with his wife's parents, but he is like a guest under the shadow of his wife's male relatives. In addition, he is meant to become father to his biological child(ren) and breadwinner for his nuclear family, while also playing the role of *mamak* (maternal uncle) to his sister's children. Abdullah, in his account on Minangkabau, described this situation precisely by writing, "How can a man possibly fulfil his dual marital responsibilities when he has no authority in

[147] Articles 70, 71, and 72 of the *Undang-Undang* of Mukomuko (Adatrecthbundel VI, 1913, pp. 345–346).

his wife's house and is no more than a 'manager' in his sister's home?" (Abdullah, 1966, p. 8) This is the dilemma experienced by husbands in *semendo* marriages. If the dilemma is no longer bearable, the husband can escape the marriage, either by uttering unilateral *talak* or simply by leaving the household. Either way, he must leave all his children behind and abide by the general norm of *harta-sepencarian.*

In summary, it can be inferred that the institution of *harta-sepencarian* has been arranged in favour of the wife and children, by allocating a greater share to them. As a general norm, such allocation continues to shape the distribution of *harta-sepencarian* among traditional villagers. However, this institution is now being challenged. A number of husbands who feel uneasy being caught between conflicting responsibilities within the *semendo* tradition, have begun to question this norm. They are challenging the institution by deviating from the general norm, either by keeping property for themselves or by filing a lawsuit at the Islamic court. This shift is connected with (among other things) a rise in 'liberalisation' in favour of the husband, which introduces different modes of earning and, in turn, strengthens the husband's position within his nuclear family. Further discussion on this shift, and the role of the state (notably, the Islamic court) throughout the process, is presented in Chapter 5. However, as background on how the shift is taking place, I present an atypical case below, concerning a husband who challenged the established institution of *harta-sepencarian* in the *adat*, by filing a lawsuit at the Islamic court.

4.4.3 *Syahril v. Yati* revisited: Contesting *harta-sepencarian*

In 1990, Syahril and Yati got married and registered their marriage at the Pancung Soal KUA – Pesisir Selatan of the West-Sumatera Province. The newly-weds initially stayed with the bride's parents for one month. They then lived on their own in a rented house in Penarik village, Mukomuko Bengkulu. In order to mingle and integrate with the locals, the couple entered different

kaums via the procedure of *terang-kaum*, which is designed to naturalise migrants of Minangkabau origin. In the meantime, they opened a grocery shop. The shop grew rapidly, and it took only two years for them to build their own house, using profits from the shop. The couple continued to expand their business, by launching a confectionary shop and investing in oil palm plantations and properties. In 2017, their assets had a net worth of 3.98 billion rupiahs, including 1.08 billion in debt (remarkable, when compared to the average person whose monthly earnings would be around 2 million). However, this success story in business was the opposite of their marital life.

In 1991, just a couple of months before the birth of their first son, Syahril was caught having an affair with a married woman. The mistress' husband filed a report to the local police, accusing him of committing adultery with his wife. In response, the police detained Syahril at the police station, but they released him after the parties agreed to reconcile and the cheated husband withdrew his accusation. After the release, Yati gave Syahril a second chance, considering her situation at the time: a pregnant wife, living in a place far from her consanguine relatives. Yati recalled this episode as being at a point in her life (in her twenties) when she urgently needed a husband figure. Unfortunately, her husband repeated his behaviour several times. Some cases were reconciled via a *kaum* deliberation, while others were left unsolved. It appeared that Syahril never learned his lesson, to the point that the *kaum* leaders gave up and refused to intervene again. In the meantime, Yati focussed on nurturing her three children and expanding their family business.

It is surprising that such an unhappy marriage survived for 23 years. With the help of the children, the family business grew rapidly, without any meaningful input from Syahril. Thus, Yati was the one who controlled both the business and other financial matters within the household. In 2013 Yati underwent a hysterectomy, and soon after her recovery she persuaded Syahril to restore their relationship by performing *Umrah* (a pilgrimage)

to Makkah. Syahril refused to go, saying that he was not ready. It is widely believed among Muslims that, during a pilgrimage, bad things may befall a person whose heart is not pure. Yati went on the pilgrimage alone and when she returned found out that, in her absence, Syahril had concluded an informal polygamy with a divorced woman. With the full support of her children, Yati expelled Syahril from the house. After taking some cash from their grocery store, Syahril left and built a new house with his new wife. From that point onwards, Syahril and Yati lived separately, but Syahril continued to ask for his share of the family business profits, so that he could provide maintenance support for his new family, including a new born baby.

This situation lasted until 2016, when Syahril registered a petition for divorce at the Arga Makmur Islamic court. The petition was accepted and the first session was held without Yati attending. Yati attended the second session, where she and Syahril received mediation led by Nurmalis. The mediation failed, and the petition proceeded with an evidentiary session. During the evidentiary session, again without Yati (as petitioned), Syahril convinced the judges that the marriage was already broken. On 13 December 2016 the judges eventually granted Syahril permission to pronounce *talak*. It later turned out that the divorce petition was a trick of his, to release himself from possible threats concerning his current informal polygamy, and (more importantly) to claim a greater share of the joint-marital property.[148] Before obtaining a formal divorce, Syahril was afraid that Yati would report his informal polygamy to the local police. Besides, in his situation, Syahril would be customarily entitled to no more than a quarter of the property.

In fact, Yati did ask Syahril to divide their property amicably, by offering eleven hectares of their palm oil plantation and one truck (equal to 1 billion rupiahs). However, he demanded all

[148] From the beginning, Syahril and his lawyer (Ali Akbar) had agreed on two lawsuits, i.e. divorce and joint-marital property (*harta-sepencarian*), with the total payment of 25 million rupiahs. Besides, Syahril was to provide accommodation for Ali Akbar throughout the process. Interview with Syahril on 1 March 2018.

the property that was registered under his name. Yati refused, because the majority of assets were registered in his name.[149] A month later, Syahril, represented by the same lawyer, registered a lawsuit at the Islamic court, suing Yati for equal division of their joint-marital property. In response, Yati hired a group of lawyers to represent her before the court. The first hearing was intense, as each party insisted on their respective demands. Syahril demanded an equal share, and Yati insisted that the majority of assets should belong to her and the children, as prescribed in *adat*. During a mediation session, Judge Mhd. Nazir, acting as mediator, suggested that the property should be divided equally, because state law says so. Otherwise, each party would endure a greater loss, from the possible court fees and other costs arising from their prolonged dispute. The mediator used this metaphor: "*lebih baik sekali putus melalui mediasi dari pada satu menjadi arang dan satu menjadi abu* (it is better to settle your dispute now, through this mediation, rather than continuing the dispute, which will turn one party into charcoal and the other into ashes)".

It was indeed quite strange for a mediator, who was supposed to be neutral, to intervene in the dispute. However, considering that the mediator was a judge himself (let alone Nazir's position as head of the Arga Makmur Islamic court, at the time), even though in this case he was not an acting judge, the intervention was inevitable, because he could foresee the possible result of their dispute.[150] Yati was unhappy with Nazir's suggestion but, after more than ten exhausting sessions that lasted almost a year, she reluctantly approved the advice. They agreed to share their property via mediation, even though Yati (who was in West-Sumatra at the time, enrolling her youngest child in school) was not present

[149] Yati told me, "even though I am the one who runs our business, I wanted to show respect to Syahril as the head of family, by registering all the property under his name". Interview with Yati at the temporary shelter, after giving up her house to Syahril as his share, on 1 March 2018.

[150] Article 5 (1) of Supreme Court Regulation 1/2016 stipulates that mediation is a 'closed session', but Article 5 (2) states that conveying a report to the judges about who is not acting in good faith and who is responsible of the failure of mediation is not a violation of the closed nature of the mediation process. In this manner, coupled with the majority of mediators in the Islamic court being judges themselves, it is hardly possible to consider mandatory mediation a neutral session, completely separate from other sessions.

and was represented only by her lawyers. After converting all the assets into rupiah, Syahril obtained 2.4 billion rupiah—including a debt of 528 million rupiah - and an obligation to pay 300 million alimony to his youngest daughter (the only underage child), which could be paid in instalments over six years. Meanwhile, Yati received a share of 1.94 billion rupiah and a debt of 550 million rupiah. Eventually, the judges issued an *akta perdamaian* (an act of peace) for them, which is legally binding and final.

When recommending an equal share, the mediator suggested a formalistic reading of Article 35 of the Marriage Law 1/1974 on the division of property acquired during marriage. He seemed unaware of the Supreme Court's more recent interpretation in Judgement 266K/Ag/2010, which allocated three-quarters of the joint-marital property to a neglected wife and the remaining one-quarter to her husband (see Chapter 2 in Section 2.3.3.2). The reasoning behind this judgement was: "… the wife was the one who obtained the property, whereas the husband left her without maintenance support (*nafkah*) for more than 11 years". In Yati's case, she was the main person behind the growth of their joint business, whereas her husband had been behaving irresponsibly for more than 23 years, plus another four years (from 2013 to 2016) when he had been living with his new wife. The Supreme Court's judgement 88/Ag/2015, in which one-third was allocated to the husband and two-thirds to the wife, considering that the disputed property included the wife's *harta-pusaka* (property inherited matrilineally), was also ignored. More ironically, some of the property that Syahril claimed, such as a car, a truck, etc., had been bought during the last four years of his absence. Indeed, there was a clear difference between the two cases: one was the result of a court judgement and the other was the result of mediation. Yet, it is clear that both the mediator and, of course, Yati herself were not well informed about the recent precedent on the possibility for a wife to gain a greater share of the marital property. If she had been properly informed, she would not have relinquished her share during mediation.

The mediator's suggestion also reveals his attitude toward the living norms in society. In this regard, the mediator, who happened to be of Minangkabau origin himself, appeared to ignore the living law in Mukomuko, which allocates a greater share for the wife and children, i.e. three-quarters of the total joint-marital property (*harta-sepencarian*). According to this living law, a wife and her children may even receive all the property, if her husband was at fault. Lamenting her situation, Yati told me while I interviewed her that, "I did not expect that he would file a lawsuit at the Islamic court, because we already have three children and he was the one who initiated and caused the divorce. In *adat*, a fault husband cannot file such a claim; he can only leave his wife, empty-handed". Indeed, a judge is not obliged to refer to a living norm, but their counterparts in the general court have started considering living norms in their judgements. In the *Sri v. Agus* case from Banyumas General Court, for instance, the judges decided to punish Agus for violating his pre-marital agreement. He was required to compensate Sri by 150 million rupiahs, because he had terminated their engagement at will, which was against the living norm in their home town. If the mediator in Yati's case had been aware of this development, as well as the Supreme Court Judgments 266K/Ag/2010 and 88/Ag/2015, his suggestion to Yati during the mediation would have been different.

By now, the couple's business had already collapsed, which had been starting to happen from the beginning of the dispute, and each party had to settle legal fees and debts from their own share. Moreover, they spent a considerable amount on accommodation throughout the process. For this reason, they had to sell a large portion of their respective shares. In addition, there was still an issue concerning execution. Syahril could not have some parts of his share, i.e. property belonging to his children (such as the car and truck), because the children insisted that the property was theirs. During my visit a year later, Yati and her children were starting a new business with her remaining share, while Syahril was about to sell his house in order to pay the alimony for

his youngest daughter, which he had not paid at all, even more than a year after their case was resolved. I will revisit this case in the next chapter which discusses court fees and costs, alimony, execution, and the role of the lawyers.

4.5 Concluding Remarks

This chapter shows how traditional villagers from *hulu-hilir* settlements still adhere to their matrilineal usages and customs. In doing so, they develop their social structure and institutions according to the matrilineal kinship system, which divides villagers into several clans, called *kaum*. Each *kaum* appoints their respective leader to play an instrumental role, notably in arranging *kerja-baik* and *kerja-buruk* among their fellow members. At village level, *kaum* leaders and *kaum* representatives form *orang adat*, which comprises three main elements: *Kaum* leaders and elders (as the genealogical elite in their respective clans), sub-village leaders (representing *kaum* in the village administration), and *pegawai syara'* (representing *kaum* in religious matters). This triangle suggests that the roles of *kaum* leaders and representatives concern not only *adat* (customary) matters, but also village affairs. This unique encounter between *adat* and the village administration, which differs from one traditional village to another, generates mutual benefit for both sides. While *orang adat* manages to gain formal recognition from the village administration, the village officers obtain legitimacy from *adat*. Together, they emerge before their fellow villagers as the most authoritative body.

The complex amalgamation of the *adat* institution and village administration constitutes the so-called Mukomuko *adat*. However, this denomination seems too general, considering that traditional villages are only some of the total number of villages in Mukomuko. This is why I prefer to link traditional village *adat* to a particular element in their tradition, such as *semendo*, when referring to their *adat* for marriage and divorce. Thus, I refer to marriages and divorce among traditional villagers as the *semendo*

tradition. It is a tradition, because the villagers observe *semendo* principles and institutionalise them at village level, with a differentiated structure and function. For example, the *kaum* leader serves as the main figure in a *semendo* marriage, and the local *Imam* is the authoritative actor in a *semendo* divorce, through the procedure of *minta-sah*. It is also a tradition, because we can link current marriages and divorces to the general norms designed for them in historical Mukomuko, and the present day manifestation of *semendo* marriage and divorce will also help us to understand possibilities for future marriage and divorce (a discursive tradition, Asad, 2009, p. 20). As a result, *semendo* marriage and divorce are a discursive tradition, differentiated from other options, such as informal, Islamic, and state marriage and divorce.

Last, but not least, it is noted that the existing *semendo* tradition is increasingly being contested. The local government is now trying to eliminate *adat* elements and figures from the village administration, by imposing an LA on every village, which will undoubtedly reduce the recognition of *orang adat* as an important implementing actor and structure. This threat occurs simultaneously with cross-ethnic marriages, and situations where a wife either has to leave her home village to follow her husband or she herself must leave the village to make a living, which is against the uxorilocal principle. In this case, the limits of *semendo* marriage are exposed: it might only ever operate effectively within a village. Another threat to the *semendo* tradition can be attributed to the increasing presence of the state (notably, the Islamic court), which enables some structural conflict with the existing tradition. Although not usual, some traditional villagers (mainly husbands) have started to challenge *semendo* divorce, by filing lawsuits at the Islamic court in order to obtain a greater share of their joint-marital property. This threat was exacerbated by the attitude of some judges, who ignored the *semendo* tradition as a living law. Such conflict is now even more likely to happen, following the recent establishment of the Mukomuko Islamic court at the end of 2018. I will address this subject further in the next chapter.

5

The State Islamic Court: Examining Conflicts between *Semendo Adat* and State Law

5.1 Introduction

This chapter seeks to investigate access to the Islamic court at the local level. The discussion draws upon Chapter 2, on the autonomy of the Islamic court. As I mentioned earlier, the Indonesian state has introduced several reforms to its family law. Law 22/1946 administratively requires marriages, divorces, and *rujuks* (reconciliations) to be registered at the relevant office, i.e. an Office of Religious Affairs (*Kantor Urusan Agama,* KUA), for Muslims, or an Office of Civil Registry (*Kantor Catatan Sipil*), for non-Muslims. Law 1/1974 requires a marriage to be registered and a divorce to be based on a judicial decision, otherwise, neither will have the force of law. Law 7/1989 on Islamic Judicature enhances the status of the Islamic court (M. E. Cammack, 1997). The 1991 Compilation of Islamic Law (*Kompilasi Hukum Islam*, KHI) codifies a standardised interpretation of Islamic law for judges at the Islamic court (Nurlaelawati, 2010). In addition to increasing state control over a citizen's personal affairs, the reforms acknowledge family law and an Islamic court which are exclusively for Muslims. Yet, rather than forming the sole outcome of legislative deliberations, the reforms have predominantly been informed by 'bureaucratisation', and by 'judicialisation' processes (see Chapter 1, Section 1.4.1). To this day, judges from the Islamic court remain active in exercising judicial law making, as is evident in the 'extended' and 'refined' form of *isbat nikah* (a retroactive validation),[151] and in the broken marriage ground.

[151] The current *isbat nikah* is extended, because it may be applied to unregistered marriages after the passing of Law 1/1974. It has also been refined, because its application is now restricted, i.e. to being religiously valid and not an informal polygamy.

The latter developments demonstrate the autonomy of Islamic court judges in performing judicial reforms of marriage and divorce law. Through the new form of *isbat nikah*, Islamic court judges have managed to accommodate unregistered marriages, which are still pervasive in Indonesian society. Meanwhile, through the invention of broken marriage, the judges have managed to provide a 'unilateral' and 'no-fault' divorce ground and, more importantly, a simpler divorce procedure.[152] The judges have therefore exercised their autonomy, by bridging the gap between a formal application of law and a sense of justice within society. However, to examine this autonomy it is necessary to look at the judges' ability to navigate between the law and a sense of justice at the local level; notably, among a social group that observes non-state rules or norms. In Mukomuko, for example, the population is comprised of different groups, such as 'traditional *hulu-hilir* (upstream-downstream)[153] villagers' and migrants in several enclaves, and a mixture of the two in urban centres. While migrants may observe various rules from their place of origin, traditional villagers adhere to the *semendo adat*, which cannot be bypassed easily. Traditional villagers may escape the *adat* by abandoning their natal village, but their *kaum* (clan) will then be socially excluded from *kerja-baik* and *kerja-buruk*.[154] By narrowing the discussion to this particular group, this chapter seeks to understand the complex entanglement between local *adat* and state law.

To this end, the chapter looks primarily at marriage and divorce cases brought to the Islamic court by traditional villagers;

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[152] By 'unilateral', I mean that this ground may be used by either a man or a woman; and by 'no-fault', I mean that this ground lifts the burden to find who was at fault from the judges' shoulders.

[153] The traditional villagers refer to natives who reside at *hulu-hilir*, i.e. the former regions of XIX Koto, V Koto, and LIX Peroatin, and adhere to a *semendo adat*. Realising the colonial impression embodied to the terms of native and traditional, I still use these terms to distinguish these people from the remaining locals who reside permanently in Mukomuko but are not part of the *adat* community.

[154] *Kerja-baik-kerja-buruk* serves as a general guideline for how a community should deal with important events, such as births, marriages and deaths. These events are divided into two categories: One is *kerja-baik* (good events), e.g. birth and marriage, and the other is *kerja-buruk* (bad events), e.g. death. (For further elaboration, see Chapter 4, Section 4.2).

and, even though this rarely occurs, I found a few cases to explore. The cases usually involve a dispute about the distribution of marital property, embodied by a conflict between matrilineally-informed *adat* and the state's more patriarchally-inclined law. This conflict is inevitable, as a greater share of marital property is proffered to wives and children by *semendo adat* than by state law. An exception applies to divorce lawsuits concerning villagers who are state officials, i.e. civil servants, police, or military officers. These officials are subject to stricter regulation,[155] and their presence before the court is mostly for legal reasons, rather than to indicate a challenge to their *adat* and its institutional actors. This chapter also looks at how judges responded to their lawsuits. As I will show, judges made their decisions by sticking strictly to the law and the accepted developments within the Supreme Court—disregarding the parties' unique *adat* and sociocultural backgrounds. This chapter also looks at other types of actor, i.e. lawyers and informal case-drafters (*juru-ketik-perkara*),[156] who act as intermediaries or brokers between the parties and judges. As I will demonstrate, their brokerage roles have proven to be both 'constructive' and 'prospective' (Buskens, 2008, p. 153; Dupret & Drieskens, 2008, p. 9; Geertz, 1981, p. 173).

This exploration draws upon caselaw from 2016 to May 2021, at the Arga Makmur Islamic and Mukomuko Islamic courts. The caselaw consists of marriage-related and divorce-related cases involving *isbat nikah*, marriage dispensation, the distribution of joint-marital property, alimony, and/or child support. This exploration reveals that the encounter between the three main actors, i.e. the parties, judges, and brokers, was shaped by a conflict between the *semendo adat* and state law, even though

[155] Not only is a judicial divorce mandatory for such officials, but a failure to comply with this provision will be subject to more severe legal sanctions. Further, they must obtain permission from their superiors prior to divorcing, or their career will be at stake (Article 3 of Government Regulation 45/1990; Police Chief Regulation 9/2010 and Ministry of Defence Regulation 23/2008).

[156] At the Arga Makmur Islamic court, an informal case-drafter is a person offering a service to formulate a lawsuit or petition, for 100,000 to 150,000 rupiahs per case. Usually, the informal case-drafter is an acquaintance of one of the court employees, and they are supposed to equate to a *Pos Bantuan Hukum* (POSBAKUM, a legal aid centre), which would not otherwise exist in this court.

the latter always prevailed in court decisions. Hence, the Islamic court was not a promising forum for villagers who would usually refer to their *adat* (as a matrilineally-inclined Islamic law), and this partly explains the low number of incoming cases from this matrilineal community. Before delving further into this argument, some background to the establishment of the Mukomuko Islamic court will first be presented.

5.2 The 'Late' Establishment of the Mukomuko Islamic Court

In 1968 the Minister of Religious Affairs (the MoRA) issued Decree Number 195/1968, concerning the establishment of the Mukomuko Islamic court. The plan was to establish this court within the former *Kawedanan* of Mukomuko, which was a self-contained region.[157] However, at the time the region was only a sub-region of the *Kota Madya* (municipality) of Bengkulu, so the plan never materialised. Later, Mukomuko and the northern parts of Bengkulu became an autonomous regency, following the secession of Bengkulu province from South Sumatra via Government Regulation 23/1976. Yet, the capital of this new regency was not Mukomuko, but Arga Makmur, a rising transmigration region far southwest of Mukomuko (252.2 km, or seven hours from Mukomuko).[158] The new Islamic court was established at Arga Makmur, although its old name, 'Mukomuko Islamic court', was retained. Only later was the name of the court changed to 'Arga Makmur Islamic court', through MoRA Decree Number 72/1984. The court's jurisdiction included Mukomuko, up until the establishment of Mukomuko Islamic court in 2018.

The region, which obtained regional autonomy in 2003, therefore had to wait 13 years for the central government to create its Islamic court through Presidential Decree 15/2016.

[157] The *Kawedanan* was an administrative unit, beneath the regency but above several sub-regencies, which was led by a *wedana* who served the regent and oversaw the sub-regencies.

[158] The appointment of Arga Makmur as the capital can be attributed to the massive transmigration programme undertaken during the New Order era. This appointment sought to create a success story for the programme, which disregarded Mukomuko's sociohistorical background as a self-contained region (Soeprapto, 1989). Yet, the first regent of North Bengkulu (Letkol Syamul Bahri) was himself a native of Mukomuko.

Nonetheless, the court did not immediately start operating; Mukomuko had to wait a further two years for this to happen. Preparing the court to start functioning fully required the regional government (PEMDA) of Mukomuko to provide official vehicles, furniture, a residence, land, and a temporary rented building for the court. After satisfying these requirements, an Islamic court was officially established in the capital city of Mukomuko. The court became operational on 22 October 2018 and received its first case on 3 December 2018. Its establishment has significantly cut people's travelling distances to court, but some residents still consider the court's position at the far north of the region to be a barrier. People who reside at the *hulu* (upstream) and southerly villages, at a maximum distance of 124 km, still have to travel around four hours to reach the capital. This explains why, in February 2021, the Mukomuko Islamic court organised a circuit court at the southern sub-regency of Ipuh, which is 98 km from the capital. However, the initiative did not completely address the barrier, since the circuit was not arranged regularly due to the limited budget offered by the Supreme Court.

The 'late' establishment of the Mukomuko Islamic court raises the question of how people obtained a formal divorce prior to its establishment in 2018. In order to find out, it is necessary to distinguish between the period before the enactment of Marriage Law 1/1974 and the period after the marriage law came into force. Before 1974, people in Mukomuko could easily formalise their divorces at either the KUA of the North Mukomuko sub-regency or the KUA of the South Mukomuko sub-regency. However, after 1974 divorce lawsuits had to be filed at the Arga Makmur Islamic court, in the capital city of Bengkulu Utara. Within the second period, it is also necessary to distinguish between two periods: one before the adoption of the 'one-roof system' in 2004, and one after the adoption of the one-roof system. The one-roof system is a model of judicial governance which charges the Supreme Court not only with judicial supervision but also with court administration (Rositawati, 2019). The Supreme

court is now in charge of its own organisational, administrative and financial matters, including the judicial bodies beneath it (Article 13 of Law 4/2004). This system was adopted to realise the independence of the judiciary and make it free from intervention from the outside; notably, from the government and parliament (Rositawati, 2019, p. 255).

In the Islamic court, adoption of the one-roof system put an end to the dual authority over it, by the MoRA and the Supreme Court. It also resulted in better facilities, such as new buildings in the capitals of many regencies and increased salaries for judges, clerks, and court employees (van Huis 2015, 55–56). However, in Mukomuko the one-roof system served to alienate people from the Islamic court. Although the distance separating Mukomuko from Arga Makmur had long been a barrier to accessing the court, adoption of the one-roof system put a stop to every policy issued by the Arga Makmur Islamic court aiming to bring it closer to the Mukomuko population. Before the one-roof system, judges from this court could easily arrange a *sidang-luar-gedung* (an out-of-court session)[159] in Mukomuko, by collaborating with the local KUA in North Mukomuko and the South Mukomuko sub-regencies. Busral, a former employee and head of North Mukomuko KUA (1997-2004), told me that during his service he could easily invite the Arga Makmur judges to conduct a session at his office. He added, "…if there were at least five divorce cases, I would call the Arga Makmur Islamic court immediately, and judges from that court would arrive the following week."[160] During this period, the KUA employees worked hand in hand with the judges and court employees to address peoples' barriers to court access, by creating a demand-based circuit court.

Tarmizi, a former clerk and judge in an Islamic court, confirms this story.[161] During this period, judges and employees from

[159] A *sidang-di-luar-gedung* is a generic term that may apply to either an integrated session (*sidang terpadu*)—such as a mass *isbat* outside the Islamic court—or a circuit court (*sidang keliling*).

[160] Interview with Busral at Bandar Ratu Mukomuko, on 19 March 2017.

[161] Tarmizi served at the Arga Makmur Islamic court twice, in 2000 and from 2005 to 2010. He was appointed Vice Chairman of the court in 2007, and head of the court from 2008 to

the Arga Makmur Islamic court would arrange to visit Mukomuko after receiving a request (by phone) from the KUA of Mukomuko to conduct a *sidang-di-luar-gedung* (a circuit court). In the meantime, the local KUA had to ensure that everything was prepared, including the collection of litigation fees, recording a divorce petitioner's or plaintiff's basic information, summoning parties and witnesses, and guiding parties in preparing the required documents and evidence. Tarmizi told me, "we came with a blank file (*berkas perkara kosong*) and left with it full." On the due date, the proper procedures were followed, including a mediation session, although each step was simpler than the last.[162] The judges could thereby expedite the adjudication process by executing all the procedures in one session. However, he added, "it was also common to decide a case in more than one session. If so, we would decide the case in the next session at court. Although the parties might skip this session, they would not be considered absent. This was indeed against the law, but we had to prioritise their situation."

Such cooperation was possible for several reasons. At the time, the KUA and Arga Makmur Islamic court were administratively and financially part of the same institution, the MoRA, which facilitated mutual cooperation. More importantly, the court could adapt its financial expenses to situations particular to Mukomuko. For example, the court managed to allocate *biaya pemanggilan* (calling fees) for judges' accommodation throughout one circuit court period, while the local KUA became a 'broker' (or bridge) between the court and society. Nonetheless, this cooperation would not have been possible without the individuals who were behind it. Tarmizi and Darussalam - the head of North Mukomuko KUA (1990-1997) - happened to be cousins.

2010. Interviews and personal communications from 2015 to 2021.

[162] At the time, mediation was already mandatory, but the judges managed to combine it with other sessions without fearing that their decision would be declared null and void. Now – notably, after the passing of Supreme Court Regulation 1/2016 on mediation - mediation should be arranged in a separate session, or the decision will be declared null and void by appeal (See also *Surat Edaran Mahkamah Agung* [SEMA, the Supreme Court Circulation Letter] 3/2015 on Islamic Chamber, point 6).

As host, Darussalam used to prepare food and housing for judges and employees from the Arga Makmur Islamic court during their stay in Mukomuko. Given his popularity in Mukomuko,[163] Darussalam could lobby the local government to arrange a hostel for the guests. In addition, the judges and employees had originally had to ride for an hour on motorbikes to reach Lais, using public transport for the remainder of their trip to Mukomuko. Only later (around 2000) did they use a private car (owned by one of the judges), to make their journey more comfortable, minimise the expenses, and reduce time spent on the road.[164] Without these initiatives, regular and accessible circuit courts would have been impossible.

After the one-roof system came into force in 2005, cooperation between the court and Mukomuko's KUA started to decline. Due to insufficient funds, the circuit court was no longer available in the North Mukomuko KUA, surviving only in the South Mukomuko KUA. This decline can also be attributed to the adoption of the one-roof system, which centralised all organisational, administrative, and financial matters under the Supreme Court, disregarding all policies carried out by Islamic courts. As a result, the court's policy of financing visits to Mukomuko using litigation fees, and its unique cooperation with other state institutions in Mukomuko both had to stop. The situation worsened when judges discovered (in 2007) that the South Mukomuko KUA had doubled its court fees and put them in its own pocket, which ultimately led Arga Makmur Islamic court to terminate its cooperation with the KUA.[165] A year later, the circuit court resumed,

[163] Before becoming Chairman of the North Mukomuko KUA in 1990-1997, Darussalam served as an employee there for several years. During his service, he had mingled and maintained good communication with the locals, recognised by them as not only as a *penghulu* (a marriage registrar) but also as a *penceramah* (a preacher) and an *orang-tua* (an elder) of *Kaum Gresik* (a clan dominated by migrants). Interview with Darussalam, just a couple of months before his sudden death, at Gunung Silan, on 28 December 2015.

[164] Before use of this private car, the team from Arga Makmur Islamic court took one whole day to make the trip, and would commence a court session the following day. Now, they could start the session on the same day they departed from Arga Makmur. They also managed to reduce the transport fee for gasoline, and they allocated the remaining income from litigation fees to pay for their accommodation in Mukomuko.

[165] Tarmizi told me: "the petitioners and litigants initially refused to admit that they were charged twice the normal fee. However, after we threatened not to proceed with their case

in response to demand from the people, but this time it was not located at the KUA office. Instead, it took place at the sub-regency office (*kecamatan*) of South Mukomuko. However, the new circuit court was no longer demand-based, and the judges were no longer free to finance their visit using litigation fees. Coupled with the Supreme Court budget cut in 2009 (van Huis, 2015, p. 156), the new circuit court therefore became rare, happening no more than twice a year.

As a programme, the circuit court was dependent on a budget allocated by the Supreme Court, and it became 'identical' to a regular court session. The only difference was its location. The new circuit court also required a specific session for mediation, unless it was carried out via the *gaib* (*verstek*) procedure. The *verstek* procedure enables judges to adjudicate a lawsuit without the presence of a defendant, after the defendant has been properly summoned. Therefore, each case requires at least two sessions: i) an examination hearing and mediation; and, ii) an evidentiary hearing and decision session. Thus, the new form of circuit court was hardly a solution to the distance issue; each justice seeker still had to visit the court in Arga Makmur. In this respect, the new form of circuit court was not a continuation of former policy, before the adoption of the one-roof system. Unlike the former circuit court, which was a demand-based program, the present-day circuit court is a mere top-to-bottom programme, which disregards the particular situation in Mukomuko. For 18 years, the people of Mukomuko were increasingly 'isolated' from the Islamic court, until the establishment of their Islamic court at the end of 2018.

The establishment of the Mukomuko Islamic court in 2018 has ultimately brought the Islamic court closer to the people of Mukomuko. It was once accessible through the constant circuit court of Arga Makmur Islamic court, becoming less accessible following the adoption of the one-roof system. However, divorce

if they did not confess, they eventually told us the truth: that the KUA had doubled the fees." Interview with Tarmizi, at Rawa-Makmur Bengkulu, on 10 April 2017.

data during this period were not well documented, either in the KUA or in the competent court; therefore, I could not confirm this shift. What is obvious is that the one-roof system has indeed increased the facilities and institutional independence of the Islamic court. Yet, as Rositawati maintains, it has also resulted in an 'internally centralistic' and 'externally disconnected' judiciary (Rositawati, 2019, p. 256). Internally, this system centralises both the technical judiciary and court administration under the Supreme Court. Externally, the system isolates the Supreme Court from other state bodies. In Mukomuko, the negative aspect of the system manifests in the demise of the old form of circuit court (as routine), and in a decline in cooperation between the Islamic court and local Offices of Religious Affairs (KUA). The one-roof system has made the first instance court in Mukomuko heavily dependent on the Supreme Court, and has resulted in its disconnection from other state institutions. In other words, Mukomuko is an example of an ongoing process of 'formalism' (Haque, 2010; Riggs, 1962), where efforts to transform the Islamic court into an independent judiciary have made the court centralistic and exclusive.

Next, I will discuss how people of Mukomuko have accessed the Islamic court. The exploration includes: (1) a period from 2016 to 2017, when Mukomuko was under the jurisdiction of the Arga Makmur Islamic court; (2) a transitional period, in 2018; and (3) a period from 2019 until May 2021, when the Mukomuko Islamic court was in full operation.

5.3 Access to the Islamic Court

This section draws upon relevant cases and statistics from Mukomuko within the last six years. The data encompass both marriage-related and divorce-related cases at the competent courts, i.e. the Arga Makmur Islamic court and the Mukomuko Islamic court. The average rise in cases each year was relatively steady. An exception to this occurred in 2018, when the number of cases decreased by around 14.5%. This decline can be attributed

to a transition from the Arga Makmur to the Mukomuko Islamic court in that year; afterwards, the number of incoming cases began climbing again. Another feature of the court statistics concerns the origin of lawsuits, which were predominantly filed by migrants who lived either in transmigration and plantation enclaves or in emerging urban centres. However, this discussion will be based mostly on cases involving members of the matrilineal community, so as to understand how people who adhere to *semendo adat* navigate different forms of normative systems and institutions, and how judges respond to their unique background. In addition, this chapter looks at the roles of informal case-drafters and professional lawyers in formulating lawsuits. The main finding will be that court access is shaped by an ongoing structural conflict between the local *semendo adat* and the state's patriarchally-inclined law.

Types of Incoming Cases		Prior to the Establishment of Mukomuko Islamic Court				Transitional Period				After the Establishment of Mukomuko Islamic Court			All Cases	All Cases of Mukomuko Origin
		2016		2017		2018				2019	2020	2021 (May)		
		Non Mukomuko	Muko muko	Non Mukomuko	Muko muko	Non Muko muko	Muko muko	Mukomuko Islamic Court	Combined	Mukomuko Islamic Court				
1	*Isbat Nikah* Petition	101*	2	17	5	32	1	1	2	21	47**	20	244	**97**
2	*Isbat Nikah* Lawsuit						1		1		1		3	**2**
3	Marriage Dispensation (*Dispensasi Kawin*)	7	2	12	3	36	2		2	20	66***	32	182	**125**
4	Poligamy Lawsuit			1		1					1		3	**1**
5	Divorce by Wife (*Cerai Gugat*)	323	119	354	134	400	103	20	123	208	246	112	2130	**942**
6	Divorce by Husband (*Cerai Talak*)	139	52	176	70	153	40	14	54	90	88	35	885	**389**
7	Joint-Marital Properties (*Harta Bersama*)			3	2	2					4	1	12	**7**
8	Inheritance Lawsuits (*Kewarisan*)	2					*1*		*1*				4	**1**
9	Inheritance Petitions (*Penetapan Ahli Waris*)					2					1	2	5	**3**
Total		**572**	**175**	**563**	**214**	**626**	**148**	**35**	**183**	**339**	**454**	**202**	**3468**	**1567**

Figure 5.3.1: Incoming cases from Mukomuko in the last six years (2016–May 2021)

N.B. While a lawsuit is contentious, a petition is voluntary in nature.
* A mass *isbat* in North Bengkulu, in 2016, received 91 cases (*Laporan Tahun PA* Arga Makmur 2016, 63-4).
** A mass *isbat* on August 2021 received 20 cases (Fakhruddin, 2020).
**** This staggering rise follows the passing of Law 16/2019, which elevates the minimum marriage age for a woman to 19-years-old.

5.4 Marriage-Related Cases: Bridging *Adat* and State Marriage

Over the last six years, the competent courts for the people of Mukomuko have recorded a steady rise in marriage-related cases, each year. The cases focus on marriage-dispensation, *isbat nikah,* and joint-marital property. After the establishment of the Mukomuko Islamic court at the end of 2018, the number of marriage dispensations and *isbat nikah* cases began to skyrocket. In 2019, the former increased tenfold, i.e. from only two *isbat nikah* cases to 20, while the latter increased sevenfold, i.e. from only three *isbat nikah* cases to 21. In the following year, this number continued to increase. Marriage dispensation cases increased more than threefold, whereas *isbat nikah* cases multiplied by more than twofold. The rise in marriage dispensation can be attributed to the passing of Law 16/2019 on the elevation of the minimum marital age for women, from 16 to 19 years-old.[166] There were precisely 20 cases in 2019 and 66 cases in 2020. According to this trend, marriage dispensation became the only case category seeing a stable and significant rise, and most of the cases were accepted. The following figure shows the correlation between the staggering rise in marriage dispensation cases and the elevation of the minimum marital age for women. Nearly all the cases were brought by the prospective bride.

[166] Following the increase in a woman's average marital age in the last quarter of 2019, the yearly number of marriage dispensation cases rose exponentially. In 2019, marriage dispensation in the Islamic court increased by twofold, from 13,822 to 24,864 cases, nationally. In the following year, when Law 16/2019 had been in full effect for a year, the number increased threefold, to 64,196 cases (*Laporan Tahunan Badilag* 2017-2020).

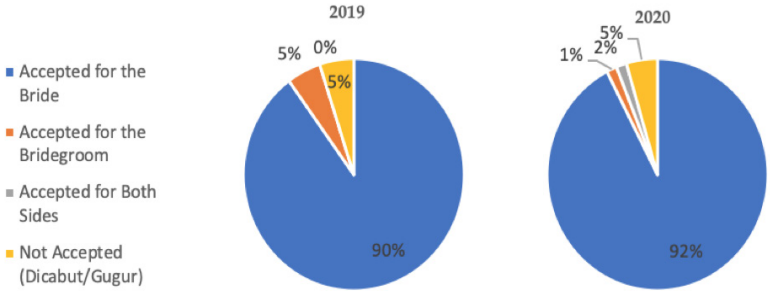

Figure 5.4.1: Marriage dispensation in the Mukomuko Islamic court

The rise in *isbat nikah* corresponds with recent judicial reform within the state Islamic court, on the extended and refined form of *isbat nikah*. Nowadays, judges from the Islamic court are more lenient regarding unregistered marriages. They are more likely to validate such marriages retroactively, via an *isbat nikah*, as long as the marriage is not against the law, i.e. it is neither an informal polygamy nor a religiously invalid marriage. Moreover, they formulate an implementing procedure that divides the *isbat nikah* into a petition (*permohonan*) and a lawsuit (*gugatan*).[167] While the former is voluntary or non-contentious, meaning it can be adjudicated by a single judge in a simplified court session, the latter is contentious and should be led by collegial judges in a complete procedure. This distinction can be seen, respectively: a) as an option for a 'less problematic' marriage; and b) as an option for an 'inherently problematic' marriage. In other words, a less problematic marriage, e.g. an unregistered marriage that is consensual and not against the limits set by the Islamic Chamber of the Supreme Court,[168] can be validated retroactively through the simplified procedure for an *isbat nikah* petition. Conversely, for

[167] The distinction between an *isbat* lawsuit and an *isbat* petition can be identified by a court registration number. However, their distinction is sometimes not clear, and in everyday use they are often referred to as *permohonan* (a petition). In the last six years, the categories have not been strictly followed and are available only in the 2017 and 2019 records (i.e. 2,373 *isbat* lawsuits plus 55,322 petitions in 2017, and 512 *isbat* lawsuits plus 60,231 petitions in 2019) for the whole of Indonesia. See the yearly reports of *Badan Peradilan Agama* (*Badilag*), for the period 2016-2020.

[168] An extensive discussion of judicial developments regarding *isbat nikah* can be found in Chapter 2. Simply put, these developments have extended the form of *isbat nikah* and refined its application, by introducing several limits; namely, being religiously valid, and not being an informal polygamy.

the purpose of a formal divorce, e.g. the division of joint-marital property, distribution of inheritance, and the like, the complete procedure of *isbat nikah* lawsuit will be followed, i.e. a contentious session with collegial judges.

In addition to the developments within the Islamic court, the yearly rise of *isbat nikah* can be attributed to the establishment of the Mukomuko Islamic court at the end of 2018 and a mass *isbat nikah* programme in mid-2020. From 2016 to 2018, before the establishment of the Mukomuko Islamic court, there were ten *isbat nikah* cases from Mukomuko, only one of which was registered as contentious. In 2016 the Regional MoRA Office in Mukomuko planned a mass *isbat nikah* programme. It identified 2,031 unregistered couples who were willing to participate, but unfortunately the plan was aborted due to lack of funds. When the Mukomuko Islamic court was in full operation, *isbat nikah* started to increase rapidly, reaching a total of 89 cases from 2019 to May 2021, only one of which was registered as contentious. In 2019 there were 21 cases, and this number continued to increase steadily in the following years. A staggering rise occurred in 2020, when the mass *isbat nikah* programme received 23 additional cases at once. Of a total of 99 *isbat nikah* cases in the last six years, only two were contentious.

Next I will present one marriage-related case involving traditional villagers, to show how the different actors were brought together in court. The featured case was primarily selected to narrow the analysis and shed light on how the actors got involved in a complex process of conflict between *semendo adat* and state law. For these purposes, the background to the case will be addressed first.

5.4.1 Nurdin v. the late Hamidah family: *isbat nikah* and debates on marital property

In 1968 H. Nurdin and Hj. Hamidah concluded a marriage before a local imam of Tanah Rekah, according to Islamic provisions. The bride's biological father acted as guardian, the bride-

groom gave a prompt bride-price (*mahar)* to the bride, and two male adults attended the procession as witnesses. The marriage procession was arranged in compliance with the *semendo adat* and led by the bride's *kaum* leader, but not registered. Even after the passing of the 1974 marriage law, which obliges registration, the couple did not make any attempt to register their marriage retroactively. In July 2017 Hamidah passed away, leaving her husband with no biological offspring. In fact, they had adopted Julita (32), Hamidah's niece, when she was eight months old, but the adoption was never legalised. Therefore, legally speaking, Julita was no more than a sororal niece. Still, Julita was always by their side, and took care of Hamidah as her own mother until her last days on her deathbed. The death of Hamidah caused deep grief and sorrow to the both Nurdin and Hamidah's families, but sadly this loss was soon overshadowed by a dispute between them concerning the distribution of inheritance objects from the late Hamidah.

Several months after this loss, Nurdin filed a report with the local police, accusing Julita of embezzling important documents and property. The police followed up with the local prosecutor, who then brought the accusation to Arga Makmur general court. This report disappointed Julita's family. According to *semendo adat*, half of Hamidah's joint-marital property belongs to the deceased wife's family, since the marriage ended with no biological children. Therefore, what Julita did should not have been seen as embezzlement. Instead (as was maintained), this was a daughter who had spent some of her parent's money, in order to fulfil her mother's needs in her final days. The trial continued and, on 23 April 2018, the court rendered verdict Number 61/Pid.B/2018/PN.Agm, which sentenced Julita to 3 months of imprisonment.

Disappointed in Nurdin, the deceased's siblings went to the Arga Makmur Islamic court to claim their share of the late Hamidah's inheritance. Initially, they were directed to validate their sister's marriage retroactively, through an *isbat* petition. The petition was formally filed by Ahmad (a pseudonym), 62, Ham-

idah's only brother. During the court session, Nurdin expressed regret (through his lawyer) that Ahmad had filed the lawsuit, but overall he did not object to validating his marriage retroactively. After six sessions, the judges awarded the petition on 24 April 2018, and instructed the petitioner to register Hamidah's marriage posthumously at the KUA of Mukomuko, in order to obtain a marriage certificate for her. Equipped with the certificate, Ahmad and his two other sisters filed an inheritance lawsuit to claim their inheritance share at the same court, on 21 May 2018. After failing to reconcile the parties through mediation, the judges proceeded with the inheritance lawsuit, which lasted 378 days and was recorded in an 111-page decision: Number 313/Pdt.G/2018/PA.Agm. Overall, there were 19 sessions, including one at their residence in Mukomuko (*descente*)[169], to verify the disputed objects at the location. In this manner, use of the Islamic court by Hamida's family was a direct response to their sororal niece being accused of embezzlement because, in their view, the property did not belong to Nurdin in its entirety.

The court session was intense, with protracted debates about the objects of inheritance. The plaintiffs argued that all the property acquired during Nurdin and Hamidah's marriage was the object of inheritance. This included: (1) immovable property, consisting of 12.15 ha of land and one 96 m^2 house; (2) movable property (vehicles) with a total monetary value of around 11 million rupiahs; (3) 48.6 g of gold jewellery; (4) 11 cows (valued at 10 million rupiahs); (5) the sale of palm oil fruit since the death of Hamidah (four-million rupiahs, per month); and, (6) various household furniture. In his answer, the defendant admitted (through his lawyer) that the plaintiffs were entitled to the inheritance. However, he objected to their demand by arguing that he had spent the majority of the claimed property on his living expenses. He also accused them of behaving unfairly by concealing some of the property under their control and not including it in their demand, i.e. two plots of land totalling 7,000 m^2, and a 100

[169] *Descente* is a legal term used in the Indonesian Islamic court to designate a court session which is held out-of-court, mainly to verify disputed objects at their exact location.

m^2 house. Nevertheless, he offered to let them keep some property they were already using, including 11,291 m^2 of land and two used motorbikes. Yet, the plaintiffs contested that this property was *harta-pusako* (matrilineally-inherited property) and it therefore belonged to their family, in any case. They persisted in their initial demand, including their share of the sold property, by turning down Nurdin's offer.[170] In response, Nurdin acknowledged their claim to the *harta-pusako*, but demanded that all the plants and buildings on them were included. In this sense, the parties expected the object of inheritance to include all the property acquired during the marriage.

The judges eventually decided to partially accept the lawsuit by establishing only half of the joint marital property as the object of inheritance and determining the rightful beneficiaries and their respective share of the inheritance. *First*, they validated only the proven objects as joint marital property, which included the 12.15 ha of land and its building, four vehicles, all the jewellery, one of the 11 claimed cattle, and some of the used furniture. Only then could they determine that half of the property was the object of inheritance whereas the other half belonged to the husband as his share from the joint marital property. *Second*, the judges established that the husband and Hamidah's siblings, including one of her sisters as co-defendant (*turut tergugat*), were the prospective beneficiaries of the inheritance. While the husband was entitled to half the inheritance object, the siblings were collectively entitled to the other half. The siblings should divide their share between them according to the 2:1 principle, i.e. two portions each for the male siblings, and one portion for each of the female siblings. As a result, the husband gained 5/10, the three sisters gained 1/10 each, and the only brother gained 2/10. This ruling also mentioned that the parties were supposed

[170] According to the inheritance law, Nurdin is entitled to half the inheritance, because the marriage had no offspring, whereas the other half belongs to the deceased wife's siblings (*asobah*). Therefore, excluding the disputed *harta pusako* objects and Nurdin's share, the siblings are supposed to get more than 3 ha of land (and the building on it), 12.15 g of gold jewellery, 28,750,000 rupiahs from vehicle sales, 19,683,300 rupiahs from cow sales, and some of the furniture.

to divide the inheritance by themselves (*natura*). Otherwise, they would be expected to auction the objects of inheritance and share the result. The judges also charged the parties 2,635,000 rupiahs each for the court session at their residence (the *descente* session), and charged the defendant 2,196,000 rupiahs, as the losing party.

In response, Nurdin filed an appeal at the Bengkulu appellate court. The court accepted his appeal and upheld the first instance court decision regarding the rightful beneficiaries and their respective shares in the property. Nonetheless, the court annulled the remaining decision concerning the object of inheritance. The judges argued that, in their claim (*petitum*), the plaintiffs did not specifically ask the court to establish the objects of the lawsuit as joint marital property, nor to distribute them between the prospective beneficiaries. They maintained in Decision Number 14/Pdt.G/2019/PTA Bengkulu that, "the first instance court decision was beyond the lawsuit (*ulta petita*) and therefore should be rejected". In fact, the plaintiffs did make a request to the judges in their claim, to establish and distribute the objects of inheritance. However, as previously mentioned, the plaintiffs who appeared before the court on their own were not aware of the distinction between objects of inheritance and joint marital property, according to Indonesian inheritance law for Muslims. Surprisingly, the defendant, who had employed a group of local lawyers, also shared in this confusion. In addition, the appellate court switched all the litigation fees for the first instance court to the plaintiffs, making them the losing party. They also charged them with the appeal fee of 150,000 rupiahs. This decision disappointed the plaintiffs, who had expected the court to offer a solution to the failure in consensual division of the inheritance.

As a last resort, the late Hamidah family petitioned a cassation to the Supreme Court on 29 October 2019. In response, the defendant filed a contra memory of cassation on 18 November 2019, asking the court to refuse the appeal for cassation. After

examining the petition, the supreme judges accepted this petition by annulling the lower courts' decisions, on the ground that the lower court judges (*judex facti*) had applied the law incorrectly. After re-examining the disputed objects (but not the verified objects), they concluded that, in their lawsuit, Hamidah's family members did not separate joint marital property from inherited property. Therefore, in its consideration, the lawsuit failed to meet one of the elements of inheritance, which is to clearly include: a benefactor (*pewaris*), beneficiaries (*ahli waris*), and inheritance objects (*objek waris*). According to these elements, the supreme judges ruled that the objects of the lawsuit were obscure (*obscuur libel*), and that the lawsuit should therefore be inadmissible (*niet ontvankelijk verklaard*, NO). Nevertheless, Nurdin now became the losing party, bearing all the litigation fees for the lower courts, including a cassation fee of 500,000 rupiahs. This decision could be seen as a 'deferred' victory for the plaintiffs, because they had to file a revised lawsuit from scratch, although no action had been taken by them before this research was concluded.

This case shows how one family's use of the Islamic court ended with no resolution. The reason for this failure was the judges' inclination not to sense their particular background as observers of the *semendo* tradition. The fact that the marriage ended with no biological child gives the wife's family the upper hand over the husband regarding joint marital property. Moreover, Julita being not only a sororal niece but also a culturally adopted daughter further enhanced the position of the late Hamidah family and its claim over Nurdin.[171] Even though the adoption was never legalised, it was Nurdin and Hamidah who consensually asked Julita's biological parents to adopt her. Nurdin did not object to this claim. His objection was to include all the

[171] In addition to the fact that Julita was culturally adopted, among traditional villagers it is also common for a sororal nephew or niece to call their aunt *ibu* (mother). During my fieldwork in 2017-2018 I was misled several times, when my interlocutors referred to someone as their mother, and they turned out to actually be the sister of their mother. Eventually, to avoid such misunderstanding, I decided to ask if the person they convincingly called *ibu* was their biological mother or their mother's sister. Such clarification was not necessary for a father's sister, who is usually called *ibu bako*.

joint marital property as inheritance objects, for which the first instance judges helped to verify the valid objects. Rendering the lawsuit inadmissible on the ground of *obscuur libel* was indeed an easy way for the supreme judges not to get involved in the complex situation, while at the same time not declining the lawsuit (which is prohibited, by law).[172] Butt confirms this trend as, "a regular use of technicalities to throw out applications" (Butt, 2019, p. 69). By delving into the strategies employed by the disputants, this case reveals a 'shopping' process toward the existing state institutions and different sets of normativity, such as the state law and the equivalent local *adat*.

5.4.2 Forum and discourse shopping

The case of *Nurdin v. Hamidah's family* shows a dispute resolution process involving several aspects, from *isbat nikah*, to joint marital property, to inheritance. The case also involved the invocation of different state institutions, notably the criminal and Islamic courts, following the failure of internal resolution within their family and their *adat* community. The case shows how the parties navigated different forums to realise their respective ends, and how functionaries of the different forums, mainly judges, responded to such expectations. As we can see, each party engaged in a process of 'forum shopping', notably in the state criminal court and the Islamic court. Conversely, functionaries in the existing forums responded to the dispute according to their respective competence and jurisdiction. Therefore, unlike the reciprocal process of 'forum shopping' and 'shopping forums' in Minangkabau in the 1970s (K. von Benda-Beckmann, 1981), the dispute between Nurdin and the late Hamidah family underwent a one-sided shopping process. The main argument here is that the parties were involved not only in forum shopping in the state courts but also in 'discourse shopping' within different legal repertoires, i.e. *semendo adat* and state

[172] According to Article 10 (1) of Law 48/2009, a court is prohibited to decline to examine, adjudicate, and decide a case brought before it on the ground that the law is either not available or unclear. Instead, the court is obliged to examine and adjudicate the case. This stipulation corresponds to *Ius Curia Novit* or *Curia Novit Jus* principles, which are popular among judges, and which mean judges are perceived to know all the law and therefore not allowed to decline any case brought before them.

law.[173] However, in disregarding the parties' quest to consider their *adat*, the judges *were* strictly constrained by the law and existing popular reform within the Islamic court.

The conceptual frameworks of forum shopping and shopping forums were first introduced to the study of disputes by Keebet von Benda-Beckmann. By examining dispute resolution in a Minangkabau village around the 1970s, she witnessed a reciprocal process between so-called forum shopping and shopping forums (K. von Benda-Beckmann, 1981, pp. 117, 145). Forum shopping refers to a process where disputants, "other than having a choice between different institutions" such as the *Adat* council and the state courts, would "base their choice on what they hope the outcome of the dispute will be, however vague or ill-founded their expectations may be". Meanwhile, shopping forums refer to a process where functionaries within the different institutions, mainly driven by political goals, "[try] to acquire and manipulate disputes" and "[fend] off the disputes which they fear will threaten their interests". This reciprocal process is "proceeded in the first place in terms of arguments over jurisdiction" and "evaluated in terms of procedural norms". Benda-Beckmann ultimately argued that the disputants, who shopped by considering the strength and limits of each forum, were exposed to a situation where the different functionaries and their respective forums were often not a choice at all, and certainly could not be easily bypassed at will. This two-way process of forum shopping and shopping forums was embodied in each dispute resolution. Apart from a few similarities, the situation is different in contemporary Mukomuko.

In Mukomuko, we can easily adapt the reciprocal concepts of forum shopping and shopping forums to the arrangement of

[173] The concept of 'discourse shopping' was coined by Biezeveld to mean a process where an actor in a dispute resolution "makes his own choice of argument and creates his own interpretation of facts, rules, and norms." In this manner, "not only do legal arguments play a role, but political, cultural, and historical arguments are used" (Biezeveld, 2004). Equipped with this conceptual framework, we can see from the featured case that the parties made their choices not only within existing forums, but also within different legal repertoires belonging to each forum.

a marriage. The previous chapter has demonstrated that traditional villagers conclude a marriage according to one or more existing type(s) of union, such as an informal union, a religious marriage, a *semendo* marriage, and a registered marriage. Each option, notably the *semendo* and registered options, has its own distinctive functionaries, such as *orang adat* for *semendo* marriage and KUA *penghulu* for registered marriage. Together, these options vary along a continuum scale, ranging from informal union as the least 'differentiated' institution, to registered marriage as the most differentiated institution (see Chapter 4, Section 4.3.1). Exposed to these options, traditional villagers get involved in a forum shopping process to determine which option best suits their situation. The functionaries within each forum would also get involved in the shopping forums for their respective need, which is made possible because the functionaries still exercise their authority. For instance, the members of *orang adat* would announce a social sanction for deviation from a *semendo* marriage, i.e. to be excluded from *kerja-baik* and *kerja-buruk,* and their involvement could not easily be bypassed by villagers.[174] However, encounters between the functionaries was not always binary. *Orang adat* members were usually in charge of administrative procedures for a registered marriage. Meanwhile, the KUA penghulu did not object to adaptations, often attending *adat* ceremonies to officiate a marriage, upon request by candidate spouses.[175]

When it comes to a dispute, the shopping process becomes one-sided. The difference, as drawn from the forum shopping and shopping forums theories, lies in two prerequisite factors that are self-evident. One concerns the existence of pluri-normative orders and institutions, and the other requires ongoing debate

[174] When a marriage is registered, the bride's *kaum* leader is usually the person who takes care of the N1-N7 forms (the administrative requirements for marriage) at the local KUA, on behalf of the bride and bridegroom. Interviews with Busral, and several KUAs in Mukomuko.

[175] Candidate spouses are charged 600,000 rupiahs to cover transport costs. Otherwise, a registered marriage will be free of charge, assuming that the candidates prefer to conduct their marriage at the KUA office.

on the competence and jurisdiction of a particular forum over the disputed subject(s) (K. von Benda-Beckmann, 1981, p. 145). Taking these factors into account, in the featured case I identify how *semendo adat* and state law coexist as 'differentiated' legal repertoires and institutions.[176] Yet, compared to a Minangkabau village in the 1970s, the situation in Mukomuko is now very different. Today, the competency and jurisdiction of state courts are no longer issues, as these are both fully established. Therefore, judges from the state courts will operate according to their own competence and jurisdiction, as assigned by law. Meanwhile, the *orang adat* will arrange an *adat* deliberation to resolve a dispute brought before it, but its role is becoming increasingly passive. This passive role, notably in divorce-related cases, can be attributed to the nature of divorce in *adat*, as neither *kerja-baik* nor *kerja-buruk.* In this manner, the involvement of *orang adat* in a dispute depends on the request made by the disputant(s). This is why the dispute between Nurdin and the late Hamidah family went through forum shopping, rather than shopping forums.

In forum shopping, the disputant 'shops' on one particular forum, or a collection of forums, to suit his or her needs. In other words, it is up to the disputant to select a forum themselves, no matter how ill-informed their expectations may be. With regard to the case, Nurdin preferred to bypass the *orang adat* and went to the local police, whereas Hamidah's family responded by filing an *isbat* petition and an inheritance lawsuit at the Arga Makmur Islamic court. Nurdin reported his foster daughter to the local police, in order to secure all the property for himself, for which the daughter was ultimately sentenced to imprisonment

[176] The term 'differentiated' is adapted from a concept in the sociology of law, i.e. differentiation, which means "the existence in a social group of secondary rules creating social roles for the performance of a particular task" (Griffiths, 2017, p. 103). By employing this concept, the *semendo* tradition is perceived as a living law that is differentiated from the remaining sources of social control over marriage and divorce, i.e. state law, religious law, or other customary laws. Together they operate on a continuum scale, from the ultimate zero point of 'less differentiated' to the infinite point of 'more differentiated'. I use this concept to avoid a binary approach, which often divides empirical laws (norms) into merely formal v. informal or legal v. non-legal, rather than treating them as a continuum scale (Abel, 2017; Griffiths, 2017; Platt, 2017). See also my operational adaptation from this concept in Figure 4.3.1.1, Chapter 4.

for three months. Conversely, the late Hamidah's family filed an inheritance lawsuit at the Islamic court and requested that the judges charge Nurdin with a crime (*pidana*) if he refused to distribute their share. This request for a criminal charge was beyond the competence of the court; therefore, it could easily be rejected. An equally ill-founded claim was the family's expectation that all the joint marital property would be included as objects of inheritance. Such a claim may be valid according to *semendo adat*, but not according to state law.[177] Unlike *adat*, Indonesian inheritance law only counts half of the joint marital property as inheritance objects. In this manner, the parties were not only involved in forum shopping, but also in 'discourse' shopping by employing different legal repertoires, i.e. *semendo adat* and state law (Biezeveld, 2004). In doing so, they expected the court to take their *adat* into account or at least to provide an arena for expressing their disappointment.

Another aspect of this case was the judges' stance toward *isbat nikah* and joint marital property lawsuits. In *isbat nikah*, the above lawsuit attracted suspicion from the defendant (*termohon*), but in essence he did not object, assuming that his marriage to the late Hamidah would be validated retroactively. Therefore, the judges could easily accept this lawsuit, since the petitioned marriage was the defendant's first marriage and it was religiously valid. Moreover, the marriage was concluded in 1968, when registration was not mandatory. However, intense debate surfaced when the late Hamida's siblings filed a lawsuit on the distribution of her inheritance. The debates revolved around the object of inheritance itself. The judges from the first instance court could easily establish the prospective beneficiaries and their respective share of the inheritance, according to Indone-

[177] According to *semendo adat*, the husband of a deceased wife is entitled to half of their marital property (*harta-sepencarian*), if there is no offspring from the marriage. Otherwise, three-quarters of the property shall be returned to the child(ren) and his wife's family (Interview with Ali Kasan, a former member of Mukomuko BMA, in 2005-2019, on 09 March 2017). A husband with offspring may receive half of the *harta-sepencarian*, if he arranges an agreement for an equal share with his wife during her lifetime (Articles 70, 71, and 72 of Undang-Undang Mukomuko Adatrecthbundel VI, 1913, pp. 345–346). For further explanation, see Chapter 4, Section 4.4.2.

sian inheritance law for Muslims. Yet, in determining the object of inheritance, they had to dig deeper to verify the disputed objects, by excluding *harta pusako* and some objects that no longer existed. Afterwards, they ruled that the joint marital property included all the verified objects, only half of which were objects of inheritance. Later, judges from the appellate court annulled this decision, considering that what the judges from the first instance court did – namely, offering their service to verify and determine the object of inheritance - was beyond their competence. As a last resort, judges from the Supreme Court rendered the lawsuit inadmissible for mixing inherited properties (*harta bawaan*) with the joint marital property.

In rendering their decision, the Supreme Court judges based their decision on unverified objects rather than on verified ones. They disregarded the efforts made by judges from the first instance court to 'educate' the parties, by assisting them in specifying the object of inheritance. They also made all expenses meaningless; notably, the *descente* session at Mukomuko. On top of that, the defendant himself admitted that he had concluded his marriage to the late Hamidah according to *adat*, for which he came to the bride's house empty-handed. One might wonder how the evidence, i.e. the verified objects, and defendant's confession and consent to relinquish his claim to the *harta pusako*, did not suffice. The judges might have been less careful when reading the 111-page decision by the first instance court, but it is clear from their reasoning that they did not consider the parties' sociocultural backgrounds. Otherwise, the judges would not have ruled the case inadmissible simply because the plaintiff did not distinguish property he had acquired during his marriage from inherited property. The supreme judges' attitude corresponds to Shapiro's proposition that "the universality of the right of appeal is a mechanism and reflection of the concentration of political power rather than a protection of individual rights"(Baumann, 1982, p. 643; Clark, 1983). In this sense, the appellate and supreme judges appeared to enforce the standard interpretation of inheritance

law, rather than protecting the individual and acknowledging the parties' particular backgrounds.

We can infer from this case that the parties were involved in a process of forum shopping and discourse shopping to secure their own interests, no matter how ill-founded their expectations might have been. This case also sheds light on a binary conflict between the parties, who observed their *semendo adat*, versus the judges, who in applying the law only dared to manoeuvre within the popular boundaries of the Islamic court. Of equal importance in this case is the judges' apparent ambivalence. They managed to validate the late Hamidah's unregistered marriage easily via an *isbat nikah*, but then rejected her family's lawsuit on the distribution of her inheritance. Dede Ramdani, a junior judge at the Belopa Islamic Court, confirmed this inclination. Unlike *isbat nikah*, broken marriage, and *taklik talak* violation, which are well-established (see Chapter 2, Section 2.3), judges from this court have not developed a stable stance toward property-related disputes. Even an informal case-drafter added that he was reluctant to assist prospective plaintiffs in drafting their lawsuits regarding the distribution of joint marital property or inheritance. Instead, judges - in collaboration with the public relations division - would pre-empt foreseeable errors from these types of lawsuits, by conducting a screening before they were registered.[178] However, this screening was not observable in Mukomuko. With the help of informal case-drafters, the judges in this region would accept all incoming cases without any screening. We will return to these informal case-drafters in Section 5.5.2 of this chapter.

5.5 Divorce-Related Cases: Types of Divorce and their Impacts

This section discusses divorce lawsuits from the Mukomuko Islamic court. The discussion includes the following subjects: (1) divorce, either by a husband (*cerai talak*) or by a wife (*cerai*

[178] Interview with judge Dede Ramdani, on 21 June 2021.

gugat); (2) joint marital property (*harta bersama*); and (3) spousal alimony, i.e. overdue maintenance (*nafkah māḍiyah*), a consolation gift (*mutah*), spousal support during a waiting period (*nafkah idah*), and child support. Discussion of these subjects begins with a statistical overview, and continues with some relevant cases. The statistics are sourced from the court's registry in the last six years, and the relevant cases draw upon incoming lawsuits from traditional villages. As we will see, the court records show an increasing number of divorce cases at the Islamic court. However, in the remaining divorce-related lawsuits use of the Islamic court remains nominal and not common. In addition to the statistics, the featured cases are those that I encountered during my fieldwork. The featured cases provide a picture of the situations which directed the villagers, who divorced mostly out-of-court (a statistical overview of this trend is available in Chapter 4), toward the Islamic court. Their experiences also shed light on how judges responded to the villagers' sociocultural background as adherents of the *semendo* tradition. Before delving into the cases, a statistical overview of divorce at the competent Islamic courts will be presented.

Before the establishment of Mukomuko Islamic court, in 2018, the rate of divorces from Mukomuko fluctuated from year to year. It increased 19.3% in 2017, but decreased by 13.2% the following year. Once the Mukomuko Islamic court was in full operation, the rate of divorces bounced back, with an 68.4% increase in 2019 and had another 12.1% increase in 2020. This rate was comparatively higher than the nationwide yearly rate for increases in divorce, which was under 10%.[179] Concerning the types of lawsuit, the ratio of divorces by a wife to divorces by a husband was 2: 1. This ratio stayed relatively stable from 2016 to 2019, but it was all about to change in 2020, when divorces initiated by wives outnumbered those initiated by husbands by almost three times. This shift corresponded to the national trend in

[179] From 2017 to 2020, 8% was the highest yearly increase in divorce lawsuits, nationwide. There were (respectively) 415,510 lawsuits in 2017, 444,358 lawsuits in 2018, 480,618 lawsuits in 2019, and 465,528 lawsuits in 2020 (*Laporan Tahunan Badilag* 2017-2020).

2017-2020, which steadily increased toward a 3:1 ratio.[180] In this respect, from 2017 to 2020 the yearly rises in divorce lawsuits in Mukomuko were higher than the national trend. Nonetheless, the average rate of divorce lawsuits in Mukomuko remained behind some other regions which had a higher rate in the corresponding year.[181] In any case, people's increasing use of the Mukomuko Islamic court in recent years, as shown by the figure 5.5.1 below, shows a positive trend in accessing the court. Moreover, nearly all the incoming lawsuits were awarded, and only a few were revoked or treated as inadmissible.[182]

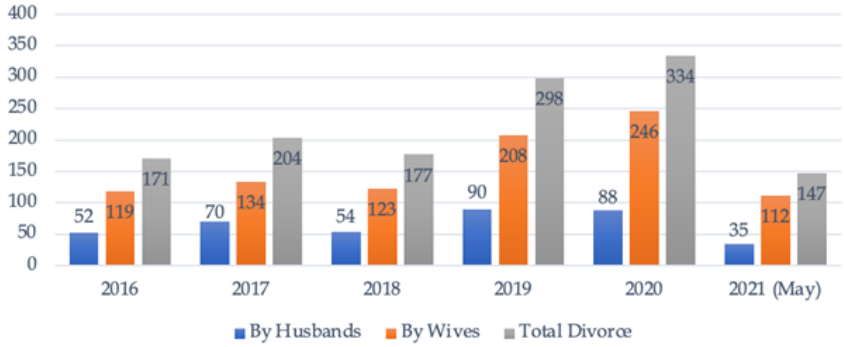

Figure 5.5.1: Types of divorce lawsuit over the past six years

Concerning joint marital property, only seven cases of this type were brought to the court, by either a husband or a wife. Two of the lawsuits were filed at the Arga Makmur Islamic court, and the remaining five were filed at the Mukomuko Islamic court. Two of the lawsuits were filed by traditional villagers, and the other five were filed by migrants. With regard to the results, only one case was granted, three cases were successfully reconciled

[180] There were precisely: (1) 301,573 to 113,937, or 2.6:1, divorce lawsuits in 2017; (2) 325,505 to 118,853, or 2.7:1, divorce lawsuits in 2018; (3) 355,842 to 124,776, or 2.8:1, divorce lawsuits in 2019; and, (4) 346,086 to 119,442, or 2.9:1, divorce lawsuits in 2020 (*Laporan Tahunan Badilag* 2017-2020).

[181] According to the 2020 data from the Central Bureau of Statistics, Central Java took first place, with a ratio of 88.9%, meaning that there were 89 divorces per 10,000 of the population, whereas Bengkulu, which includes the Mukomuko regency, was in 10th place, with a ratio of 65.6%.

[182] An estimation can be found in the competent court responses to incoming lawsuits from people in Mukomuko in 2016 and 2019. The estimation is included in Figure 5.3.2.2 of this chapter.

through mediation, two cases were (respectively) inadmissible and revoked, and the last case is now in an ongoing session. In the granted decision, which was filed by a native villager, the judges distributed joint marital property equally between the parties. However, in the successfully mediated cases, the judges upheld the parties' agreement through a decree, to support an overall equal share. Their attitude corresponds to the previous case of Syahril versus Yati (in Chapter 4), where the presiding judges actively intervened in the mediation process by suggesting that they distribute their joint marital property consensually, according to the 50:50 principle. Otherwise, as the mediating judge told them, they would "have to go through a costly and protracted session". In the case of *Nurdin v. Hamidah's family*, it appears that this suggestion was not without reason. Their conflict regarding the status of joint marital property, as also occurred in another case of this type,[183] was left unsolved.

Two more subjects I encountered during my research were spousal alimony and child support, which were often combined as one claim. Unlike a lawsuit on joint marital property, which 'must' be filed separately from a divorce lawsuit,[184] claims to spousal alimony and child support can be integrated into a divorce lawsuit. Obtaining the true number of such claims requires further inquiry of each incoming divorce case, since the court registry provides a particular category for these claims. In *cerai-talak*, a wife may claim spousal alimony and child support through a reconvention or counterclaim. In *cerai-gugat*, she may also include such claims in her lawsuit.[185] Moreover, judges in ei-

[183] A lawsuit on joint marital property, Number 78/Pdt.G/2017/PA.AGM.

[184] The Supreme Court issued a direction for justice seekers not to combine a divorce lawsuit with a lawsuit on joint marital property, assuming that it would slow down the adjudication process and increase appeal and cassation cases (*Buku II Pedoman Pelaksan Tugas* 2013, 162). Judge Edi Riadi criticised this discretion, since it was based merely on assumption, not on research. "There has been no research that proves an accumulative lawsuit would likely end in an appeal and cassation," he added. Interview with Supreme Court Judge Edi Riadi, at his office, on 21 May 2019.

[185] SEMA 3/2018, Point 3, in accordance with Supreme Court Regulation 3/2017, stipulates that a wife may claim spousal alimony (such as *mutah* and *idah* support) in a *cerai gugat* procedure, as long as the wife is not proven to be *nusyuz* or disobedient. For a thorough and nuanced analysis of the development of this concept, see (van Huis, 2015, pp. 244–246).

ther *cerai-talak* or *cerai-gugat* may also independently rule (*ex officio*) to grant a wife child support, once they are assured that the child is under the tutelage of the wife.[186] In Mukomuko, a close reading of the incoming divorce cases suggests that such an integrated claim was available only in some *cerai-talak* lawsuits, for which the petitioned wives appeared before the court (non-*verstek*) and made a counterclaim. What follows is a comparison of divorce lawsuits filed by husbands in two different periods, 2016 and 2019 (including how the lawsuits were decided), in order to show the occurrence of alimony and child support claims. In the 2016 period the competent court was in Arga Makmur, and in the 2019 period the Mukomuko Islamic court was fully operational.

Figure 5.5 2: Court decisions on 'cerai-talak' in 2016 and 2019

The pie charts show that there were six cases (11%) out of the 52 *cerai-talak* lawsuits in 2016 and four cases (6%) out of the 64 *cerai-talak* lawsuits in 2019,[187] which possibly contained counterclaims to spousal alimony and child support. However, a close reading of those lawsuits suggests that, within the corresponding years, there were only four cases with such counterclaims. Therefore, I can conclude that spousal alimony and child support were rarely claimed in Mukomuko. In the following section, I will present a divorce-related case brought by a traditional villager. In fact, the case was basically 'trouble-free, as there were

[186] The Supreme Court's 2016 Plenary Meeting of the Islamic Chamber, in Point 5 (SEMA 4/2016).

[187] Concerning *cerai gugat* in 2019, there was a difference between the court's *Laporan Tahun* (the yearly report) and the number of cases available via *Sistem Informasi Penelusuran Perkara* (SIPP, the information system for a lawsuit tracing). While *Laporan Tahun* mentioned 90 cases, the SIPP provided 64 cases, all of which are available to the public. To make this analysis possible, I referred to the SIPP version.

no fierce disputes involved and the parties eventually agreed to separate amiably. Yet, we can grasp from this case how a 'complete' divorce procedure manifests in practice, and it includes several out-of-court mediations, a counterclaim to spousal alimony and child support, and a great deal of divorce-related costs. Moreover, the case will serve as material for later analysis of the roles of different actors in writing a lawsuit and constructing legal truth.

5.5.1 *Suhar v. Tini*: law-abiding citizens and a complete divorce procedure

In 1995 Suhar and Tini got married and registered their marriage at the KUA of Gading Cempaka, Bengkulu. After spending a month in the bride's parents' house, they migrated to Ketahun, because Tini had been employed to teach at an elementary school in this region. After five years, they returned to Tini's parents' house, following the transfer of her work back to Bengkulu. Meanwhile, Suhar, who originally came from Mukomuko, worked as an employee in a private company in Bengkulu. Two years later the couple had their own house in Bengkulu. In 2006, Suhar passed a public servant selection to become a teacher at a public elementary school in his hometown, Mukomuko. Since then, the couple have lived separately: one in Mukomuko, and the other in Bengkulu. Tini once asked Suhar to transfer his job to Bengkulu, so that they could be closer. However, as Suhar told me, "this would have required a lot of cost and lengthy administrative processes, which I did not mind, but at the time we had just planted some oil palms, so I asked her to be patient until they had started producing".[188] This long-distance relationship survived up until the 20th year of their marriage, and in that time the couple had four children.

In 2014, a serious fight occurred between Suhar and Tini. The fight was caused by the presence of a third party, Tini's landlady, who was then Tini's adoptive mother (*ibu angkat*), and who

[188] Interview with Suhar at his maternal house, which is now his sister's house, in Talang Buai village, on 5 May 2017.

intervened in the couple's private affairs. A rumour was spreading within the community, suggesting that Tini was having an 'inappropriate' relationship with her adoptive mother. The inappropriate relationship likely meant a non-heterosexual romance, but I could not confirm this rumour as the husband preferred not to discuss it during our conversation. For this reason, Tini was brought to visit five different shamans, to get rid of the influence of her adopted mother, but these efforts all proved futile. There was also another rumour, accusing Suhar of having an affair with another woman during his stay in Mukomuko. Even though there was no confirmation of either of these rumours, the couple's marriage was already broken, culminating in their separation at the end of 2014. Before the separation, the couple arranged internal mediation (involving Tini's parents) three times, but this ultimately failed. Thus, Suhar returned to his parent's house in Mukomuko, and Tini and their children returned to her parents' house in the capital of Bengkulu. In the end, Suhar decided he wanted to formalise the separation by initiating a divorce in the Islamic court.

As he was a public servant, Suhar first had to obtain permission from his superiors, which took around ten months. In addition to three internal mediations (in a private setting), this long process comprised more mediations: i) at the *Dinas Pendidikan* (the regional office of education) for three months; ii) at the *Badan Kepegawaian Daerah* (BKD, the regional personnel agency) for three months; and, iii) at the regional inspectorate for one-and-a-half months. This process included a waiting period of two months for formal divorce permission from the regent. After going through all these processes, Suhar eventually managed to file a divorce petition at the Arga Makmur Islamic court on 11 April 2016. This petition was the last step for him, but it took another three months and several days for the judges to permit him to pronounce a *talak*. This judicial process took longer than usual, and involved more sessions, because the wife appeared before the court and made a counterclaim for overdue maintenance (*nafkah māḍiyah*), maintenance support during her

waiting period (*nafkah idah*), child support (*nafkah anak*), and a consolation gift (*mutah*). Their formal divorce would have been faster through a *verstek* procedure, which normally takes around a month and lasts for only three sessions.

Suhar and Tini had to attend six sessions together in the Islamic court, in addition to Suhar's two court visits: one was to register at the beginning of the process, and the other was for a divorce pronouncement (*ikrar talak*) at the end of the process. The judges dissolved Suhar and Tini's marriage on the grounds of broken marriage and the failure of internal mediation. However, the wife's presence required an additional court mediation session, and three further sessions to examine her counterclaim. After all these sessions, the judges accepted Suhar's petition and Tini's counterclaim, after adjusting the required amount of compensation to Suhar's ability. The amount granted comprised: 10,500,000 rupiahs, for 21 months of overdue maintenance support; 1,500,000 rupiahs, for three months of *idah* support; 5 g of gold (around 2,500,000 rupiahs) as a consolation gift; and one million rupiahs per month as child support for all their children, for at least the next 14 years, considering that the youngest child at the time was only seven-years-old. The full amount had to be paid before Suhar could pronounce the divorce before the judges' assembly. In other words, permission for the *ikrar talak* was made dependent on payment of the approved compensation.

Throughout the process, Suhar and Tini appeared before the court in person, unaccompanied by lawyers. In formulating his petition, Suhar was assisted by an informal case-drafter. The case-drafter was located near the court and tasked with drafting lawsuits for 150,000 rupiahs, per case. In the Arga Makmur Islamic court, the case-drafter was usually a relative or acquaintance of one of the court employees. In this case, the informal case-drafter's service was included in the down payment that Suhar made during registration. In other Islamic courts this service was offered free of charge by a *Pos Bantuan Hukum* (POSBAKUM, a legal aid centre), which was designated for justice seekers who

could not afford a lawyer (Law 50/2009, Article 60c).[189] Whichever route is pursued (i.e. using an informal case-drafter, a POSBAKUM, or a lawyer), a divorce lawsuit is 'constructed' to include the following elements: (1) the legal standing of the parties, comprised of identities and domiciles; (2) ground(s) for divorce, of which the main ground is usually either continuous strife or violation of *taklik talak*;[190] (3) a period of separation; and (4) an internal mediation failure. In this manner, an incoming (divorce) lawsuit will be framed to fit these elements, which then serve as background for the judges' decision.

In this case, the emphasis was not on the cause of the dispute, but the dispute itself and who had filed the lawsuit. The fact that the couple's relationship was already irretrievably broken sufficed for the judges to grant the husband permission to pronounce *talak*. Even Tini herself confirmed most of Suhar's claims. Meanwhile, the presiding judges did not count the wife's return to her parent as disobedience (*nusyuz*). As a result, Tini was entitled to *nafkah māḍiyah*, *nafkah idah*, *nafkah anak*, and *mutah*. In this respect, the judges' lenient attitude toward the *nusyuz* norm corresponds with the finding from van Huis on judges' nuanced attitudes toward *nusyuz* in the Islamic court, by narrowing the limits of *nusyuz* (van Huis, 2015, p. 244). In this respect, the judges (led by a female judge) reminded the petitioned wife of her rights to: (1) overdue maintenance; (2) maintenance support during her waiting; (3) child support; and, (4) a consolation gift from her husband (cf. judges' similar attitude from West Java in Nurlaelawati, 2018).

Suhar spent a considerable amount of money to obtain the formal divorce. Expenses consisted of both litigation and non-lit-

[189] This service fee is deducted from the court's yearly budget (*Daftar Isian Pelaksanaan Anggaran*, DIPA). To obtain assistance from a POSBAKUM, a litigant has to provide the following documents: *Surat Keterangan Tidak Mampu* (SKTM, a Statement of Insufficient Means); a social allowance receiver statement; and, a statement of inability to pay a lawyer (Supreme Court Regulation 1/2014).

[190] This emphasis corresponds with the recent development in the Islamic chamber of the Supreme Court, to simplify divorce grounds into either broken marriage (from the 1974 Marriage Law, Article 19f) or a *taklik talak* violation (from the KHI, Article 19h). Further discussion on these developments is included in Chapter 2.

igation fees. While the former comprises expenses deposited at court during registration, the latter covers the remaining costs spent throughout the process. Concerning the litigation fees, Suhar spent a sum of 366,000 rupiahs,[191] but the actual amount was 925,000 rupiahs, including a case-drafting service and additional summoning fees. The actual amount of the litigation fees therefore differs from the amount published by the judges in their decision.[192] In terms of non-litigation fees, Suhar spent around ten million rupiahs on his accommodation and the seven hour-long trips he made from Mukomuko to Arga Makmur.[193] This amount excluded additional non-litigation fees for presenting witnesses, and for their accommodation in Arga Makmur. This amount was much larger than what the local government had calculated for all Suhar's expenses during mediation and the other processes.

A year later, Suhar married a divorcee who already had two children. Recently, this new couple had their first baby. At the same time, Suhar has managed to maintain good communication with his children by Tini. Apart from providing monthly support for the children, Suhar also pays their education fees. Meanwhile, the children have paid several visits, spending holidays with their father in Mukomuko. This case is a par excellence story of a law-abiding citizen who went through a divorce and maintained good communication with his former wife and their children. Moreover, this case shows how different actors and issues pop up in everyday use of the Islamic court. Suhar and Tini's use of the court shows the actual cost of a formal divorce and demonstrates the defining roles of the informal case-drafter in constructing legal truth.

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[191] This amount includes 30,000 for registration, 50,000 for processing, 180,000 for summoning the petitioner, 95,000 for summoning the petitioned, 5,000 for editorial costs, and 6,000 for an official seal (*biaya materai*).

[192] In some other cases, where a justice seeker employed a professional lawyer, the fee amount turned out to be even more.

[193] Suhar recalled that he spent one million rupiahs on two short visits to the court for registration (at the beginning of the process) and for pronouncing *talak* (at the end of the process). He spent around nine million rupiahs (one and half million rupiahs each) on the six sessions in between.

5.5.2 Informal case-drafters and the construction of 'legal truth'

My first analysis of the case of *Suhar v. Tini* revolves around the construction of truth. It involves the translation of the multi-faceted reality of an incoming case into a single legal narrative, i.e. a highly polished lawsuit. In the Islamic court, this process begins as early on as the drafting of a lawsuit, and it includes the identities of the parties, the background to the divorce, and the claims.

The first element serves as a means to determine court jurisdiction over the lawsuit. It describes the absolute competence of the Islamic court by mentioning: whether or not the parties' religion is Islam; whether the parties are ordinary citizens or state officials;[194] and, whether their domicile is under the court's jurisdiction or not (i.e. the court's 'relative' competence). The second element concerns the parties' legal standing before the court, by emphasising that their marriage has been registered. This section also contains information about and background to the marital breakdown, such as divorce ground(s), a period of separation, or the failure of internal mediation. The background may contain dramatic stories,[195] but emphasis is 'always' placed on either continuous strife (broken marriage) or, especially in cases involving a neglected wife, *taklik talak* violation. The third element includes *primer* and *subsider* claims, which are both specific and general.[196] Together, all three elements transform ordinary language into a lawsuit.

In the Arga Makmur Islamic court specifically, the translation of ordinary language into legal terminology is primarily conduct-

[194] The latter, i.e. a civil servant or a military or police officer, requires additional permission from their superiors before their divorce can proceed.

[195] The background may contain several legally 'valid' accusations, such as an affair, a religious conversion, liquor consumption and gambling, domestic violence, etc., but it always includes either continuous strife (for an explanation, see Point F of Article 32 (2) of the Marriage Law) or violation of *taklik talak* (the KHI, Article 116h). Hence, it allows judges to decide an incoming lawsuit according to recent developments regarding broken marriage, as well as (especially in cases involving an abandoned wife) considering the existing option of *taklik talak* (see Chapter 2).

[196] The *primer* claim contains a specific request for divorce, whereas the *subsider* claim contains an open request to the judges to decide as fairly as possible (*seadil-adilnya*).

ed by an informal case-drafter. This role may also be performed by a lawyer, or (in other Islamic courts) by a POSBAKUM, even though the law allows an individual to formulate his or her lawsuit orally.[197] However, oral lawsuits barely exist in this court. In this respect, the drafters of cases serve as intermediaries or bridges between the litigant and presiding judges, and they assist the litigant in formulating his or her lawsuit so that the judges can apply relevant rules to it (cf. Dupret & Drieskens, 2008, p. 9). Their main role concerns framing ordinary events as legal facts, which will assist the judges throughout a process known as the legal characterisation of facts.[198] In other words, mainly by suggesting incorporation of either continuous strife or a *taklik talak* violation in the lawsuit background, the judges manage to adjudicate the lawsuit according to recent developments concerning broken marriage and *taklik talak* violation. In this manner, the case-drafters emerge as 'cultural brokers'(Geertz, 1960; Horikoshi, 1987), resembling the roles of *'udul* (professional witnesses) in a Moroccan context (Buskens, 2008); case-drafters transform everyday events into a legal narrative, just like professional witnesses who write legal marriage documents in Morocco. The following case of *Puja v. Kesuma* (pseudonyms) will illustrate how this process manifests in the Arga Makmur Islamic court.

> In 2011, after marrying Puja (25) in Serang Banten, Kesuma (26) left higher education in a private institution in Jakarta to seek a job. After six months, the couple decided to move to Kusuma's hometown, Mukomuko, where they spent the next two years. On the verge of the third year of their marriage a fierce quarrel occurred, as the husband accused his wife of having an affair. This accusation was the reason he took his wife to live with her parents in Java. Later, both Kesuma and Puja, who had lived separately for a year, concluded unregistered marriages to new partners. One was in Mukomuko, and the other was in Serang Banten.

[197] As of 2020, a POSBAKUM had not been established in Mukomuko, due to the lack of funding (Laporan Tahun PA Mukomuko 2020, 09).

[198] This process aims to distinguish an ordinary fact (*fakta peristiwa, feitelijke grond*) from a legal fact (*fakta hukum, rechterlijke grond*), before applying the relevant provision to it (Riadi, 2013, p. 37). In this manner, any emphasis on either continued strife or *taklik talak* violation in the case background allows the judges to adjudicate a case according to the preferred trend in the court.

In early 2017, right before the birth of his first child, Kesuma went to Arga Makmur Islamic court to legally dissolve his previous marriage. By concealing his current unregistered marriage, he managed to frame his lawsuit, with the help of an informal case-drafter, as follows. It included, *first*, the legal standing of the parties regarding their identities and domiciles. The marriage took place in Serang, and then the couple moved to their own home in Mukomuko. *Second*, the ground(s) for divorce: the emphasis was on continuous strife before the accusation of an affair. *Third*, the period of separation: three years and three months. *Fourth*, the failure of mediation.

At the first hearing, the judges accepted the application without Puja attending (*verstek*), because she now lives somewhere in Java, implying that the process would skip the mediation session; they then adjourned the session. The second session was held on 9 May 2017, to examine the lawsuit. This session revolved around the occurrence of conflict, the failure of internal mediation, and separation for a certain period, to prove that the marriage is beyond repair. Rather than verifying the constructed facts, the presiding judges directed the plaintiff to confirm all his claims, so that they could determine the breakdown of the marriage. In the final session, the judges permitted Kesuma to pronounce *talak*.

Throughout the process, the judges were not critical of dubious stories made up by the plaintiff and his only witness, Abdul (18). The witness was his nephew, and he accompanied the plaintiff to the court. During his examination, Abdul confirmed all the questions raised by the judges concerning the breakdown of his uncle's marriage. He convincingly told the judges about Kesuma's wife's infidelity, the failure of their internal mediation, and his own involvement in due process. His testimony is not logical in many ways, since it is not common to involve a child in such private matters. At the time, Abdul was a child aged 14. However, this testimony sufficed for the judges to grant a divorce on the ground of broken marriage, considering the enormous caseloads they faced daily. Later, Kesuma and Abdul admitted to me outside of court that their testimony was fabricated.

This case shows the role of an informal case-drafter in directing Kesuma to frame his lawsuit according to the broken marriage ground, rather than the accusation of an affair. Otherwise, he would have to go through the laborious *lian* (an adultery

accusation) procedure. According to Law 7/1989 on Islamic judicature, a *lian* divorce requires additional procedures for the accusation, the accused wife's rebuttal, and the pronouncement of *sumpah lian* (a sworn declaration). It also requires the presence of the accused wife who, in this case, happened to be absent. A simpler procedure may apply to a *lian* accusation by a wife, but the wife still has to deliver a *sumpah lian*, unless the accusation has been proven through a criminal court decision (Mahkamah Agung RI, 2013, pp. 163–165). This option was less preferable (not to mention impossible) for Kesuma, who went to court in search of a speedy process, to enable him to register his current informal marriage. The case-drafter not only assisted the litigant by advising the lawsuit option, but they also facilitated the judges who would base their decision on the lawsuit. Hence, the construction of a lawsuit is 'prospective' in nature, and comparable with the process of an *'adl* (professional witness) writing a marital document in Morocco, which serves as valid legal evidence for possible conflict in future (Buskens, 2008, p. 153). In the Indonesian Islamic court, this process guarantees that the lawsuit will be adjudicated on the ground of broken marriage.

With the help of informal case-drafters acting as brokers between litigants and judges, all incoming divorce lawsuits are formulated according to the ground of either broken marriage or *taklik talak* violation. From a total of 1,051 divorce lawsuits from Mukomuko in the last five years, 791 (75.27%) were treated as broken marriages and 179 (17.03%) were treated as *taklik talak* violations. The remaining 81 (7.70%) lawsuits were either revoked (49; or 4.66%) or unidentified (32; or 3.04%).[199] The numbers and percentages suggest that the grounds for divorce in those years were pretty much constructed, but that the constructed lawsuits still mentioned the real cause(s) of each divorce.[200] Taking Kesuma's case as an example, accusing his wife

[199] From an analysis of the incoming divorce lawsuits in the Arga Makmur and Mukomuko Islamic courts, from 2016 to June 2020.

[200] In 2016 the MoRA Research and Development Department commissioned a research team, in order to understand the recent staggering rise in divorces initiated by wives. This research concluded that the trend was driven mainly by disharmonious marriages and hus-

of having an affair was an underlying cause of the breakdown of his marriage, and this not only allowed the judges to grant him a divorce on the ground of broken marriage, it also proved effective in gaining their sympathy. In observing the *Puja v. Kesuma* case, I also got an impression from the judges' gestures that they would accelerate the process, after finding out that the dispute before them was triggered by an (unproven) affair committed by Kesuma's wife (cf. Nurdin, 2018 for the correlation between a wife's behaviour and a court's judgement in the Aceh Islamic court). This impression corresponds to the social stigma attached to an unfaithful wife (Wirastri & van Huis, 2021, p. 2), which in this case benefitted the husband.

If we now return to *Nurdin v. Hamidah's family*, we come across a similar process of translating ordinary events into legally valid language. This process was apparent in their *isbat nikah* and inheritance lawsuits, for which they obtained a lot of help from an informal case-drafter. With this help, the plaintiffs eventually managed to formulate their lawsuit to include three mandatory elements: the court's competence and jurisdiction, the plaintiffs' legal standing, and legally valid claims. Without these elements, the family's lawsuit would have been no more than legally ill-grounded expectations from a legally-illiterate group. Meanwhile, Nurdin relied mostly on a group of professional lawyers, who assisted him in formulating answers to the lawsuit. In this manner, both the informal case-drafter and lawyers assisted the parties in translating their claims and answers into legally valid language. Conversely, the presiding judges could easily grant the *isbat* lawsuit, since it was well drafted and legally eligible, i.e. it was concluded before 1974 and filed by a competent subject. Nonetheless, in the inheritance lawsuit the judges needed to undergo a protracted process of verifying the disputed objects, because the plaintiffs, certainly with the help of an infor-

bands' negligence (Kustini & Rosida, 2016, pp. xi–xii). The researchers did not consider that their conclusion was based on constructed causes and failed to capture the actual causes. In fact, had they delved deeper into the background (*posita*) of each case, where the actual causes were usually mentioned, they would have reached different conclusions.

mal case-drafter, failed to identify and formulate the inheritance objects according to the requirements of the law.

After a long process, the Supreme Judges in the inheritance dispute between *Nurdin v. the late Hamidah's* family eventually ruled that the lawsuit was inadmissible, simply because it was not clear what the disputed objects were. This rejection can be attributed to the fact that judges have not yet developed a firm position regarding inheritance-related cases. They share this limitation with the brokers, especially informal case-drafters who are not yet equipped with a standardised template for such cases and therefore could not avoid rejection. In the other cases featured here, the brokers' roles were crucial. In the *Syahril v. Yati* case, the lawyers were active in convincing the parties to distribute their joint marital property according to the 50:50 principle, instead of *semendo adat*. However, there was no lawyer in the *Suhar v. Tini* case, and the judges were active in reminding the wife of her right to spousal alimony. As a result, both the judges and brokers played a part in the construction of legal truth, which is prospective, but at the same time restricted to developments within the Islamic court. Their shared roles also contribute to a more general discussion, concerning the relationship between legal writing and everyday life (cf. Buskens, 2008; Messick, 1996). I will now turn to asking who goes to the Islamic court, and who actually the court serves.

5.6 Whose Court is this and Who Do the Competent Courts Actually 'Serve'?

As mentioned previously, the main users of the Islamic courts in Indonesia are non-traditional villagers. Chapter 3 illustrated how the contemporary people of Mukomuko are comprised of matrilineal communities within traditional *hulu-hilir* villages, transmigrants in their enclaves, and more diverse community groups in urban centres. Unlike the *hulu-hilir* villagers, who observe their *semendo adat* and rely predominantly on its institutional actors, the migrants feel a greater need for the

Islamic court for external support. A close reading of the domiciles of people bringing cases to the Islamic court confirms that the majority of in-court divorces were brought by people from migrant enclaves and urban centres. Within the jurisdiction of Arga Makmur Islamic court, the ratio between people from traditional villages and non-traditional villages bringing cases was, consecutively, 40:130 (23.53% to 76.47%) in 2016, and 42:162 (25.6% to 74.4%) in 2017. After the establishment of Mukomuko Islamic court, at the end of 2018, the ratio did not change significantly: in 2019, it was 65:192 (33.85% to 66.15%). This comparison suggests that the main users of the competent Islamic courts were those of migrant origin. The case of Talang Buai village, where I spent most of my time during fieldwork, confirms this. From 2016 until May 2021 there were only two in-court divorces from this village, both of which were filed by villagers who are civil servants.

Other users include state officials (i.e. civil servants, military and police officers) from a variety of ethnic and community backgrounds. According to the law this particular group is subject to a stricter divorce procedure, as state officials are legally required to obtain permission from their superiors before initiating a divorce.[201] However, in practice, this requirement can be bypassed in court if a state official is married to a non-state official. Supposing that this is the case, the state official can obtain a divorce without being given permission, by asking his or her partner to file the divorce via a *verstek* procedure. This option has developed for a reason. It prevents state officials from complicating divorce for their non-civil servant partners by refusing to arrange the permission. Specific to police officers, an easier procedure was formalised through SEMA 5/2014. This SEMA allowed judges from the Islamic courts to proceed divorce lawsuits involving police officers without necessarily confining themselves to obtaining permission. Instead, officers would be required to make a written declaration that they would bear out

[201] Article 3 of Government Regulation 45/1990; Police Chief Regulation 9/2010; and, Ministry of Defence Regulation 23/2008.

any possible consequences for not asking permission from his or her superior.[202] Figure 5.6.1, below, shows that there were 23 divorce lawsuits involving state officials from Mukomuko in 2016 and 2017. Twenty-one of the cases were awarded, and two were revoked. From the 21 cases awarded, only six contained permission from superiors. The remaining 15 were all filed without permission from superiors: eight (38%) by state officials, and seven (33%) by non-state officials.

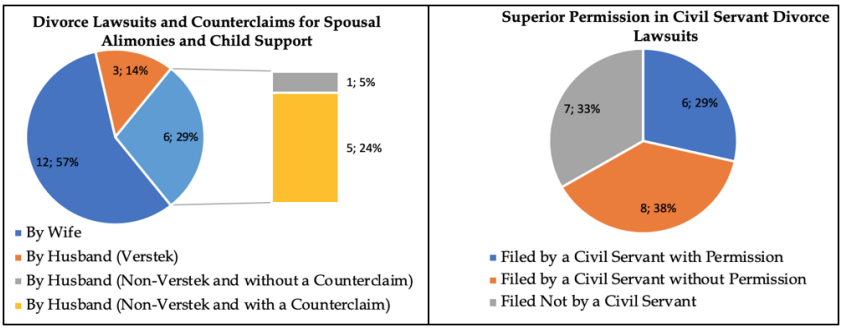

Figure 5.6.1: Divorce lawsuits among state officials in 2016 and 2017

In 2020 the Supreme Court refined the previous provision by circulating SEMA 10/2020, requiring judges not to process a divorce lawsuit brought by a member of the police or military, unless a letter of permission has been provided by their superiors. If there is no letter of permission, the presiding judges have to adjourn the session for six months. During the recess, as plaintiff the party is required to obtain a permission letter from his or her superiors, or as defendant, to notify his or her superiors. However, little is known about the impact of this provision in Mukomuko Islamic court, since the SEMA was only circulated at the end of 2020. Further research is therefore needed. A judge from the Mukomuko Islamic court told me that she had not encountered a single case from a member of the police or military from the beginning of 2021 until June 2021.[203] Strict application of permission from su-

[202] It includes possible sanctions, ranging from a demotion, a transfer, or a non-job, to a dismissal, as stipulated in Article 7 (4) of Government Regulation 53/2010 and its corresponding provisions.

[203] Interview with Laila, a judge at the Mukomuko Islamic court, on 21 June 2021. Another judge (Dede Ramdani) from the Beloka Islamic court confirmed the same. Unlike the pre-

periors only really occurs among the military. During my research at the Arga Makmur Islamic court, I found only one case, Number 114/Pdt.G/2019/PA.Mkm, where a military officer became the defendant and was not present during the session (*verstek*). The wife, as plaintiff, provided a permission letter from her husband's superiors. The military was therefore the first to apply permission from superiors, followed by police, then civil servants.

Another aspect of divorce lawsuit among state officials concerns counterclaims, made by wives, to spousal alimony and child support. A general norm applies in this instance, meaning that such a counterclaim may exist only when both parties appear before the court (non-*verstek*), the husband is the plaintiff (*cerai-talak*), and the wife has made a counterclaim (see Section 5.5 of this chapter). According to this general norm, only six cases (29%) out of the 21 awarded cases contained a counterclaim. Nonetheless, Figure 5.6.1, above, shows that only five out of the six cases contained counterclaims, by wives, to spousal alimony and child support. All five were awarded, but the amount granted was adjusted according to the husbands' ability, usually the amount he had agreed to during the court session (cf. van Huis, 2015). Therefore, no matter how few cases there were, I assume that counterclaims to spousal alimony and child support in Mukomuko were dominated by cases involving civil servants. Further, as I observed in court hearings, the presiding judge often played an important role in reminding the wives of their rights, while adjusting the amount agreed between the parties.

Traditional villagers who adhere to the *semendo* tradition also use the court. As already mentioned in the previous section, this user is not common, but I still found a few cases involving them. My featured cases, including those presented in the previous chapter, were mostly drawn from this category. Traditional villagers' use of the competent Islamic courts occurs mainly in marriage-related and divorce-related cases that involve a dispute

vious year, when the council had received five cases filed by members of the police or military, he did not encounter a single divorce case of this type from January until June 2021. Interview with judge Dede Ramdani, on 21 June 2021.

about the distribution of property, such as joint marital property and inheritance. Villagers go to court mainly after the failure of consensual resolution, either within their nuclear family or within their matrilineal clan and their *adat* at village level. Among such cases was that of the husband who challenged the *semendo adat* to obtain a greater share of the joint marital property (see, *Syahril v. Yati*). In another case, the court was expected to intervene after the parties failed to distribute inheritance objects consensually (see, *Nurdin v. The late Hamidah's* family). In this way, traditional villagers use the state Islamic court in 'extreme' cases. By extreme, I mean property-related disputes, notably between *semendo adat* and state law, after the parties have failed to reach a consensual out-of-court resolution.

5.7 Concluding Remarks

The previous section showed that the main users of the competent Islamic court in Mukomuko are migrants. Meanwhile, traditional villagers rarely bring their disputes to the court unless they are forced to, as has happened in lawsuits involving state officials, or in extreme cases, such as disputes about joint marital property, inheritance distribution, etc. While state officials are legally subject to stricter regulation when attending court, in extreme cases villagers are usually attempting to escape or challenge *semendo adat*. If this were not the case, the villagers would rely on internal resolution within their nuclear families or their *kaum* (clan). Therefore, compared to migrants, the lower number of judicial divorces among villagers does not necessarily indicate a lower number of disputes (especially divorces) that took place in everyday practices. Instead, this trend suggests an inherent conflict between the *semendo adat* observed by the villagers and the law imposed upon them by the state. This (structural) conflict mainly occurs in the court when different actors (i.e. parties and judges) are brought together, and brokers, such as informal case-drafters and lawyers who mediate between the parties and judges, should also be taken into consideration.

By narrowing the discussion to the villagers, this chapter shows that their reluctant use of the state Islamic court has occurred for a number of reasons. Among other things, problems arose as a result of the adoption of the one-roof system and the late establishment of the Mukomuko Islamic court. While the former alienated people from the Islamic court, the latter generated access issues relating to travelling distance and costs. Before the adoption of the one-roof system, villagers used to access the court via a regular circuit court, but after its adoption they had to travel to the Arga Makmur Islamic court. Only later did this situation ameliorate, after their own court was established at the end of 2018. In fact, there was an increase in incoming lawsuits after the establishment of Mukomuko Islamic court, but overall the villagers continued to resolve their disputes out-of-court. As already mentioned, this inclination can be attributed to a conflict between their matrilineal *adat* and the more patriarchally-inclined state law. This conflict posed a serious threat to villagers' *semendo adat* in property-related cases, especially for women. This is the reason why the invocation of the state court only occurred in extreme cases, usually brought by men in an attempt to obtain a greater share as a result of their property-related disputes.

Last but not least, the marriage-related and divorce-related dispute cases featured here demonstrate that each actor plays a role. Traditional villagers engaged with shopping processes to secure their interests. In doing so, they exercised forum shopping in state courts and discourse shopping within different legal repertoires. In forum shopping, they chose either the state Islamic court or the general court, no matter how ill-founded their choice might be. In discourse shopping, they referred not only to the state law but also to their own *adat*. Conversely, judges from the Islamic court responded to their lawsuits by sticking strictly to the law, manoeuvring only within established developments in the Islamic court, and disregarding the villagers' unique socio-cultural backgrounds. Otherwise, their judgment, as seen

in *Nurdin v. Hamidah's family,* will be liable to nullification by the higher courts. Between these actors sit the informal case-drafters and lawyers, whose role as 'broker' was constructive and prospective. They helped the parties to turn their lawsuits into a proper draft, while providing something for the judges to base their decision on. Although their assistance was crucial for anticipating possible errors, the brokers generally sided with the judges and acted as an extension of that role. Consequently, the outcome of this conflict was predominantly determined by judges, and the Islamic court emerged as being unsuitable for villagers.

6

Conclusion: The Interplay between State Islamic Law and Matrilineal *Adat*

This study has approached marriage and divorce among Muslims in peripheral areas in Indonesia from various angles, employing legal analysis, and historical and ethnographic research. It seeks to understand the intricate relationship between the interpretation of Muslim family law, as promulgated by the state, and the different forms of empirical laws or norms operating within Indonesia's multicultural Muslim society. Focussing on Mukomuko-Bengkulu, on the west coast of Sumatra, this dissertation discusses marriage and divorce practices in three different but connected contexts: everyday practices at societal level; relevant cases available in the first instance Islamic court; and landmark decisions and developments within the Islamic Chamber of the Indonesian Supreme Court, at national level. The main finding of this study is that Mukomuko's *adat* and its institutional actors persist, even though marriage and divorce practices are increasingly influenced by the state. In state-society encounters at the Islamic court, the study reveals the prevalence of compromise and conflict, respectively aligned with the national and local levels. While the Islamic Chamber of the Supreme Court has considerable room for compromise at national level, local courts frequently see tensions emerging. This difference can be attributed to the gradual centralisation and homogenisation of the Islamic judiciary, which saw discretion and policy making being predominantly placed in the hands of Supreme Court judges. Before elaborating on these findings, I will start with major scholarly insights regarding the development of the Indonesian family law system before I discuss what my own findings contribute to this literature.

The existing scholarship teaches us that the Indonesian state has implemented profound reforms in the fields of marriage and divorce. These reforms have made marriage registration and judicial divorce procedures mandatory, restricted polygamy, and introduced a minimum marital age and equal divorce grounds for wives and husbands (M. Cammack, 1989; M. E. Cammack, 1997; Soewondo, 1977). The reforms have also formalised legal pluralism, by introducing state-sanctioned Islamic law for Muslims and establishing an Islamic court exclusively for Muslims (J. R. Bowen, 2003; M. E. Cammack, 1997; Nurlaelawati, 2010; Pompe, 1988). The state has employed multiple approaches in these reforms, ranging from statutory (legislative) change to 'bureaucratisation' and 'judicialisation' (cf. J. R. Bowen, 1998, 2005; Nakamura, 2006; van Huis, 2015). Yet, exactly how the state interacts with Indonesian Muslims of various ethnicities, Islamic denominations, and sociocultural traditions is not so clear. Many studies have suggested that the unification of Muslim family law does not necessarily end with binary solutions, but that it is also a matter of compromise and mutual adjustment (Bedner, 2021, p. 393; Fauzi, 2023, p. 9; Grijns & Horii, 2018; Horii, 2021; Platt, 2017). This has to do with the fact that, broadly speaking, unification is often at odds with existing local normative variations across the archipelago (Idrus, 2003; Millar, 1991; Nurmila, 2009; Platt, 2017; van Huis, 2015; Wirastri & van Huis, 2021), and that straightforward implementation of state law would lead to conflicts and the loss of state legitimacy.

Mukomuko is a case in point, in which the state's patriarchally-inclined Islamic law often conflicts with matrilineal community traditions. In order to shed light on this topic, the study has examined three central questions: (1) How do geographically peripheral Muslim communities, and specifically the matrilineal Muslim community in Mukomuko, construct and safeguard their own Islamic law on marriage and divorce *vis-à-vis* the interpretation of Islamic law as promulgated by the state? (2) How do Islamic court judges representing the state respond to local con-

ditions, when promoting social change in the fields of marriage and divorce among the people of Mukomuko in particular, and among Indonesian multicultural Muslim societies in general? (3) What can we learn from Mukomuko's case, with regard to the increasing trend in Indonesia toward a more centralised and homogenised Islamic judiciary?

6.1 Main Findings

6.1.1 Legal pluralism: *State law v. semendo adat*

The first finding concerns the pluralism of the laws, i.e. state law and *semendo adat*, governing marriage and divorce among matrilineal Muslim communities in Mukomuko. While the former represents 'patriarchally-inclined' Islamic law, as promulgated by the state, the latter refers to 'matrilineally-inclined' Islamic law, as preserved by members of the communities across the *hulu-hilir* (upstream-downstream) villages. They can both be labelled as Islamic law, since they both relate respectively to an established form of Islamic law as a 'discursive tradition'. By discursive tradition, I mean a tradition that "consists essentially of discourses that seek to instruct practitioners regarding the correct form and purpose of a given practice that, precisely because it is established, has a history. These discourses relate conceptually to a past and a future through a present" (Asad, 2009, p. 20). By examining how state law and *semendo adat* operate in present day Mukomuko, this study reveals a mixture of compromise and conflict, with certain actors caught in the middle: i) state actors, such as marriage registrars at the Office of Religious Affairs (*Kantor Urusan Agama*, KUA) and Islamic court judges; ii) quasi-state actors, such as case-drafters (*juru-ketik-perkara*) and lawyers; and, iii) non-state actors, such as local clan (*kaum*) leaders and elders, and religious functionaries (*pegawai syarak*). Before explaining the dynamic of these pluralistic constellations, I will first provide a brief discussion of state law and *semendo adat*.

The state law on marriage and divorce for Muslims has its origin predominantly in the Shafiite school of Islamic jurispru-

dence, which is patriarchally-inclined, combined with elements of local norms (or *adat*), legal understanding of other schools, contemporary interpretations of Islamic law, and bodies of policies and regulations promulgated by the 'state' (Hooker, 1984; Lukito, 2008; Nakamura, 2006; van Huis, 2015).[204] By contrast, the *semendo adat* inherits a unique mixture of Islam and matrilineal traditions from Minangkabau (cf. Abdullah, 1966, p. 15, 2010, p. xxxii; F. von Benda-Beckmann & von Benda-Beckmann, 2013, p. 15). While in this dissertation *adat* refers to "a concrete body of rules and practices inherited from the past" (Henley & Davidson, 2008, pp. 817–818),[205] *semendo* derives from a popular denomination and a particular element of Mukomuko's *adat*, i.e. matrilineal marriage and divorce (Adatrecthbundel VI, 1913, p. 290; Bogaardt, 1958, p. 34). Put together, the term *semendo adat* means a concrete body of local rules and practices on marriage and divorce, inherited from Minangkabau. It is therefore 'Islamic', but also 'matrilineally-informed', in the specific context of Mukomuko. In their operation, state law and *semendo adat* coexist to shape everyday practices of marriage and divorce among the matrilineal Muslim community in Mukomuko, and thereby must be viewed (respectively) as a distinctive discursive tradition.

The coexistence of state law and *semendo adat* becomes apparent in the way members of the matrilineal Muslim community in Mukomuko conclude their marriages and obtain their divorces. Despite the mandatory marriage registration and judicial divorce procedures stipulated by state law, local *semendo adat* marriage and divorce procedures remain a popular option within this community. In this way, state law and Mukomuko's *semendo adat* coexist as 'differentiated' normative systems and institutions (cf. Griffiths, 2017, p. 103), shaping people's marriages,

[204] The term 'state' denotes not only the Indonesian state, but also the ruling regimes in the sultanate and colonialist eras, which introduced important ordinances and policies that are still relevant today.

[205] *Adat* is a broad concept that can be used to mean: (1) a concrete body of rules and practices inherited from the past; (2) a coherent discourse concerning history, land, and law; or (3) a set of loosely related ideals which, rightly or wrongly, are associated with the past - authenticity, community, harmony, order, and justice (Henley & Davidson, 2007, 2008, pp. 817–818).

divorces, and related disputes. They operate, among other forms of normative systems and institutions, in 'a continuum scale'(cf. Platt, 2017, pp. 6–9), from the ultimate zero point of 'less differentiated' to the infinite point of 'more differentiated'. In this manner, an informal union and a registered marriage must be viewed as the least and the most differentiated marriages, respectively, whereas Islamic (religiously valid, but unregistered) and *semendo* marriages both fall between the two extremes. The same logic applies to a divorce in *semendo adat*, locally known as a *minta-sah* procedure, which is more differentiated than an arbitrary separation and an Islamic divorce, but is still less differentiated than a judicial divorce at the Islamic court. Therefore, although secondary in terms of a common and accepted part of the state legal system, *semendo adat* is often socially more important, and certainly locally more differentiated, in comparison with the general provisions of Islamic law.

Nonetheless, the distinction between state and *adat* laws is not always clear, and their relationship in practice is often a matter of compromise and mutual adjustment (cf. Brickell & Platt, 2015; Fauzi, 2023, p. 9; Grijns & Horii, 2018). Since the Islamic court extended the application of *isbat nikah* to validate unregistered marriages retroactively, registration at the KUA at the time of marriage is not the only way to have a marriage recognised. Moreover, the local procedures of marriage and divorce in the *semendo adat* are often complementary and not necessarily opposed to the state procedures. For instance, a marriage registrar from the KUA can easily adapt to an *adat* marriage, as the community will secure a special session for him within the sequence of steps involved in the *semendo* marriage ceremony. This privilege enables the registrar to disseminate certain ideals mandated by the state, such as the mainstreaming of *taklik talak* (conditional divorce). An important development is that the state's *taklik talak* also operates outside the court. This can be seen in the role of the local *imam* (representing the *adat*) when this *imam* assesses the feasibility of a divorce in *adat* according to the criteria for

conditional divorce that are set by the state. These adjustments create a twilight zone, where the shadows of different legal orders converge. Santos speaks of this phenomenon as 'interlegality', when "different legal spaces superimpose[ed], interpenetrate[d] and mix[ed] rather than coexist[ed] merely in the same political space" (Santos, 1987, pp. 297–298, 2020, p. 89).

Despite the prevailing convergence of state and *adat* laws, I have seen tensions emerging at both societal and state levels. At the societal level tension usually occurs in subtle ways, and it might also involve a conflict with the more 'orthodox' provisions in Islam (sharia). I discussed how, in *Abbas v. Dini* (presented in Chapter 4), Abbas sued Dini (his wife) before an *adat* council to return all the expenses for their marriage, after he discovered her affair with another man. He demanded a full return of the expenses, totalling 21 million rupiah, which he claimed as *mahar* (a bride price), because the marriage was unconsummated and the wife was the one at fault. However, the council refused to rule in his favour, since most of the expenses were considered *antaran-belanjo* (wedding expenses from a groom to a bride), which are voluntary and therefore non-reclaimable. According to the local *adat*, Abbas was entitled to only a very small amount (50 thousand rupiah), as a 'fixed' *mahar* (cf. a local concept of 'ampa co'i ndai' among Bimanese in Wardatun, 2018). The council eventually disbanded, without the parties reaching an agreement. This case shows the tension arising from confusion between *mahar* - prescribed differently in sharia, state law, and *semendo adat* - and the local concept of *antaran-belanjo.* It also reflects the dynamic between three types of symbolic universes, i.e. sharia, state law, and *semendo adat* (K. von Benda-Beckmann, 2009, p. 217; or 'an Islamic triangle', the term used by Buskens, 2000).

At state level, the tensions between state law and *semendo adat* can be found in property-related cases, such as disputes about joint-marital property and inheritance distribution, that have ended up in a courtroom. However, one should keep in mind

that the members of matrilineal Muslim communities in Mukomuko rarely bring their disputes to the Islamic court, unless they are forced to, as has happened in some lawsuits involving state officials, and in some property-related cases. While state officials are legally subject to stricter regulation when attending court, in property-related cases a few husbands seeking a greater share of marital property have made attempts to escape or challenge *semendo adat.* If this were not the case, the members of Mukomuko's matrilineal communities would likely have to rely on internal resolution within their nuclear family, *kaum* deliberation, or the *adat* council. This suggests that disputes at the Islamic court have only occurred in rare and extreme cases, when resolution has failed to occur via the *adat*. This study also reveals that in these few cases the judges from the first instance Islamic court in Mukomuko are not compromising, and their strict application of state law does make conflict between state law and *semendo adat* inevitable.

Disputes ending up in the Islamic court involve three main types of actor. The first type tends to be a member of Mukomuko's matrilineal community, who has appeared before the court as a party to secure their own interests. In doing so, they have engaged in two shopping processes: 'forum shopping', in various dispute resolution fora; and, 'discourse shopping', within different legal repertoires (Biezeveld, 2004; K. von Benda-Beckmann, 1981). When forum shopping, the members of this matrilineal community chose either a deliberation in the *adat* council or the state Islamic court. In some cases, their choice included mediation at a police station and a battle in a criminal court, even though neither of these forums were the proper place for their disputes. When discourse shopping, they referred not only to the state law, but also to their own *semendo adat*. The second type of actor is the first instance Islamic court judge. Although rare, Islamic court judges have received a few cases containing a demand to consider the *semendo adat*. In response to this particular demand, the judges usually used a formalistic approach, ma-

noeuvring only within established developments in the Islamic Court. If they had not done so, their judgements would be liable to nullification by the higher courts, as seen clearly in *Nurdin v. the late Hamida's family* (presented in Chapter 4). This formalistic trend has to do with the gradually centralised and homogenised Islamic judiciary, which I will address later in more detail, when presenting the third finding of this study.

Between these two actors sit the intermediaries (or 'brokers', the term used in Geertz, 1983, p. 173; Horikoshi, 1987), such as informal case-drafters (*juru-ketik-perkara),* lawyers, *kaum* (clan) leaders, and *kaum* elders. Intermediaries can be divided into two categories according to their legal preference: toward state Islamic law, or toward *semendo adat*. The first category consists of informal case-drafters and lawyers. Their role is 'constructive' and 'prospective' (cf. Buskens, 2008, p. 153; Dupret & Drieskens, 2008, p. 9). They help parties to properly draft their lawsuits, while providing something for judges to base their decisions on. These intermediaries have generally showed a preference for state Islamic law, and their assistance has been crucial not only for anticipating possible errors but also for constructing incoming lawsuits in a way that fits the established developments in the Islamic court. In drafting a divorce lawsuit, for example, they are most likely to refer to the existing templates provided by the court, by including either broken marriage or *taklik talak* violation grounds (cf. Dupret et al., 2019, p. 430). Consequently, the outcome of such procedures is predominantly determined by state Islamic law. The second category of intermediaries consists of *kaum* leaders and elders as staunch defenders of the matrilineal *adat*. They often speak before the court on behalf of their clan members, and assist them in invoking their *semendo adat*. However, their intermediary role is now increasingly contested, as judges are encouraging individual citizens to appear in court on their own.

The lessening role of *kaum* elites corresponds to the non-compromising approach of judges in the first instance Is-

lamic court for Mukomuko's population. The judges in this court have become more formalistic in their judgements, causing the involvement of *kaum* leaders and elders to be unnecessary. At first, the judges were concerned about their legitimacy and getting recognised by the people and their *kaum* elites, but now (especially after the gradual trend toward the more centralised and homogenised Islamic judiciary) the judges no longer need to look for such social recognition. The demise of the role of *kaum* elites at court works in parallel with the creation of KUA in each sub-district, which have replaced the existing 'informal' registrars, i.e. *Pegawai Pembantu Pencatatan Nikah* (P3N), which used to be *kaum* representatives. Although, in practice, many *kaum* leaders still play a brokerage role for their clan members in the KUA office (cf. the role of 'modin' in Fauzi, 2021), the abolition of P3N in Mukomuko has seriously threatened the position of *kaum* elites, as it further weakens the state's recognition of them. Another threat to the *adat* and its institutional actors comes from local governments, which have tried to eliminate the involvement of *kaum* leaders and elders in village administration. Rather than preserving the longstanding collaboration with the local elites, the district of Mukomuko created *Lembaga Adat* (LA, *Adat* Institution) in each village, as an institution separate from the village administration.

Prior to the establishment of LA, the *kaum* elites were an integral part of village politics and administration. They used to play a role in determining how a village election must be conducted, and who must be included in the village government structure through their involvement in an *orang adat* assembly.[206] Although one village may differ from the next in this, *kaum* elites have generally been increasingly excluded from village administrations. In this manner, the invention of LA demonstrates what many legal scholars have called an imposition of 'official'

[206] The *orang adat* assembly comprises *kaum* leaders and elders, sub-village heads, and religious functionaries. This composition can be traced back to Minangkabau's *orang-tigo-jenis*, after the Padri movement formalised the involvement of religious dignitaries as an integral part of local elites (Abdullah, 1966, p. 15, 2010, p. xxxii).

law on a 'living' one (Bedner, 2021, pp. 378–380; Just, 1992, p. 379; Pirie, 2013, p. 50; Vincent, 1990). This contrasts with the more accommodative approaches in other regions, such as the return to the *nagari* in West Sumatra (Vel & Bedner, 2015; F. von Benda-Beckmann & von Benda-Beckmann, 2013) and the district government's recognition of customary rules and village elites in Aceh (Arfiansyah A., 2022). However, it does not necessarily imply that the role of *kaum* leaders and elders no longer holds, since the community generally continues to rely on them to arrange most of their important affairs, known locally as *kerja-baik-kerja-buruk* ('good' and 'bad' affairs).[207] Their social significance persists in everyday practices, especially in matters of marriage and divorce, and cannot be underestimated.

6.1.2 The logic of the courts

I will now turn to the second finding of this research, which concerns how the attitudes of judges differ between the different levels of court. While judges from the Islamic Chamber of the Indonesian Supreme Court have become more accommodating toward various local conditions, judges from the first instance Islamic court in Mukomuko often use a formalistic approach, disregarding the local *adat* observed by members of Mukomuko's matrilineal Muslim community. This study reveals that both compromise and opposition serve as forms of logic to inform the judicial process at different levels of the Islamic court. Compromise is the approach favoured by judges at the Islamic Chamber of the Supreme Court, when they are aligning state law with various social conditions informed by provisions in Islam and *adat*, and by sociocultural backgrounds. Meanwhile, opposition is likely to occur at local court level. This is illustrated by the conflicts between state law and *semendo* adat which have emerged from disputes (mostly property-related) between members of Mukomuko's

[207] Important affairs are generally divided into *kerja-baik* (good events), such as births and marriages, and *kerja-buruk* (bad events), such as deaths. While public participation in the first category tends to be passive, their participation in the second is active. Accordingly, people will not participate in a marriage celebration unless invited, but they will automatically get involved in taking care of a deceased person. Still, the involvement of *kaum* leaders and elders in both categories is mandatory.

matrilineal community that have ended up in a courtroom. The different forms of logic can be attributed to the greater autonomy enjoyed by Supreme Court judges, compared to their counterparts in lower courts. Therefore, to better understand the role and function of the Islamic court, it is important to consider the different inclinations (or logic) of judges from different court levels.

At national level, judges from the Islamic Chamber of the Supreme Court have been active in judicial law making, in order to reconcile the law and its purposes and to consider the various local conditions informed by provisions in Islam and *adat*, and by sociocultural backgrounds. For instance, in order to find a middle ground between the mandatory marriage registration procedure and widespread unregistered marriages, the Supreme Court judges introduced an 'extended' and 'refined' form of *isbat nikah.* Through this new form of *isbat nikah,* the judges now manage to validate unregistered marriages retroactively, as long as they are religiously valid and not contrary to other legal provision(s). In the field of divorce, 'broken marriage' was invented as a unilateral, no-fault, and all-encompassing divorce ground. Through increasing use of broken marriage as a ground for divorce, a simpler and more equal divorce procedure for husbands and wives is being promoted, and the burden to find who is at fault is being lifted from the judges' shoulders. Moreover, in order to prevent their court turning into a mere divorce registration office (cf. Husaeni, 2012; van Huis, 2015, p. 243), the judges have started to reapply consideration of fault to broken marriage divorces, especially when the 'fault' is relevant to a spouse's post-divorce rights. These breakthroughs show the judges' ability (or 'autonomy', the term used by Bedner, 2016) to bridge emerging gaps between the formal application of law and a sense of justice in society.

The judges' autonomy to develop the law is crucial to the court's legitimacy in the eyes of Muslim communities, as more responsive judgements enhance people's recognition of the

court. However, it is important to note that social recognition is not the only logic that works. Judges from the Islamic Chamber of the Supreme Court have also been very careful to ensure that developments do not work against the 'core values in Islam' (the term used by Nurlaelawati & van Huis, 2020). In establishing a child-father legal relationship, for instance, judges from this court do not automatically incorporate the 2012 Constitutional Court ruling, which enables a child out of wedlock to legalise their legal relationship to their biological father, as long as there is sufficient proof that they have a blood relationship. Instead, the judges make legalisation of a child-father relationship dependent on an *isbat nikah* judgement, which is now applicable only to a religiously valid and non-polygamous unregistered marriage. Beyond this adaptation, a child-father legal relationship may only be 'acknowledged' (with a restricted legal relationship) through a separate petition on a child's origin (*hak asal usul*), rather than 'legalised' (with a full *nasab* relationship). By doing so, the judges seek to protect not only the child but also the first wife, and more importantly, to ensure that their judgement is in accordance with a more accepted provision in Islam that enables full filial status (*nasab*) to arise only from a religiously valid marriage.

In contrast, at local level, the first instance Islamic court in Mukomuko frequently sees tensions emerging. The state Islamic law which the judges from this court apply is often in conflict with *semendo adat.* By examining incoming cases from members of Mukomuko's matrilineal Muslim community, notably their disputes about joint marital property, this study reveals that judges have responded to these cases by sticking strictly to the law and disregarding the *semendo adat* that entails, among other things, a greater share for wives than for husbands. This actually goes against the existing trend among judges at the Supreme Court, who have started to render more nuanced decisions on this matter by delivering a greater share of the joint marital property to wives, rather than remaining confined to the equal distribution

mandated by the law.[208] The first instance judges' formalistic approach explains why the majority of Mukomuko's matrilineal community prefers to resolve such disputes on their own, out of fear that the involvement of the court will harm their local ideas of justice. This attitude is perfectly illustrated by the local expression *"satu menjadi arang, satu menjadi abu"* (or, "one party becomes charcoal, the other becomes ashes"), which describes the usual fate of their cases in the hands of the Islamic court judges. In fact, the outcomes of their cases would not have been different if the parties had decided to bring their disputes to the Supreme Court. However, such parties often find the higher courts to be too costly and time-consuming, and therefore less accessible.

The prevalence of this formalistic approach is remarkable, considering the greater chance of first instance judges meeting the parties in person and digging deeper into facts the parties have presented. Generally, it is argued that first instance court judges are more likely to exercise judicial law making than those from higher courts, who often confine themselves to spotting errors of law, rather than rendering factual judgements (Shapiro, 1986, pp. 93–96). The case of Mukomuko, where judges from the first instance Islamic court have been less responsive to parties' pleas to invoke their *semendo adat*, shows the opposite. By contrast, Supreme Court judges have become more accommodating toward various local conditions, as demonstrated earlier on in their innovation in matters of marriage and divorce. Although Shapiro made an exception, stating that higher courts from the European civil law tradition might be closer to facts (Shapiro, 1986, p. 95), I found that in Indonesia, which inherited the Dutch European civil law tradition, this exception is unlikely to be the reason for the Supreme Court's more accommodative approach, since the 'accepted' competence of this court is not to assess facts

[208] In Judgement 266K/Ag/2010, Supreme Court judges adjudicated a three-quarter portion of joint marital property to a wife from Yogyakarta, taking into consideration her greater contribution in acquiring the property (cf. Judgement 78K/Ag/2021, which allocated 70% of joint marital property to a wife and 30% to a husband). In a similar case from West Sumatra, i.e. Judgement 88/Ag/2015, the judges allocated one-third to the husband and two-thirds to the wife, by invoking the local norm of *harta-pusaka* (a matrilineally-inherited property), which constitutes part of the disputed property.

but to spot errors of law. A more convincing explanation for this can be found in the gradual centralisation of the Islamic judiciary, which provides the Supreme Court with greater autonomy than the lower courts to control what Shapiro calls the "three main tasks of a court"; namely, conflict resolution, social control, and law making (Shapiro, 1986, p. 151). Such centralised autonomy is a puzzle which needs to be considered when attempting to understand the role and function of Islamic courts within Indonesian multicultural Muslim society.

The greater autonomy enjoyed by judges from the Islamic Chamber of the Supreme Court enables them to perform judicial law making, and to maintain a balance between the preservation of law and core values in Islam and the necessity of considering various social conditions in their judgements. Their autonomy confirms many important studies that suggest the defining role of Islamic court judges in general, in preserving and transforming (or reforming) Indonesian Muslim family law (J. R. Bowen, 1998, 2005; Lev, 1972; Nurlaelawati, 2010; Nurlaelawati & van Huis, 2020; van Huis, 2015, 2019a). However, when we look at the role of judges in such processes it is important to distinguish between different judges from different levels of court. The present study demonstrates how centralising autonomy in the hands of the Supreme Court comes at the expense of the independence of the first instance Islamic court. As first instance judges have come under the increasing control of the Supreme Court, it is safest for them either to render their judgement in a formalistic manner, or to make their judgement according to established developments in the Islamic Chamber of the Supreme Court (for example, via frequent use of the extended and refined form of *isbat nikah* and the ground of broken marriage). Otherwise, their judgement will be liable to nullification by the higher courts, either through an appeal at the appellate court or through a cassation and judicial review at the Supreme Court. This means that the first instance judges are 'never' taking the lead in judicial innovation.

6.1.3 The gradually centralised and homogenised Islamic judiciary

The increasing trend toward a more centralised and homogenised Islamic judiciary is the third finding of this dissertation. The trend is clearly depicted in the adoption of the one-roof system (*sistem satu atap*) in 2004, which centralises both the technical judiciary and court administration under the Supreme Court (Rositawati, 2019, p. 256). The one-roof system put an end to the MoRA's and Supreme Court's dual authority over the Islamic court. It also resulted in better facilities, such as new buildings in the capitals of many regencies and increased salaries for judges, clerks, and court employees (van Huis 2015, 55–56). However, in Mukomuko the one-roof system served to alienate people from the Islamic court and, as I will show later, made this court more dependent on the Islamic Chamber of the Supreme Court. Although the distance separating Mukomuko from Arga Makmur had long been a barrier to accessing the court, people from Mukomuko had somehow found the court to be more accessible *before* the adoption of the one-roof system. The situation was better for people from Mukomuko at that time, because they could bring their cases to a circuit court (*sidang keliling*), which would routinely be held in their hometown. During this period, the judges and court employees from the Arga Makmur Islamic Court worked hand in hand with local KUA employees to address peoples' barriers to court access, by creating a demand-based circuit court.

After the one-roof system came into force, cooperation between the Arga Makmur Islamic court and the local KUA started to decline. The one-roof system turned the previously demand-based circuit court into a top-to-bottom programme. As a programme, the new circuit court was dependent on the limited budget, allocated by the Supreme Court no more than twice a year (cf. van Huis, 2015, p. 156). Meanwhile, the judges were no longer free to use litigation fees to finance their visits to Mukomuko. The situation worsened in 2017, when judges from the

Arga Makmur Islamic Court discovered that South Mukomuko KUA had doubled the litigation fees and put them into its own pocket, ultimately leading the Arga Makmur Islamic court to terminate its cooperation with the KUA. A year later the circuit court resumed, in response to demand from the people, but this time it was not located at the KUA office. Instead, it took place at the sub-regency office (*kecamatan*) of South Mukomuko. It soon appeared that the new form of circuit court was no longer demand-based, and any attempts to revive its previous format are now considered corruption; financing a circuit court with the litigation fees will be certainly against the law. The demise of the demand-based circuit court shows the flip side of the one-roof system, which circumscribes the independence of the lower courts and has severed the link with the MoRA and the KUA. The one-roof system put a stop to every policy issued by the Arga Makmur Islamic court aiming to bring it closer to the Mukomuko population, and this caused a split in the administration of Muslim family matters on the part of the state.

The split between the KUA and the Islamic court also resulted in ambivalence on the part of the state. When legalising an unregistered marriage (for instance), in practice people can still resort to the KUA, although *isbat nikah* in Islamic courts is the only legal procedure available to register such a marriage retroactively. This confirms Fauzi's finding in Pasuruan, where *isbat nikah* is meaningful only to people who seek legal status for children born outside a registered marriage, whereas those who only need a marriage certificate can simply ask the KUA to register their marriage (Fauzi, 2023, p. 263). Another problem arising from this split concerns the weakening relationship between judges and people. Unlike officials of KUA at the sub-district level, who have managed to develop a closer relationship with the people, first instance judges at district level have become increasingly estranged from the people. At the end of 2022, when visiting the University of Bengkulu, I had a chance to present my research to the head of the Islamic Chamber of the Supreme Court and Is-

lamic court judge representatives from the region. After the session, I was approached by one of the judges who adjudicated a case I had presented, saying that he had not realised that the case had been that complex, involving conflicts between state law and *semendo adat.* His statement did not surprise me, as we cannot expect more from a judge who, after the split, serves at one court for just a few years, before being rotated to another court for another short-term stay. The split and short periods of service certainly serve as barriers to judges becoming more familiar with the people and their sociocultural backgrounds.

The negative impact of the one-roof system was aggravated further by the 'late' establishment of the Mukomuko Islamic court. The region, which had already obtained regional autonomy in 2003, had to wait 13 years for the central government to create its Islamic court through Presidential Decree 15/2016. Nonetheless, the court did not immediately start operating; Mukomuko had to wait a further two years for an Islamic court to be officially established in the capital city of Mukomuko. To reach the competent court (i.e. the Arga Makmur Islamic court) before this time, people had to spend a considerable amount of time and money on a seven-hour road trip to the capital regency of North Bengkulu. The establishment of Mukomuko Islamic Court in 2018 has significantly cut people's travelling distances to court, but some residents still consider the court's position at the far north of the region to be a barrier. People who reside in the *hulu* (upstream) and southerly villages, at a maximum distance of 124 km, still have to travel for around four hours to reach the capital. Therefore, the people, especially those who belong to the matrilineal *adat*, have continued to resolve their disputes on their own. An exception applies to those of migrant origin, who contribute for the most part to incoming lawsuits in the Mukomuko Islamic court. The difference can be attributed to the fact that, unlike migrants whose only option is the state Islamic court, Mukomuko's matrilineal Muslim community may resort to their *adat* council as an alternative.

Another effort to centralise and homogenise the judiciary appears in the already mentioned adoption of the obligatory transfer system and uncertain career management in the Supreme Court. This system, as I mentioned briefly above, rotates judges from one place to another once every two to four years, and makes this rotation a condition for promotion. Its proponents argue that this system is strategic, as it disseminates national law and prevents conflicts of interest. Yet, critics of this system have made it clear that it has prevented judges from gaining a better understanding of local contexts and Indonesian multicultural society (Bedner, 2017; Rositawati, 2010, pp. 50–52, 2019, p. 172). Bedner, in his study of the Indonesian administrative court, maintains that making promotion conditional on obligatory rotation has been practically counterproductive, because the system is now shaped mainly by "wide discretionary powers", rather than by merit or detailed assessment. He adds that the system has led to corruption, as judges craving a better, more strategic placement might use all means to persuade their superiors. At the same time, it is used for punishment of judges stepping out of line. (Bedner, 2001, pp. 204–210; see also Pompe, 2005). The impact of mandatory transfer and its function as a form of career management in the Islamic court both require more attention; further research is still required. What is clear from my research is that the judges now serving at the Mukomuko Islamic court are not from this region. They therefore know very little about the people and their *adat*.

In general, the increasing trend toward a centralised and homogenised Islamic judiciary has been advantageous in terms of accelerating the state's unification project (cf. O'Shaughnessy, 2009; Peletz, 2002, pp. 277–278; van Huis, 2015). Nonetheless, the case of Mukomuko and examples elsewhere in Indonesia show how the gradually more centralised and homogenised Islamic judiciary is also problematic, especially for a diverse nation like Indonesia. Many studies have suggested that marriage and divorce among Indonesian Muslims remain predominantly communi-

ty-based affairs, beyond the state's reach (Brickell & Platt, 2015; Idrus, 2003; Millar, 1991; Nurmila, 2009; Nurmila & Bennett, 2014; Platt, 2017; Wirastri, 2018; Wirastri & van Huis, 2021). In response to this, and mainly to maintain their social legitimacy before the Muslim community (cf. Fauzi, 2023, p. 250; Shapiro, 1986, p. 97), judges from the state Islamic court have been active in judicial law making activities, accommodating various local conditions in their judgements. However, as I mentioned earlier, in my discussion of judges' different attitudes at different court levels, judicial law making has become centralised in the hands of the Supreme Court judges. This ongoing centralisation serves to further homogenise lower level Islamic courts, but ironically, in Mukomuko this homogenisation will only endanger the court's legitimacy before the people, as the latter have become reluctant to bring their disputes to the court.

6.1.4 Islamic courts and state formation

The fourth finding concerns the role of Islamic courts in the process of nation-state formation. Peletz, in his study of the Malaysian Islamic courts, suggests that these courts have played a pivotal role in nation-state formation (Peletz, 2002, pp. 277–278). By promoting the state's patriarchal ideology, they were instrumental in the reproduction and transformation of symbols and meanings of nationhood and cultural citizenship, as they penetrated deeply into communities and families, irrespective of their membership of a particular clan, ethnicity, or community (Peletz, 2002, p. 4). O'Shaughnessy, in her study of Indonesian Islamic courts in Central Java, went even further by concluding that the courts were responsible for mainstreaming the state's patriarchal ideology, namely the male-headed family and stigmatisation of divorce (O'Shaughnessy, 2009, p. 70). Van Huis, in his research on women's access to post-divorce rights in the Cianjur and Bulukumba Islamic courts has nuanced this argument. He confirms that the Islamic courts may be accountable for the transformation of divorce norms among the societies studied, according to state ideology, but he adds that the transformation

depends on "the courts' role and functioning in the local communities concerned and the level of competition of the local alternative normative systems and institutions". Whereas in Cianjur the autonomous *ulamas* and the Islamic court were competing institutions, in Bulukumba the two institutions and their actors were relatively new, and they managed to develop a more consensual relationship (van Huis, 2015, pp. 17–18 and 264–265).

Van Huis' research suggests that the historical trajectory of each court has contributed to different attitudes toward judicial divorce, as evidenced in the greater social acceptance of non-court divorces in Cianjur than in Bulukumba. Confirming van Huis' thesis, my research in Mukomuko shows that the state's top-down approach to the mainstreaming of unified Muslim family law has not automatically transformed the local practices of marriage and divorce in favour of the state ideology suggested by O'Shaughnessy. While van Huis draws his argument from people's different attitudes toward the mandatory judicial divorce procedures promulgated by the state, I draw my argument from the intricate relationship between two forms of Islamic law: i.e. the *semendo adat* observed by the villagers from Mukomuko, and the Muslim family law imposed upon them by the state. The case of Mukomuko demonstrates how the unification of Muslim family law has launched the Islamic court upon a path which leads to both compromise and opposition. Compromise usually serves as a 'cultural logic' (Dupret, 2007; Gluckman, 1955; Merry, 1990; Mir-Hosseini, 2000; Peletz, 2002, p. 277; Rosen, 1989), influencing the Supreme Court's approach of aligning state Islamic law with various social conditions informed by provisions in Islam and *adat*, and by sociocultural backgrounds. Meanwhile, opposition likely occurs at the local level, as depicted by the conflicts between state law and *semendo adat* in some Mukomuko cases, mostly property-related ones, that have ended up in a courtroom.

Despite the different forms of logic observed by judges at different court levels, it is important to note that the Indonesian Islamic courts have served as strategic loci for developments in

Muslim family law. As "official interpreters" of the law (cf. J. R. Bowen, 2001; M. E. Cammack, 1997; Lev, 1972; van Huis, 2019a), judges from these courts have introduced many important reforms to give men and women equal standing in Muslim family law (or the 'third phase' of Muslim family law reform, the term used by Welchman, 2007, pp. 12–15). This opposes O'Shaughnessy's argument that these courts would promote the stigmatisation of divorce for women, thereby as she added causing women's subordinate position in divorce to remain unchanged (O'Shaughnessy, 2009, pp. 70, 202). This judicial development also corresponds to similar phenomena around the Muslim world, ranging from judicial *ijtihad* in Pakistan (Abbasi, 2017), through judicial law making in Egypt (Lindbekk, 2017), Morocco (Sonneveld, 2019) and Zanzibar (Stiles, 2019), and the dominant influence of Supreme Justice on Jordanian law making (Engelcke, 2018), to civil court interference in the reform of Islamic family law in many Muslim-minority nations in Western Europe (Sezgin, 2018; van Eijk, 2019). Across these jurisdictions, Muslim family law has increasingly been the subject of reform, by either the Islamic judiciary or civil courts. The case of Indonesia shows that the role of Islamic courts in this respect has become increasingly centralised and homogenised toward the Islamic Chamber of the Supreme Court (cf. Tunisian Case in Voorhoeve, 2012, p. 216). For a diverse nation like Indonesia, this trend is problematic. It has led to conflict and loss of state legitimacy, as evidenced by the people's reluctance to bring their disputes to the Islamic court in Mukomuko and by the fact that some judgements, which opposed *semendo adat*, cannot be executed in practice.

Next, I will provide a further elaboration of these findings, with regard to the intricate state-society relationships in the field of marriage and divorce. I will also provide some critical reflections on the prospects of *adat* and the gradually more centralised and homogenised Muslim family law system in Indonesia.

6.2 Everyday Practices of Marriage and Divorce in the Contemporary Mukomuko

As I already mentioned elsewhere in this book, Mukomuko's contemporary population is predominantly Muslim and, in terms of settlement patterns, comprises three distinct community groups. These are: (1) matrilineal communities, who have resided in the upstream and downstream (*hulu-hilir*) villages and across a number of important rivers in this region, since time immemorial; (2) [trans]migrants, who are mostly from the island of Java and were scattered across several enclave settlements following their mass state sponsored arrival from the 1980s to the present day; and, (3) urban people, who are a mixture of the first two groups and more recent migrants, and who live in emerging market and administrative centres across Mukomuko. While the majority of the matrilineal community and transmigrants remain homogenous within their respective settlements, urban people have become more heterogenous as diverse ethnic groups have come to live alongside them. The matrilineal community also includes the ethnic group, Pekal, who inhabit the most southern part of the region and share a matrilineal kinship system. Together, this multi-ethnic society constitutes the so-called 'local people' of the now district of Mukomuko.

In the fields of marriage and divorce, the matrilineal community, constituting the 'natives', must be distinguished from communities of migrant origin.[209] While natives usually observe the *semendo adat*, their own Islamic law on marriage and divorce, migrants often carry various traditions with them from their place of origin. However, native-migrant encounters are also inevitable, as evidenced by numerous cross-ethnic marriages. The native-migrant encounters work in parallel with two important events: (1) the regional autonomy of Mukomuko district in 2003, which led to the creation of an Office of Religious Affairs (*Kan-*

[209] While acknowledging the colonial implication embodied by the term 'native', I still use this term to distinguish natives from other locals who reside permanently in Mukomuko, but who are not part of the *adat* community.

tor Urusan Agama, KUA) in each sub-district; and (2) the establishment of Mukomuko Islamic court at the end of 2018. These events brought the state closer to Mukomuko society, but they also made the native-migrant distinction in matters of marriage and divorce clearer. Migrants saw the increasing presence of the state as a positive development which brought them better access to state marriage and judicial divorce. By contrast, natives regarded this development with suspicion, fearing that the more patriarchally-inclined Muslim family law that the state promotes would bring harm to their local idea of justice. This explains why marriage and divorce among the latter remain predominantly community-based, and the involvement of the state mostly occurs in less problematic and more extreme cases, as happened in the first marriage at the KUA and the property-related disputes at the Islamic court.

While focussing on the matrilineal Muslim community I learned that *semendo adat* remains a general norm that shapes marriage among them, particularly marriage involving one of their daughters. According to this *adat*, a proper marriage must involve the *orang adat* assembly and observe (among other things) clan-exogamous and uxorilocal (matrilocal) principles. In this manner, membership of a particular *kaum* or clan is mandatory if a marriage is to be recognised by the *adat*. Prospective brides and bridegrooms, especially those who plan to settle outside their village of origin after their marriage, can in fact escape the *adat* by resorting to one of the Offices of Religious Affairs (KUA) that are now available in each sub-district across Mukomuko. However, couples are not allowed to celebrate their wedding publicly in the village, which undoubtedly brings shame to their parents. More importantly, the parents, especially the bride's parents and her *kaum*, will be excluded from *kerja-baik-kerja-buruk* ('good' and 'bad' affairs), and only after paying an *adat* fine will the latter's social rights be restored. This corresponds with the communal nature of the marriage, which is not only a matter between the couple but also between two extended families

or clans. Consequently, even though state marriage at the KUA now provides an alternative, *adat* marriage remains strongly observed and its social significance cannot be underestimated.

In terms of obtaining a divorce, this study reveals the prevalence of non-judicial divorces within this matrilineal community, which initiated by either the husband or the wife. While a husband can easily terminate his marriage out-of-court by uttering *talak*, as prescribed by Islam, a wife does not have any such privilege under the dominant interpretation of Islamic law. Instead, she has recourse to a local alternative that has become known as the *minta-sah* procedure, which serves mainly as leeway for a neglected wife to escape an unhappy marriage. Through this procedure, a neglected wife presents a symbolic offering of *siri-secerano (serrano* or *cerano)* to the local *Imam*, while uttering: "*Aku naik bersuami dan turun tidak bersuami lagi*" (or, "I ascended with a husband, and I am descending without one"). Afterwards, she lays down the offering and leaves the Imam's house before the latter can even answer. While it might seem one-sided, this procedure in fact relies on the fulfilment of several conditions which have been agreed socially, within this community. The agreed conditions are comparable to those of *taklik talak* (conditional divorce), as promulgated by the state. The difference lies in who will examine these conditions. While the state law requires the violation of these conditions to be examined solely by Islamic court judges, members of Mukomuko's matrilineal Muslim community have incorporated them into their own system by bestowing the authority to examine these conditions on the local *Imam*.

From a legal perspective, the state and the unified Muslim family law that it promotes have clearly ruled that both marriage registration and judicial divorce are mandatory to gain the force of law. However, this does not necessarily mean that the local procedures of *adat* marriage and *minta-sah* are not 'recognisable' by law. In the case of an unregistered *adat* marriage, the couple can validate their marriage retroactively through the *isbat nikah* procedure at the Islamic court, although this sometimes leads to le-

gal problems, because not all types of unregistered marriage are eligible for such retroactive validation (see Chapter 2 in Section 2.2.3, on the limits of *isbat nikah*). Meanwhile, the local *minta-sah* procedure often serves as a 'temporary' solution for neglected wives who want to dissolve their marriage but cannot yet access the Islamic court. The latter can validate their non-judicial divorce at the Islamic court at some point over the course of their lives. Therefore, it can be said that the local procedures of *adat* marriage and *minta-sah,* both representing the matrilineal *adat*, have managed to operate in everyday practices as either 'differentiated' empirical law (cf. Abel, 2017; Griffiths, 2017, p. 103) or 'semi-autonomous law' (cf. Moore, 1973). The local procedures are recognisable by state law, and are certainly more differentiated than other local normative systems and institutions.

Speaking of Mukomuko generally, one must keep in mind that the level of adherence to the *semendo adat* differs from one village to the next. While the *semendo adat* and its institutional actors remain in full operation in many rural *hulu-hilir* villages, I have witnessed a growing dissatisfaction with the *adat* and its institutional actors among members of the matrilineal community in villages that are now becoming urban centres. A few male attendees of the Madani mosque in the capital of Mukomuko district shared their discontent toward the incumbent *pegawai syarak* (religious functionaries) with me. In their eyes, the functionaries are not pious enough to occupy their positions and had been elected arbitrarily, within the *adat*.[210] Their dissatisfaction also concerns some elements of *adat*, such as the matrilineal property and inheritance system and the trivial position of a husband, which all run counter to the more orthodox interpretation of Islamic law prescribed in classical Islamic jurisprudence (*fikih*). Another threat comes from the few husbands who, dissatisfied with the result of *adat* deliberation, have started bringing cases to the Islamic court (by 'forum shopping', the term used by K. von Benda-Beckmann, 1981). Their appearance

[210] An interview with the Madani mosque congregation on 22 March 2017.

before the Islamic court is usually an attempt to obtain a greater share of marital property and is therefore also a clear sign of escaping *adat*. Viewed this way, it can be said that people's attitude toward *semendo adat* is gendered, because it distinguishes husbands from wives and depends on the level of social acceptance of *adat* among the local communities of each village.

6.3 Matrilineal Muslims and the Unification of Muslim Family Law

The case of Mukomuko shows how the unification of Muslim family law has not led automatically to complete domination by the state. I have seen the persisting role of matrilineal *adat* across the *hulu-hilir* villages of this region. Although the matrilineal sultanate of Anak Sungai (in Mukomuko) was already in decline following the 1789 patrilineal revolution instigated by the British EIC, eventually disappearing in 1870, under Dutch colonial administration (Bastin, 1965; Bogaardt, 1958; Znoj, 1998, pp. 106–110),[211] matrilineal *adat* and its institutional actors managed to survive at village level as the dominant normative system and institution. This situation changed neither during Japanese occupation (1942-1945), nor nearly 80 years after Indonesian independence (in 1945). The pejorative term, *'pulau di atas pulau'* (or, 'an island upon an island') is often used to describe Mukomuko's isolation from the surrounding regions and central government. Therefore, unlike the fate of many local norms and actors elsewhere in Indonesia, which disappeared under Indonesia's centralising and unifying regimes (J. R. Bowen, 2003, p. 89; Galizia, 1996, p. 139; Lev, 2000, pp. 28–31; K. von Benda-Beckmann, 2009, p. 223), Mukomuko has enjoyed the advantage of the local *adat* and its institutional actors, which have managed to remain in full operation at village level, without much outside intervention (cf. Arfiansyah A., 2022 about Gayo).

[211] The 1789 patrilineal revolution had weakened the relationship between the central (sultanate) and peripheral (supra village and village) levels and increased the former's subjugation by the British EIC, who had appointed the incumbent sultan in 1804 as a mere salaried local assistant. Under the Dutch colonial administration, the local sultanate continued to decline and culminated in the abolition of Anak Sungai Sultanate through an introduction of *marga* (an alien supra villages) system to this region.

In matters of marriage and divorce, this isolation also means more space for the local interpretation of Muslim family law. The *semendo adat,* which is matrilineally-informed in nature, continues to shape everyday practices of marriage and divorce among this matrilineal community, despite the state's agenda to unify Muslim marriage from the time of Indonesian independence (1945) onwards. In other words, the *semendo adat* resisted a more patriarchally-inclined interpretation being imposed on all Muslim citizens by the state. The persisting role of the *semendo adat* was facilitated by the late establishment of the Mukomuko Islamic Court at the end of 2018. Meanwhile, access to the Arga Makmur Islamic Court, a seven-hour round road trip, was simply too costly and time consuming for most people. The situation worsened after adoption of the one-roof system in 2004, which gradually homogenised and centralised the Islamic judiciary. As I mentioned earlier, the one-roof system caused a split between the local KUA and Islamic court and (more importantly) put an end to the existing cooperation between the two offices, which had aimed to bring the state closer to the population. The state's relative absence and the lack of access to state institutions have both caused marriage and divorce among Mukomuko's population to remain community-based affairs.

However, even before the state's increasing presence in the 2000s, the situation had started to change, following the mass arrival of migrants in the last two decades of the 20th century. Migrants arrived in three subsequent stages: i) during the state-sponsored transmigration programme in the 1980s; ii) during massive investment in large-scale natural rubber and oil palm plantations in the 1990s; and, iii) during Mukomuko district's regional autonomy in 2003. While transmigrants inhabit several enclaves, which have been allocated to them across the region, other migrants have settled in either the planation enclaves or the emerging urban centres. At present, migrants already outnumber those from *hulu-hilir* villages (or natives) by

a ratio of 51:49.[212] Apart from diversifying the composition of the Mukomuko population and stimulating economic growth in the region, migrants have also contributed to increased state involvement in matters of marriage and divorce. However, as I mentioned earlier, this development is specific to migrants. Unlike natives, who have their *adat* and its institutional actors as a socially binding alternative, migrants have no other option than to resort to the state. The Arga Makmur Islamic Court records in 2016 and 2017 confirm this point, as most of its incoming cases are brought by migrants.[213]

The establishment of the Mukomuko Islamic Court towards the end of 2018 brought the court closer, even though people from the southernmost villages still have to travel for around four hours to reach the court. This also marks a new phase for the matrilineal community, in which their adherence to the *semendo adat* and its institutional actors is being seriously tested. Their local interpretation of matrilineally-informed Muslim family law is being challenged by the state's more patriarchally-inclined version of family law, which has arrived in their backyard. The Mukomuko Islamic Court records from 2019 and 2020 confirm that the majority of incoming cases were brought by those of migrant origin, instead of by the matrilineal community. I did encounter some cases brought by the latter, but this was a continuation, rather than a new trend: before the Mukomuko Islamic court was established, I had already found a few cases at the Arga Makmur Islamic Court which had been brought by members of the *adat* community. The cases were brought to the court either by civil servants or by unsatisfied husbands; the former was generally for a legal reason, whereas the latter was generally to obtain a better outcome. However, the vast majority of the matrilineal community continue to rely on their *adat* and its institutional actors, just as they used to before the establishment of the

[212] The 2010 census, from the Central Bureau of Statistics (*Badan Pusat Statistik,* or BPS).

[213] A close reading of the profiles of parties originating from Mukomuko shows that the ratio of cases between traditional villages (*hulu-hilir*) and non-traditional villages (migrant) was 40 to 130 (23.53% to 76.47%) in 2016, and 42 to 162 (25.6% to 74.4%) in 2017.

court. In the village of Talang Buai, for instance, where divorcing and remarrying were pervasive, I only encountered two in-court divorces between 2016 and 2020, both of which were filed by civil servants.

The persistent reliance of the matrilineal community on their *adat* and its institutional actors occurs for several reasons. *First*, even though access to the first instance Islamic court is now much easier, the court has not really served the needs of this particular community group. Unlike the Supreme Court judges, who have started to become more lenient toward particular conditions, the first instance Islamic court judges have taken a formalistic approach to adjudicating their cases, disregarding their sense of local justice informed by their *adat*. Instead of exercising judicial discretion (or 'legal differentiation', the term used by Bedner, 2017), the Islamic court judges dared only to manoeuvre within the legal structure established by the Islamic Chamber of the Supreme Court at national level. *Second*, the situation was aggravated by the increasing trend toward a more homogenised and centralised Islamic judiciary, which caused a split on the part of the state between either the Supreme court and the lower courts, or between the first instance Islamic court and the KUA. The case of Mukomuko shows how the split served to alienate the people from the state, especially the state Islamic court, as seen in the demise of the demand-based circuit court. *Third*, a number of disputes, such as those concerning *mahar* and *antaran* (discussed in the first finding), were just beyond the court's jurisdiction. For all these reasons, the *adat* and its institutional actors become the *only* choice, or at least the only temporary one, to serve the needs of Mukomuko's matrilineal Muslim community.

6.4 The Prospect of *Adat* in the Gradually Centralised and Homogenised Muslim Family Law System: A Lesson from Mukomuko

As my final conclusion, I would say that 'all's well that ends well'. When we consider what developments the future may bring, I

would argue that the situation in Mukomuko will likely change in favour of state norms. I draw this hypothesis on the basis of two important developments.

The first development concerns the increasing presence of the state over the last two decades: (1) the 2003 regional autonomy has automatically led to the formation of KUAs in each sub-district (from just two to 15 KUAs); (2) the adoption of the one-roof system in 2003 has gradually centralised and homogenised the Islamic judiciary; and (3) a new Islamic court was eventually established in 2018 in the Mukomuko district capital. The second development concerns ongoing changes from within Mukomuko's contemporary population. Migrants already outnumber natives, and native-migrant marriages are occurring. In other words, the matrilineal *adat* communities are now at a crossroads. In addition, I have witnessed anomalies from within the *adat* community. A few (male) members of the *adat* community have started to bring their disputes to the state in an attempt to escape their *adat*. A similar shift is evident in the growing dissatisfaction among the *adat* community. This is happening especially among people residing in the emerging urban centres, who have started to question the legitimacy of *adat*, which for them seems to go against not only the state law but also the more orthodox interpretation of Islamic law. These developments have brought the state closer to Mukomuko's population, but they have also called the established local normative system and community institution of *adat* into question.

Nonetheless, this hypothesis requires more attention. The increasing presence of the state has attracted a few husbands to bring their disputes to the Islamic court, but it has still caused tension and conflict between *semendo adat* and state law, particularly in cases that involve property-related disputes, such as joint-marital property and child supports. What is obvious now is that *semendo adat* and its institutional actors (*orang adat*) continue to shape the everyday practices of marriage and divorce among Mukomuko's matrilineal Muslim community. The social

significance of this *adat* and its institutional actors cannot simply be overlooked, especially when it comes those inhabiting the rural *hulu-hilir* villages across the region. In this manner, the first instance judges' insistence not to consider the local idea of justice will bring harm to local people, notably to the female members of this *adat* community and their children, who are better served by the *semendo adat,* their own Islamic law on marriage and divorce, rather than by the state Islamic law (cf. the importance of "cultural expertice" for judges in rendering a more just decision from other areas in Indonesia in Holden, 2023; Holden et al., 2019; Nurlaelawati & Witriani, 2023, p. 332). Moreover, the judges' lack of consideration for the local *adat* of Mukomuko is against one of the underlying objectives of Indonesian family law, i.e. better legal protection for wives and children.

The first instance judges' insistence not to consider the local *adat* in their judgements also contradicts Article 229 of the 1991 Compilation of Islamic Law (*Kompilasi Hukum Islam*, KHI), which makes it mandatory for judges at the Islamic courts to thoroughly consider legal values that live within society so that their judgments are in accordance with feelings of justice. For this reason, the judges should more carefully consider the local *adat* in their judgments, which would also help sustain the basic social logic of courts, i.e. the 'triadic' structure of conflict (Shapiro, 1986, p. 16). Otherwise, they may lose legitimacy in the eyes of local communities and become merely marriage and divorce registration institutions. More importantly, gradually centralised and homogenised Muslim family law would be counterproductive to the development of law itself. The case of Mukomuko teaches us how this ongoing centralisation and homogenisation has caused fragmentation on the part of the state, as has happened in the split between KUA and Islamic Court and the different forms of logic that informed judges' judgments from different levels of court (cf. the perpetual role of non-state actors in the implementation of marriage law in Pasuruan in Fauzi, 2023; and a situation in Sudan where an 'illegibility', rather than a fully

codified sharia, can be more attractive to a state for being more effective either to respond to new threats or to take advantage of new opportunities in Sachs, 2018, p. 648).

To sum up, I will return to my point of departure. In *Syahril v. Yati* (presented in the introductory chapter) I showed how Syahril, the husband, attempted to obtain a greater share of marital property by asking the Islamic court to intervene in the dispute. The husband's bid eventually paid off, as judges from the Islamic court successfully 'forced' Yati, the wife, to give up half the marital property to Syahril, after allocating 300 million rupiah of the assets as alimony for their youngest daughter (16). However, this judgement, which was against the *adat*, reflected only part of the story, because execution of the judgement was another issue at play. Syahril could not take over some parts of his share, which were under the control of the couple's children, and Yati had not received a single rupiah of alimony for her daughter, who was under her tutelage. This story teaches us that, in order to make a judgement meaningful, a judge must consider not only state law but also the local idea of justice. Bedner speaks of this as the need for 'legal differentiation'(Bedner, 2017), especially if we consider Indonesia's multi-ethnic Muslim communities and the various forms of local normative systems and institutions that operate within them. It is equally necessary for judges at the first instance court to become more female friendly by following their counterparts from the Supreme Court (cf. J. R. Bowen, 2003, p. 257; Lev, 1972, p. 155; Nurlaelawati, 2013a, p. 245; Nurlaelawati & Salim, 2017, p. 211; van Huis, 2015, p. 4). Otherwise, as evidenced in *Syahril v. Yati* and other Mukomuko cases, the court's judgement would not be enforceable in practice, and more importantly, it would lead to conflict and loss of the state social legitimacy.

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Glossary

Listed are only the non-English terms, i.e. Indonesian, Dutch, Japanese, and local language, that recur in the text. Please note that I use the Indonesian spelling for Islamic legal terms originating from the Arabic language in accordance with the way those terms are most commonly used in daily practice. The meaning and use of the latter terms may differ from those in the Arabic countries.

Adat:	In its broad definition, the term *adat* can be used to mean either: (1) a concrete body of rules and practices inherited from the past; (2) a coherent discourse concerning history, land, and law; or (3) a set of loosely related ideals which (rightly or wrongly) are associated with the past: authenticity, community, harmony, order, and justice. In the present study, the term *adat* carries the first definition, meaning a concrete body of local rules and practices inherited from past Minangkabau and developed in Mukomuko throughout the course of its history.
Afdeling:	The Dutch Indies Colonial Government System led by an assistant *Residen*
Ahli waris pengganti:	representation of heirs.

Anak luar nikah: a child out of wedlock. In establishing a child filial status, judges from the Indonesian Islamic court distinguish between a legalisation (with a full *nasab* relationship) and an acknowledgement (with a restricted legal relationship) of a child-father relationship. While the former is intended for a child born to an unregistered marriage that can be validated retroactively through *isbat nikah*, the latter is intended for a child born to an unregistered marriage that is not legible for *isbat nikah*.

Antaran (antar-belanjo): voluntary expenses from a bride groom to his bride. This term derives from *antar* (carrying or bearing) *belanjo* (expenses). While the term should be shortened as *belanjo* (expenses), but the term *antaran*—with an additional syllable 'an' to make it a noun in the Malay language—was locally perceived to be more proper to maintain a sense of politeness.

At-fault: a matrimonial guilt or a blame-game.

Biaya berperkara: non-litigation fees. This includes accommodation expenses (i.e. transportation, housing, meal costs) spent by a litigant throughout his or her court sessions. The expenses would be higher supposed the litigant employed a professional lawyer.

Biaya perkara: litigation fees. This includes a registration, summons (for both parties), editorial, and an official seal (*biaya materai*) fees as published by the judges in their decisions.

Bicara: this term literally means a 'talk'. In practice, *bicara* refers to a deliberation forum of the *adat* assembly that serves as a means of a decision making since time immemorial.

Cara-gadis: It refers to the first marriage of a female members of Mukomuko's matrilineal community. Usually, this type of marriage is registered to the state and follows all the sequence of important steps of *adat* marriage.

Cara-randa:	It refers to the marriage of a widow or divorcee to a bachelor, a widower, or a divorced man. Usually, this type of marriage is unregistered, mostly due to her former marriage that ended up in an out-of-court divorce. Compared to all the sequence of steps followed in *cara-gadis*, *cara-randa* marriage usually follows a more simplified procedure.
Cicilan/ angsuran:	instalment payment.
Cognatic:	a non-unilineal (or bilateral) kinship-system.
Dinas Kependudukan dan Pencatatan Sipil (Dukcapil):	the Civil Registry Office.
Executoir verklaring:	executorial force; statement of the general court which orders enforcement of a judgment of the Islamic court. Until the reforms of the 1989 Islamic Judiciary Law the subsequent priest councils, *penghulu* courts and Islamic courts had no independent capacity to enforce their judgments. Litigants who wanted to see these judgments enforced had to petition to the general courts (during the Netherlands Indies the *landraad*) in order to obtain an *executorial force.*
Fasakh:	annulment of marriage
Fatwa:	legal opinion of Islamic scholars.
Fikih:	Islamic jurisprudence or doctrine. It refers to practical rules deriving from the primary sources in Islam through a process of *ijtihad* (legal reasoning), which are diverse in nature as a 'law' of scholars.

Gugatan cerai: a divorce lawsuit. Indonesian family law distinguishes a divorce lawsuit among Muslims into *cerai talak* (a divorce initiated by husband) and *cerai gugat* (a divorce lawsuit initiated by wife). This distinction is modelled after traditional *fikih* provisions, which give a husband the privilege of unilateral divorce (*talak*) over his wife. While their distinctive names are still retained, their use in court is almost no different since both *cerai talak* and *cerai gugat* are contentious and must be equipped with a valid divorce ground(s) and dependent on a court's judgment.

Gun: the Japanese Indies Colonial Government System led by a *Gunco,* who was 'equivalent' to the Dutch *Controleur*.

Hakam: mediator.

Harta-sepencarian: joint-marital property; conjugal earnings or properties acquired by a couple during marriage.

Hulu-hilir: upstream-downstream. A defining feature of the geospatial polity of Mukomuko in the past and the main settlements of matrilineal communities in the present-day Mukomuko.

Ibu: mother. Among Mukomuko's matrilineal community, the term *ibu* is interchangeably used to mean either a biological mother or a mother's sister (a sororal mother). However, it must not be confused with an agnatic mother or a father's sister who is usually called *ibu bako*.

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

Isbat nikah massal: a mass retroactive validation of a marriage held under the cooperation of an Islamic court, an Office of Religious Affairs (*Kantor Urusan Agama,* KUA), and a local government (*Pemerintah Daerah, Pemda*). In some cases, a mass *isbat nikah* was held abroad, such as in Malaysia, through a cooperation between the Islamic Chamber of the Supreme Court and an Indonesian embassy from the country concerned.

Isbat nikah: petition for a declaration of the legality of a marriage in which the court investigates whether the legal requirements for a marriage have been met. In its present-day use, this type of petition becomes increasingly used to validate a religiously unregistered marriage.

Islamic Law: practical rules prescribed in Islam. In a scholarly use, there are three different terms used interchangeably to refer to the prescribed rules in Islam, i.e. sharia, *fikih*, and Islamic law. In the present study, their distinctions will be retained, but sometimes the term of Islamic law will be used to mean either sharia or *fikih*.

Iwad: a compensation paid by a wife to his former husband in exchange for his agreement to pronounce *talak* in a *khul*ʿ divorce (a divorce by agreement).

Juru ketik perkara: informal case-drafters. In the Arga Makmur Islamic court, an informal case-drafter is the one who offered a service to formulate a lawsuit or a petition for 100,000 to 150,000 rupiahs per case. Usually, the informal case-drafter is an acquaintance to one of the court's employees whose presence nearby the court was to run the role of *Pos Bantuan Hukum* that does not exist in this court.

Kaum: a matrilineal clan. This term resembles with an equivalent term of '*suku'* in Minangkabau. These two terms have been used interchangeably in Mukomuko to mean its a matrilineal clan system. In contemporary Mukomuko, the existing *kaums* are *Enam di Hulu, Enam di Hilir, Delapan di Tengah, Tujuh Nenek, Lima Suku, Sang Pati, Gresik Ketunggalan, Datuk Rio Manyusun, Datuk Rio Menang, Datuk Rio Melan Putih Bubun, Datuk Rio Sati, Datuk Rio Batuah,* and *LIX Peroatins.*

Keluarga bako: an agnatic family.

Kementerian Agama The Ministry of Religious Affairs (the MoRA).

Kerja baik and *kerja buruk:* good events and bad events. This term serves as a general guideline on how this community should deal with important events such as birth, marriage, and death. While public participation in *kerja-baik* is passive, their participation in *kerja-buruk* is active. For instance, people will not participate in a marriage celebration unless invited, but they will automatically get involved in taking care of a deceased person.

Khataman: a final test of Quranic recitation, which is usually held for a bride before her marriage.

Khulʿ: a divorce by a mutual agreement. It refers to a traditional Islamic divorce procedure in which the wife offers her husband to return (part of) her dower (*mahr*) in exchange for his pronunciation of the *talak* and in which she will refrain from her maintenance rights during the *iddah*. However, its present-day use across the Muslim world has been significantly modified to mean a (unilateral) divorce option for wife.

Kompilasi Hukum Islam (KHI):	the Compilation of Islamic Law. A body of Islamic law (i.e. marriage, inheritance, and religious endowment) compiled by the state through a joint-cooperation between the MoRA and the Supreme Court by involving Islamic figures and scholars. The KHI was intended to be the official reference for judges in the Islamic court, even though a few judges initially retained the views available within the traditional *fikih.*
Landraad:	court for the Indigenous population during the Netherlands Indies.
Lian:	an adultery accusation. This accusation can serve as a divorce procedure in the Islamic court. The outcome of this procedure is a final divorce, and the couple cannot remarry.
Mahar:	dower; the (agreed) bride-price given by a bridegroom to a bride, which constitutes one of the requirements for a Muslim marriage. The *mahar* can be paid in cash during the solemnisation of marriage (a prompt *mahar*) or counted a husband's debt to his wife (a deferred *mahar*). The *mahar* belongs to the bride and is hers to keep in the case of divorce. She is entitled to half if the marriage ends before consummation. The *mahar* is one of the requirements for a Muslim marriage.
Mahkamah Agung (MA):	the Supreme Court, which functions as the court of cassation (*Kasasi*) and judicial review (*Peninjauan Kembali, PK*)
Mandur:	a head of labour workers.
Marga:	an ethnic-based supra village institution. The institution of *marga* was first introduced in the East Indies under the Dutch administration. It survived the early period of Indonesian independence until its abolition through the passing of Law 5/1979 on Village Administration.
Masuk kaum:	a procedure in Mukomuko to naturalise a foreigner (migrant) into the *adat* community.

Muhallil: a man who married a divorced woman, who got a triple talak *(talak bain kubrā)* from her former husband.

Mutah (mut'ah): a consolation gift. A man is required to give *mut'ah* to his former wife as a token of consolation for repudiating her through a *talak,* provided that it concerns a non-final divorce, and she was not *nusyuz* at that time.

Nafkah māḍiyah (nafkah lampau): unpaid due maintenance. In the case of divorce preceded by a husband's negligence of spouse supports, a divorced wife is entitled to the unpaid due maintenance.

Nanam kelapo: a procession, where a bride and a groom exchange coconut seeds and plant them near their future house, not only to symbolise their union but also to provide a sustainable source for the local cuisine that uses considerable amounts of coconut cream.

Nusyuz: marital discord caused by disobedience or not fulfilling the marital duties. Wives who are *nusyuz* lose their legal rights on maintenance from their husband. Traditionally *nusyuz* refers to the wife's behaviour, but recently the Indonesian Islamic courts have applied the term to husbands as well.

Onderafdeling: The Dutch Indies Colonial Government System led by a *Controleur*.

Ongkos perkara: ligation and non-litigation costs.

Orang adat: the elite members of *adat* in Mukomuko, which comprise *kaum* (clan) leaders and elders, sub-village heads, and *pegawai syarak* (religious functionaries).

Orang-tigo-jenis: literally three types of people. Its use in Mukomuko refers to an assembly of local elites that comprise the Penghulu, the *Imam-Khatib* (the religious dignitaries) and *Orang banyak* (the mass). This assembly derives from Minangkabau after the Padri movement, which formalised the involvement of religious dignitaries as its integral part.

Pegawai Pembantu Pencatatan Nikah (P3N)	an 'informal' marriage registrar.
Pegawai syarak:	religious dignitaries or functionaries that comprise of *Imam*, *Khatib*, *Bilal Muhsin*, and *Bilal Jum'at,* who are arranged hierarchically and rotated among the existing clan representatives once in every three years.
Pengadilan Agama (PA)	Islamic Court.
Pengadilan Tinggi (PT):	the court of appeal or the appellate court.
Perjanjian pra-nikah:	a prenuptial agreement. According to the Indonesian family law, prospective bridegroom and bride can arrange a prenuptial agreement, especially, to separate their respective earnings during the marriage. After the Indonesian Constitutional Court Judgement No. 69/PUU-XIII/2015, such agreement can be arranged voluntarily at any time either before or after the concluding of a couple's marriage.
Pos Bantuan Hukum (POSBAKUM)	a legal aid centre facilitated by the state through an Islamic court. Its main task is to provide a legal aid for free for justice seekers, who could not afford a professional lawyer. In 2016, there were only 120 legal aid centres from a total of 359 Islamic courts across Indonesia.
Riddah or *murtad:*	conversion from Islam. According to Article 116 [h] of the Compilation of Islamic Law (*Kompilasi Hukum Islam*, KHI), *riddah* than causes a marital breakdown can serve as a valid ground for divorce both for husband and wife.
Semendo adat:	a popular denomination and a particular element of Mukomuko's *adat* to mean its matrilineally-informed of Islamic law on marriage and divorce.

Sharia:	Sharia (with capital) in a broad meaning is equal to Islam as religion, but in its narrow meaning refers to practical rules prescribed in the primary sources of Islam, i.e. Qur'an and prophetic traditions.
Sidang di luar gedung:	*a* generic term for out-of-court sessions that may apply either to an integrated court session (*sidang terpadu*), such as a mass *isbat nikah* outside the Islamic court, or a circuit court (*sidang keliling*) held at surrounding regions from the Islamic court.
Šiqāq	a procedure in which the Islamic judge appoints one family member of each spouse as mediators (*hakam*) in an attempt to reconcile a couple. When reconciliation fails, the *hakams* have the possibility to advise the couple to divorce. In Indonesia their advice traditionally was not only directed at the husband in order to persuade him to pronounce the *talak*, but also to the Islamic judge who could divorce the couple.
Sistem Kamar	Chamber System. This system was used to divide judges Supreme Court according to their competence or jurisdiction. This system was first implemented following Supreme Court Decree No. 142/KMA/SK/IX/2011, divides this court into five main chambers: Criminal, Civil, Administrative, Islamic, and Military Chambers.
Surat Pernyataan Tanggung Jawab Mutlak (SPTJM):	a letter of absolute responsibility. In a recent development, a person may obtain important civil documents, which used to be dependent on presenting a marriage certificate determining whether a person's marriage was registered or not, simply by presenting their SPTJM to the Civil Registry Office *(Dinas Kependudukan and Pencatatan Sipil, Dukcapil).*

Taklik talak: a conditional divorce agreed between a husband and the state. It refers to a contract pronounced by the bride-groom immediately after the conclusion of the marriage in which he states the conditions under which he will divorce his wife if she wants him to do so. A wife who wants to divorce on the base of the *taklik talak* must bring her case to a judge who will verify whether one of the conditions has been met. If so, she has to pay her husband the amount of compensation as established in the *taklik talak* and will be officially divorced.

Talak bain khulʿi: a final divorce, which is resulted from a violation of *taklik-talak* by husband.

Talak bain kubrā: a final divorce. The couple cannot reconcile and only remarry after the wife has been remarried with another man (*muhallil*) and subsequently divorced him.

Talak bain ṣuġrā: a final divorce. The couple cannot reconcile but can still remarry.

Talak raǧʿi: a non-final or revocable divorce. The couple can reconcile (*rujuk)* during the *iddah*.

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

Terang kaum: a procedure in Mukomuko, designated for a migrant with Minangkabau origin or those who already belong to a particular *kaum*, to find a local *kaum* acting as his or her local parents in the *adat* community.

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

Wasiat wāǧibah: obligatory bequest.

Zina fornication, adultery, sin. According to Indonesian Muslim family law, a divorce can be obtained through an adultery accusation (see a *lian* procedure) before the Islamic court, and the outcome of such procedure is a final divorce.

Summary

This dissertation has approached marriage and divorce among Muslims in 'peripheral' areas in Indonesia from various angles, employing legal analysis as well as historical and ethnographic research. The study seeks to understand the intricate relationship between the interpretation of Muslim family law as promulgated by the state, and the different forms of empirical laws or norms operating within Indonesia's multicultural Muslim society. Focussing on Mukomuko in Bengkulu province, on the west coast of Sumatra, this study discusses marriage and divorce practices in three different but connected sites: i.e. everyday practices at societal level; relevant cases available in the first instance Islamic courts of Arga Makmur and Mukomuko; and landmark decisions and developments within the Islamic Chamber of the Indonesian Supreme Court, at the national level. On the basis of ten months of fieldwork I conducted in this region and during several subsequent shorter visits to the research sites from 2017 to 2019, this study shows that Mukomuko's *adat,* which is 'matrilineally-inclined' in nature, and its institutional actors (the assembly of *orang adat*) have persisted, even though marriage and divorce practices are now increasingly influenced by the state. Mukomuko is a case in point, in which the state's patriarchally-inclined Islamic law conflicts with matrilineal community traditions.

In order to shed light on this topic, this dissertation has examined three central questions: (1) How do geographically peripheral Muslim communities, and specifically the matrilineal Muslim community in Mukomuko, construct and safeguard their own Islamic law on marriage and divorce *vis-à-vis* the interpretation of Islamic law as promulgated by the state? (2)

How do Islamic court judges representing the state respond to local conditions, when promoting social change in the fields of marriage and divorce among the people of Mukomuko in particular, and among Indonesian multicultural Muslim societies in general? (3) What can we learn from Mukomuko's case, especially with regard to the increasing trend in Indonesia toward a more centralised and homogenised Islamic judiciary? Starting from everyday practices of marriage and divorce at societal level, this dissertation then focuses on relevant cases at different level of Islamic courts. Here, the dissertation looks at a number of regulatory spaces with regard to how people conclude their marriages, obtain their divorces, and resolve their related disputes. This bottom-up inquiry leads this dissertation to conclude the following findings.

First, by examining how state law and the local *adat* operate in present day Mukomuko, this study reveals a mixture of compromise and conflict, with certain actors caught in the middle: i) state actors, such as marriage registrars at the Office of Religious Affairs (*Kantor Urusan Agama*, KUA) and Islamic court judges; ii) quasi-state actors, such as case-drafters (*juru-ketik-perkara*) and lawyers; and, iii) non-state actors, such as local clan (*kaum*) leaders and elders, and religious functionaries (*pegawai syarak*). Concerning the compromise, state law and Mukomuko's *adat* coexist as 'distinctive' normative systems and institutions (or 'differented', the term used by Griffiths, 2017, p. 103), shaping people's marriages, divorces, and related disputes. They operate, among other forms of normative systems and institutions, on 'a continuum scale' (cf. Platt, 2017, pp. 6–9). Although secondary as part of the state legal system, the local *adat* is often socially more important, and certainly locally more differentiated, than the general provisions of Islamic law. However, it is important to note that their distinction is not always clear since they also superimpose, interpenetrate, and mix rather than coexist merely in the same political space. As a consequence, the coexistence of state and *adat* laws also creates a twilight zone, where the

shadows of different legal orders converge (cf. "interlegality" in Santos, 1987, pp. 297–298, 2020, p. 89).

Despite the prevailing convergence of state and *adat* laws, I have seen tensions emerging at both societal and state levels. At the societal level tension usually occurs in subtle ways. It may involve a conflict with the more 'orthodox' provisions in Islam, while the tensions between state law and *adat* emerge in property-related cases, such as disputes about joint-marital property and inheritance distribution, which have ended up in a courtroom. However, one should keep in mind that the members of matrilineal Muslim communities in Mukomuko rarely bring their disputes to the Islamic court, unless they are forced to, as has happened in some lawsuits involving state officials, and in some property-related cases. The reason that state officials appear in court is that they are subject to stricter regulations than ordinary citizens, but the property-related cases are brought by those few husbands who are seeking a greater share of marital property and therefore try to escape or challenge Mukomuko's matrilineal *adat* (cf. "forum shopping" in K. von Benda-Beckmann, 1981, 1984). If this were not the case, the members of Mukomuko's matrilineal communities would likely have to rely on internal resolution within their nuclear families, their *kaum*, or resolution by the *adat* council. The disputes at the Islamic court only occur in rare and extreme cases and usually involve a tension between the state's patriarchally-inclined Islamic law and the local *adat* of the more matrilineally-inclined Islamic law.

Second, in state-society encounters at the Islamic court, the study shows the tension between compromise and conflict as well. While the Islamic Chamber of the Supreme Court has considerable room for compromise at national level, local courts frequently see tensions emerging. At the national level, the Supreme Court judges have been active in judicial law making, in order to reconcile the law and its purposes and to consider the various sociocultural conditions informed by provisions in Islam and *adat* and the need to make their court more friendly, *especially*, toward

women and children. For instance, to address the widespread phenomenon of unregistered marriages, the judges introduced an 'extended' and 'refined' form of *isbat nikah* (a retroactive validation of marriage). In the field of divorce, they invented 'broken marriage' as a unilateral, no-fault, and all-encompassing divorce ground, which enables a simpler and more equal divorce procedure for husbands and wives. At the same time, to prevent their court turning into a mere divorce registration office, the judges have started to reapply considerations of fault to broken marriage divorces, not to decide whether to allow divorce or not, but where it concerns a spouse's post-divorce rights. These breakthroughs show the judges' 'autonomy' (the term used by Bedner, 2016) to bridge emerging gaps between the formal application of law and a sense of justice in society.

By contrast, at the local level, judges from the first instance Islamic court in Mukomuko often approach divorce in a formalistic manner, disregarding the local *adat* observed by members of Mukomuko's matrilineal Muslim community. Having examined cases from members of this matrilineal community, notably their disputes about joint marital property, this study reveals how judges often disregard the local *adat* that entails, among other things, a greater share for wives than for husbands. This actually goes against the existing trend among judges at the Supreme Court, who render more nuanced and female-friendly decisions on this matter. The first instance judges' formalistic approach explains why the majority of Mukomuko's matrilineal community prefers to resolve such disputes on their own, out of fear that the involvement of the court will harm their local ideas of justice. This attitude is perfectly illustrated by the local expression *"satu menjadi arang, satu menjadi abu"* ("one party becomes charcoal, the other becomes ashes"), which describes the usual fate of their cases in the hands of the Islamic court judges. While the outcomes might have been different had the parties decided to bring their disputes to the Supreme Court, they often find the higher courts to be too costly and time-consuming, and therefore less accessible.

The different logic among judges from different court levels can be attributed to the gradual centralisation and homogenisation of the Islamic judiciary, which serves ***the third*** finding of this study. The trend is clearly depicted in the adoption of the one-roof system (*sistem satu atap*) in 2004, which centralised both the technical judiciary and court administration under the Supreme Court. While enhancing the court's status and facilities, the one-roof system ironically served to alienate people in Mukomuko from the Islamic court. Although the distance separating Mukomuko from Arga Makmur had long been a barrier to accessing the court, the people somehow found the court to be more accessible *before* the adoption of the one-roof system. People could bring their cases to a circuit court, which would routinely be held in their hometown through the court's cooperation with the local KUA. After the one-roof system came into force, the previously demand-based circuit court was turned into a top-to-bottom system and it became dependent on a limited budget, allocated by the Supreme Court no more often than twice a year. This situation was exacerbated by the 'late' establishment of the Mukomuko Islamic court in 2018. These setbacks show the flip side of the one-roof system, which has severed the court's link with the local population and the KUA and caused a split in the administration of Muslim family matters by the state.

The negative impact of the one-roof system was aggravated further by the increasing centralisation and homogenisation of Islamic judiciary, which saw discretion and policy making being predominantly placed in the hands of Supreme Court judges. As first instance judges have come increasingly under control of the Supreme Court, it is safest for them to render formalist judgements, and to only take into account established interpretational developments in the Supreme Court. Otherwise, their judgement will be vulnerable to nullification by the higher courts, either through an appeal or through cassation and/or revision. There is a general argument in socio-legal studies that first instance court judges are more likely to engage in judicial law making

than those from higher courts, who often confine themselves to spotting errors of law, rather than rendering factual judgements (cf. Shapiro, 1986, pp. 93–96). However, the case of Mukomuko shows the opposite, with first instance judges 'never' taking the lead in judicial innovation. This trend is problematic, especially for a diverse nation like Indonesia, as it does not accommodate the various forms of local normative systems and institutions that operate in society. Many studies have suggested that marriage and divorce among Indonesian Muslims remain predominantly community-based affairs, and straightforward implementation of state law will endanger the court's legitimacy before the people, as the latter become reluctant to bring their disputes to the court.

The fourth finding of this dissertation concerns the role of Islamic courts in the process of nation-state formation. Several studies have suggested that the Islamic courts, serving as strategic loci for developments in Muslim family law, have been instrumental in the transformation of marriage and divorce norms among Muslim societies in conformity with state ideology (O'Shaughnessy, 2009; cf. Peletz, 2002, pp. 277–278). Van Huis, in his research on women's access to post-divorce right in the Cianjur and Bulukumba Islamic courts has nuanced this argument. He confirms that the Islamic courts may be accountable for the transformation of divorce norms among the societies studied, but he adds that the transformation depends on "the courts' role and functioning in the local communities concerned and the level of competition of the local alternative normative systems and institutions" (van Huis, 2015, pp. 17–18 and 264–265). Confirming van Huis's thesis, my research in Mukomuko shows that the state's top-down approach to the mainstreaming of unified Muslim family law has not automatically transformed the local practices of marriage and divorce in favour of the state ideology. Even though marriage and divorce practices are increasingly influenced by the state, I still see tensions emerging between two forms of Islamic law: i.e. the local one observed by Mukomuko's

matrilineal communities, and the Muslim family law imposed upon them by the state.

As my final remark, I would have liked to say that 'all's well that ends well'. In general, the more centralised and homogenised Islamic judiciary has been advantageous in terms of accelerating the state's unification project. However, this trend comes at the expense of the lower courts' autonomy, which is counterproductive to the development of law itself. Article 229 of the 1991 Compilation of Islamic Law (*Kompilasi Hukum Islam*, KHI) stipulates that it is mandatory for judges at the Islamic courts to thoroughly consider legal values that live within society so that their judgments are in accordance with feelings of justice. My previous remarks have demonstrated how the first instance judges' lack of autonomy to consider the local idea of justice has been harmful for local people, notably for the female members of Mukomuko's matrilineal community and their children, who are better served by their own *adat* than by the state law. Their lack of autonomy in this respect is counterproductive to one of the underlying objectives of Indonesian family law, i.e. better legal protection for wives and children. Moreover, this trend has caused fragmentation on the part of the state, as it contradicts important policies issued to bring the court closer to local people and it even goes against the more female friendly inclination among judges from the Supreme Court. Therefore, in order to make a meaningful judgement, a judge must consider not only state law but also the local idea of justice (cf. the need for 'legal differentiation' in Bedner, 2017). Otherwise, the court's judgement will not be enforceable in practice, and more importantly, it will lead to conflict and loss of the state social legitimacy.

Chapter Overview

Chapter 1 provides an introduction to the topic and sets out the thematic and theoretical orientations of the dissertation. It includes the research backgrounds, questions, frameworks, the research context, and the methodology.

Chapter 2 discusses important developments of marriage and divorce norms within the Islamic Chamber of the Supreme Court at the national level. The discussion reveals a consistent trend of judicial law-making as apparent in the 'extended' and 'refined' form of *isbat nikah*, the invention of 'broken marriage', and a number of important developments to provide a better and more equal court access for both men and women. These legal breakthroughs show the autonomy of Islamic courts, especially in bridging the gaps between a formal application of law and a sense of justice in society. The judges' autonomy is crucial as the more responsive attitude enhances their social recognition and the court's legitimacy in the eyes of local society. However, a careful analysis of case law also reveals that accommodation is not the only logic that works. Judges from the Islamic Chamber of the Supreme Court have also been very careful to ensure that developments do not work against the established interpretation of law and 'core values in Islam' (cf. Nurlaelawati & van Huis, 2020). The discussion in this chapter demonstrates that the Islamic courts have served as strategic loci not only for the development of law but also for the encounter of different normative systems.

Chapter 3 shifts the attention to Mukomuko, on the west coast of Sumatra, which serves as a home for three distinct community groups. They are: (1) matrilineal communities, who have resided in the upstream and downstream (*hulu-hilir*) villages since time immemorial; (2) migrants, mostly from the island of Java, who are scattered across several enclave settlements, following the mass arrival of state sponsored transmigrants from the 1980s to the present day; and, (3) urban people, who are a mixture of the first two groups and more recent migrants, and who live in emerging market and administrative centres across the present district of Mukomuko. While the majority of the matrilineal community and the transmigrants remain exclusively within their respective settlements, urban people have been mixing, as more diverse ethnic groups have come to live side by side.

In the field of marriage and divorce, the matrilineal communities usually observe their matrilineal *adat* inherited from Minangkabau, whereas the migrants and the urban people often carry with them various traditions from their place of origin. The Chapter argues that this multicultural society and the different forms of local norms operating among them provides a perfect site for this dissertation, which seeks to understand how the state law and its patriarchally-inclined ideology actually work in practice.

Chapter 4 discusses everyday practices of marriage and divorce among Muslims in Mukomuko. It focuses on the experiences of matrilineal Muslim communities who inhabit the *hulu-hilir* villages across the district of Mukomuko. This chapter looks particularly at how these people navigate state law and the equivalent local *adat* of the more matrilineally-informed Islamic law in concluding their marriages, obtaining their divorces, and solving their related disputes. Mukomuko is a case in point, where the state law and its patriarchal ideology are put to the test. Despite the increasing penetration of state family law, which is intended for all Indonesian Muslims, the local *adat* and its institutional actors (*orang adat*) in Mukomuko have persisted and cannot be easily bypassed and *adat* often is socially more important than state law. Moreover, the local *adat* is certainly locally more established, in comparison with other local normative systems observed by the remaining Mukomuko's population, who do not belong to the matrilineal *adat* community.

Chapter 5 examines cases from Mukomuko at two Islamic courts, the Arga Makmur Islamic Court (2016-2018), and the Mukomuko Islamic Court (from 2019 onwards). Cases were mainly brought by people of migrant origin. This can be attributed to the fact that, unlike the matrilineal communities, who may resort to their *adat* council, migrants have no forum that is binding and which serves as an alternative to the state Islamic court. Although cases from the matrilineal community are rare, the few cases I found, notably cases relating to property, are significant, as indicators of the conflicts and possible reconciliations between the

state's patriarchally-inclined Islamic law and Mukomuko's *adat* of the more matrilineally-inclined Islamic law.

The Chapter also discusses the role of intermediaries, who acted as 'brokers' between parties and judges in the state-society encounter at the Islamic court. They include: (1) informal case-drafters and (2) lawyers, who have a preference for state law, and (3) clan leaders and elders, who have a preference for the local matrilineal *adat*. The role of the first two intermediaries is 'constructive' and 'prospective' (cf. Buskens, 2008, p. 153; Dupret & Drieskens, 2008, p. 9). They help parties to properly draft their lawsuits, thus providing judges with information to underpin their decisions. Their assistance in this respect has been crucial, not only in anticipating possible errors but also in constructing incoming lawsuits in a way that fits the developments in the Islamic court. The latter two intermediaries often speak before the court on behalf of their clan members, and assist them in invoking their matrilineal *adat*. However, the role of these local intermediaries is now increasingly contested, as judges, who tend to a more formalistic approach to law, and are encouraging individual citizens to appear in court on their own. Consequently, the outcome of cases is predominantly determined by state Islamic law.

Finally, Chapter 6 concludes that despite increasing state influence, everyday practices of marriage and divorce among Mukomuko's matrilineal community remain predominantly community-based affairs, based on their matrilineal *adat.* This Chapter also discusses the prevalence of compromise and conflict in the Supreme Court and the local Islamic courts. While the Islamic Chamber of the Supreme Court has considerable room for compromise, local courts contribute to tensions. The different logic of these different levels of court can be attributed to the increasing trend toward a more centralised and homogenised Islamic judiciary. My previous remarks have clearly demonstrated that this trend is problematic, especially for a diverse nation like Indonesia, where the first instance judges'

insistence not to consider the local *adat* threatens to endanger their social legitimacy. But more importantly, judges at every level should always take into account local ideas of justice.

Sumenvatting
(Summary in Dutch)

Matrilineaire islam

Islamitische staatswetgeving en dagelijkse praktijken van huwelijk en echtscheiding onder mensen van Mukomuko-Bengkulu, Sumatra, Indonesië

Dit proefschrift heeft het huwelijk en echtscheiding onder moslims in 'perifere' gebieden in Indonesië vanuit verschillende invalshoeken benaderd, waarbij gebruik is gemaakt van zowel juridische analyse als historisch en etnografisch onderzoek. De studie probeert de ingewikkelde relatie te begrijpen tussen de interpretatie van het islamitisch familierecht zoals afgekondigd door de staat, en de verschillende vormen van empirische wetten of normen die werkzaam zijn binnen de multiculturele moslimsamenleving in Indonesië. Deze studie concentreert zich op Mukomuko in de provincie Bengkulu, aan de westkust van Sumatra, en bespreekt huwelijks- en echtscheidingspraktijken op drie verschillende, maar onderling verbonden locaties: d.w.z. alledaagse praktijken op maatschappelijk niveau; relevante zaken beschikbaar in de islamitische rechtbanken van eerste aanleg van Arga Makmur en Mukomuko; en baanbrekende beslissingen en ontwikkelingen binnen de Islamitische Kamer van het Indonesische Hooggerechtshof, op nationaal niveau. Op basis van tien maanden veldwerk dat ik in deze regio heb uitgevoerd en tijdens verschillende daaropvolgende kortere bezoeken aan de onderzoekslocaties van 2017 tot 2019, laat dit onderzoek zien dat Mukomuko's adat, die 'matrilineair geneigd' van aard is, en zijn institutionele actoren (de vergadering van *orang adat*) zijn blijven bestaan, zelfs al worden huwelijks- en echtscheidingspraktijken nu steeds meer door de staat beïnvloed. Mukomuko is hiervan een voorbeeld, waarin de

patriarchaal georiënteerde islamitische wet van de staat in strijd is met matrilineaire gemeenschapstradities.

Om dit onderwerp te belichten heeft dit proefschrift drie centrale vragen onderzocht: (1) Hoe construeren en beschermen geografisch perifere moslimgemeenschappen, en specifiek de matrilineaire moslimgemeenschap in Mukomuko, hun eigen islamitische wet inzake huwelijk en echtscheiding ten opzichte van de interpretatie van de islamitische wet zoals uitgevaardigd door de staat? (2) Hoe reageren islamitische rechters die de staat vertegenwoordigen op lokale omstandigheden, bij het bevorderen van sociale verandering op het gebied van huwelijk en echtscheiding onder de bevolking van Mukomuko in het bijzonder, en onder Indonesische multiculturele moslimgemeenschappen in het algemeen? (3) Wat kunnen we leren van de zaak van Mukomuko, vooral met betrekking tot de toenemende trend in Indonesië naar een meer gecentraliseerde en gehomogeniseerde islamitische rechterlijke macht? Vanuit de alledaagse praktijken van huwelijk en echtscheiding op maatschappelijk niveau als beginpunt, richt dit proefschrift zich vervolgens op relevante zaken op verschillende niveaus van islamitische rechtbanken. Hierbij onderzoekt het proefschrift een aantal plekken van regelgeving met betrekking tot de manier waarop mensen hun huwelijken sluiten, hun echtscheidingen verkrijgen en de daarmee samenhangende geschillen oplossen. Dit bottom-up onderzoek leidt tot de volgende bevindingen van dit proefschrift.

Ten eerste, door te onderzoeken hoe het staatsrecht en de lokale *adat* in het huidige Mukomuko functioneren, onthult dit onderzoek een mengeling van compromissen en conflicten, waar bepaalde actoren bij betrokken raken: i) statelijke actoren, zoals huwelijksregistreerders van het Bureau voor Religieuze Zaken (*Kantor Urusan Agama*, KUA) en rechters van islamitische rechtbanken; ii) quasi-statelijke actoren, zoals degenen die zaken opstellen (*juru-ketik-perkara*) en advocaten; en iii) niet-statelijke actoren, zoals lokale clanleiders en -oudsten (*kaum*),

en religieuze functionarissen (*pegawai syarak*). Wat betreft het compromis: het staatsrecht en de adat van Mukomuko bestaan naast elkaar als 'onderscheidende' normatieve systemen en instellingen (of 'gedifferentieerd', zoals verwoord door Griffiths, 2017, p. 103), die huwelijken, echtscheidingen en daarmee samenhangende geschillen tussen mensen vormgeeft. Ze opereren, naast andere vormen van normatieve systemen en instituties, op 'een continuümschaal' (cf. Platt, 2017, pp. 6–9). Hoewel secundair als onderdeel van het rechtssysteem van de staat, is de lokale *adat* vaak sociaal belangrijker, en vooral lokaal meer gedifferentieerd, dan de algemene bepalingen van het islamitisch recht. Het is echter belangrijk op te merken dat het onderscheid tussen beiden niet altijd duidelijk zichtbaar is, omdat ze elkaar ook overlappen, doordringen en met elkaar vermengd raken, in plaats van dat ze louter naast elkaar bestaan in dezelfde politieke ruimte. Als gevolg hiervan creëert de co-existentie van staats- en adatwetten ook een schemergebied, waar de schaduwen van verschillende rechtsorden samenkomen (cf. "interlegaliteit" in Santos, 1987, pp. 297-298, 2020, p. 89).

Ondanks de gangbare convergentie van staats- en adatwetten heb ik spanningen zien ontstaan op zowel maatschappelijk als staatsniveau. Op maatschappelijk niveau ontstaat spanning meestal op subtiele manieren. Er kan sprake zijn van een conflict met meer 'orthodoxe' bepalingen in de islam, terwijl spanningen tussen het staatsrecht en de adat naar voren komen in zaken omtrent eigendom, zoals geschillen over huwelijksgoederengemeenschap en de verdeling van erfenissen, die in de rechtszaal zijn beland. We moeten echter in het achterhoofd houden dat de leden van de matrilineaire moslimgemeenschappen in Mukomuko hun geschillen zelden voor de islamitische rechtbank brengen, tenzij ze daartoe worden gedwongen, zoals is gebeurd bij sommige rechtszaken waarbij overheidsfunctionarissen betrokken zijn, en in sommige zaken omtrent eigendom. De reden dat staatsbeambten voor de rechtbank verschijnen is dat zij aan strengere regels zijn

onderworpen dan gewone burgers, maar dat de eigendomszaken worden aangespannen door de enkele echtgenoten die trachtten een groter deel van het huwelijksvermogen te bemachtigen en daarom proberen Mukomuko's matrilineaire *adat* te ontlopen of aan te vechten (cf. "forum shopping" in K. von Benda-Beckmann, 1981, 1984). Als dit niet het geval zou zijn, zouden de leden van Mukomuko's matrilineaire gemeenschappen waarschijnlijk moeten vertrouwen op een interne oplossing binnen hun kernfamilies, hun *kaum*, of een oplossing van de adatraad. Geschillen bij de islamitische rechtbank komen slechts in zeldzame en extreme gevallen voor en brengen doorgaans een spanning met zich mee tussen het patriarchaal georiënteerde islamitische recht van de staat en de lokale adat van het meer matrilineair georiënteerde islamitische recht.

Ten tweede laat de studie ook, bij het treffen van staat en samenleving bij de islamitische rechtbank, de spanning zien tussen compromissen en conflicten. Terwijl de Islamitische Kamer van het Hooggerechtshof op nationaal niveau aanzienlijke ruimte heeft voor compromissen, zien lokale rechtbanken vaak spanningen ontstaan. Op nationaal niveau zijn de rechters van het Hooggerechtshof actief geweest bij het maken van gerechtelijke wetgeving, om de wet en haar doeleinden met elkaar te verzoenen en rekening te houden met de verschillende sociaal-culturele omstandigheden ingegeven door bepalingen in de islam en *adat* en de noodzaak om de rechtbank welwillender te maken, vooral jegens vrouwen en kinderen. Om bijvoorbeeld het wijdverbreide fenomeen van niet-geregistreerde huwelijken aan te pakken, introduceerden de rechters een 'uitgebreide' en 'verfijnde' vorm van *isbat nikah* (een retroactieve validatie van het huwelijk). Op het gebied van echtscheiding hebben ze het 'gebroken huwelijk' uitgevonden als een unilaterale, schuldloze en alomvattende echtscheidingsgrond, die een eenvoudiger en gelijkwaardiger echtscheidingsprocedure voor echtgenoten en echtgenotes mogelijk maakt. Tegelijkertijd zijn de rechters, om te voorkomen dat hun rechtbank louter een echtscheidingsregistra

tiekantoor wordt, opnieuw schuldoverwegingen gaan toepassen op gebroken huwelijksechtscheidingen, niet om te beslissen over het al dan niet toestaan van echtscheiding, maar over de rechten van de echtgenoot na de echtscheiding. Deze doorbraken laten zien hoe de 'autonomie' van rechters (de term die door Bedner, 2016 wordt gebruikt) de opkomende kloof tussen de formele toepassing van het recht en een gevoel van rechtvaardigheid in de samenleving overbrugt.

Op lokaal niveau daarentegen benaderen rechters van de islamitische rechtbank van eerste aanleg in Mukomuko echtscheiding vaak op een formalistische manier, waarbij ze de lokale *adat*, die wordt waargenomen door leden van Mukomuko's matrilineaire moslimgemeenschap, negeren. Na bestudering van zaken van leden van deze matrilineaire gemeenschap, met name hun geschillen over het gezamenlijk huwelijksvermogen, onthult dit onderzoek hoe rechters vaak voorbijgaan aan de plaatselijke *adat*, dat onder andere een groter aandeel aanhoudt voor vrouwen dan voor mannen. Dit gaat in feite in tegen de bestaande trend onder rechters bij de Hoge Raad, die genuanceerder en vrouwvriendelijker oordelen in deze kwesties. De formalistische benadering van de rechters in eerste aanleg verklaart waarom de meerderheid van de matrilineaire gemeenschap van Mukomuko er de voorkeur aan geeft dergelijke geschillen zelf op te lossen, uit angst dat de betrokkenheid van de rechtbank hun lokale ideeën over rechtvaardigheid zal schaden. Deze houding wordt prachtig geïllustreerd door de lokale uitdrukking "*satu menjadi arang, satu menjadi abu*" ("de ene partij wordt houtskool, de andere as"), die het gebruikelijke lot van hun zaken beschrijft wanneer deze in handen van islamitische rechters belanden. Hoewel de uitkomsten misschien anders zouden zijn geweest als de partijen hadden besloten hun geschillen voor te leggen aan het Hooggerechtshof, vinden zij de hogere rechtbanken vaak te kostbaar en tijdrovend, en daarom minder toegankelijk.

De verschillende logica onder rechters op verschillende gerechtsniveaus kan worden toegeschreven aan de geleidelijke

centralisatie en homogenisering van de islamitische rechterlijke macht, wat ***de derde*** bevinding van dit onderzoek ondersteunt. Deze trend komt duidelijk tot uiting in de invoering van het één-dak-systeem (*sistem satu atap*) in 2004, waarbij zowel de technische rechterlijke macht als het gerechtelijk bestuur onder het Hooggerechtshof werden gecentraliseerd. Hoewel het de status en faciliteiten van het hof versterkte, zorgde het één-dak-systeem er ironisch genoeg voor dat de mensen in Mukomuko vervreemd raakten van het islamitische hof. Hoewel de afstand die Mukomuko scheidde van Arga Makmur lange tijd een barrière was geweest voor toegang tot de rechtbank, vonden de mensen de rechtbank op de een of andere manier toegankelijker voordat het één-dak-systeem werd aangenomen. Mensen konden hun zaak voorleggen aan een circuitrechtbank, die routinematig in hun woonplaats zou worden georganiseerd via samenwerking van de rechtbank met de plaatselijke KUA. Na de inwerkingtreding van het één-dak-systeem werd de voorheen vraag-gestuurde rechtbank omgevormd tot een *top-to-bottom*-systeem en werd zij afhankelijk van een beperkt budget, dat niet vaker dan tweemaal per jaar door de Hoge Raad werd toegekend. Deze situatie werd verergerd door de 'late' oprichting van de islamitische rechtbank Mukomuko in 2018. Deze tegenslagen tonen de keerzijde van het één-dak-systeem, dat de band van de rechtbank met de lokale bevolking en de KUA heeft doorgesneden en breuk heeft veroorzaakt in de administratie van zaken van moslim families door de staat.

De negatieve impact van het één-dak-systeem werd nog verder verergerd door de toenemende centralisatie en homogenisering van de islamitische rechterlijke macht, waarbij discretie en beleidsvorming voornamelijk in handen werden gelegd van de rechters van het Hooggerechtshof. Omdat rechters van eerste aanleg steeds meer onder controle van het Hooggerechtshof zijn gekomen, is het voor hen het veiligst om formalistische uitspraken te doen en alleen rekening te houden met de gevestigde interpretatieve ontwikkelingen binnen

het Hooggerechtshof. Anders is hun oordeel kwetsbaar voor nietigverklaring door de hogere rechtbanken, hetzij via hoger beroep, hetzij via cassatie en/of herziening. Een algemeen argument in sociaaljuridisch onderzoek behelst dat rechters van rechtbanken in eerste aanleg eerder geneigd zijn zich bezig te houden met het maken van wetten dan rechters van hogere rechtbanken, die zich vaak beperken tot het opsporen van onjuistheden in de wet, in plaats van feitelijke uitspraken te doen (vgl. Shapiro, 1986, blz. 93–96). Het geval van Mukomuko laat echter het tegenovergestelde zien: rechters van eerste aanleg nemen 'nooit' het voortouw op het gebied van justitiële innovatie. Deze trend is problematisch, vooral voor een divers land als Indonesië, omdat het geen ruimte biedt aan de verschillende vormen van lokale normatieve systemen en instituties die in de samenleving actief zijn. Veel studies hebben gesuggereerd dat huwelijken en echtscheidingen onder Indonesische moslims overwegend gemeenschapsgerelateerde aangelegenheden blijven, en dat een eenvoudige implementatie van de staatswet de legitimiteit van de rechtbank tegenover de bevolking in gevaar zal brengen, omdat de bevolking terughoudend zou worden in het voorleggen van haar geschillen aan de rechtbank.

De vierde bevinding van dit proefschrift betreft de rol van islamitische rechtbanken in het proces van vorming van de natiestaat. Verscheidene studies hebben geopperd dat de islamitische rechtbanken, die dienen als strategische loci voor ontwikkelingen in het islamitisch familierecht, instrumenteel zijn geweest in de transformatie van huwelijks- en scheidingsnormen in islamitische samenlevingen in overeenstemming met de staatsideologie (O'Shaughnessy, 2009; vgl. Peletz, 2002, pp. 277-278). Van Huis heeft in zijn onderzoek naar de toegang van vrouwen tot het recht na echtscheiding in de islamitische rechtbanken van Cianjur en Bulukumba dit argument genuanceerd. Hij bevestigt dat de islamitische rechtbanken verantwoordelijk kunnen worden geacht voor de transformatie van scheidingsnormen in de onderzochte samenlevingen, maar hij voegt daaraan toe dat

die transformatie afhankelijk is van "de rol en het functioneren van de rechtbanken in de betrokken lokale gemeenschappen en de mate van concurrentie van de lokale alternatieve normatieve systemen en instellingen" (van Huis, 2015, pp. 17-18 en 264-265). In een bevestiging van de stelling van Van Huis, laat mijn onderzoek in Mukomuko zien dat de top-down benadering van de staat om het geüniformeerde islamitische familierecht te mainstreamen niet automatisch de lokale praktijken van huwelijk en echtscheiding heeft getransformeerd ten gunste van de staatsideologie. Hoewel huwelijks- en echtscheidingspraktijken in toenemende mate door de staat worden beïnvloed, zie ik nog steeds spanningen ontstaan tussen twee vormen van islamitisch recht: lokaal recht dat door de matrilineaire gemeenschappen van Mukomuko wordt nageleefd en islamitische familierecht dat hen door de staat wordt opgelegd.

Ik had graag willen eindigen met de opmerking: 'Eind goed, al goed.' Over het algemeen is de meer gecentraliseerde en gehomogeniseerde islamitische rechterlijke macht namelijk voordelig geweest in termen van het versnellen van het eenwordingsproject van de staat. Deze trend gaat echter ten koste van de autonomie van de lagere rechtbanken, wat contraproductief is voor de ontwikkeling van het recht zelf. Artikel 229 van de Compilatie van Islamitisch Recht uit 1991 (*Kompilasi Hukum Islam*, KHI) bepaalt dat het voor rechters bij de islamitische rechtbanken verplicht is om de juridische waarden die in de samenleving aanwezig zijn grondig te overwegen, zodat hun oordelen in overeenstemming zijn met het rechtvaardigheidsgevoel. Mijn eerdere opmerkingen hebben aangetoond hoe het gebrek aan autonomie van rechters in eerste aanleg bij het overwegen van lokale ideeën over rechtvaardigheid schadelijk is geweest voor de lokale bevolking, met name voor vrouwelijke leden van Mukomuko's matrilineaire gemeenschap en hun kinderen, die meer baat hebben bij hun eigen adat dan het staatsrecht. In dit opzicht is hun gebrek aan autonomie contraproductief voor een van de onderliggende

doelstellingen van het Indonesische familierecht, namelijk een betere rechtsbescherming voor vrouwen en kinderen. Bovendien heeft deze trend fragmentatie bij de staat veroorzaakt, omdat deze in tegenspraak is met belangrijk beleid uitgevaardigd om de rechtbank dichterbij de lokale bevolking te brengen, en zelfs in strijd is met de meer vrouwvriendelijke neigingen onder de rechters van het Hooggerechtshof. Om een zinvol oordeel te kunnen vellen, moet een rechter daarom niet alleen rekening houden met het staatsrecht, maar ook met het lokale idee van rechtvaardigheid (cf. de noodzaak van 'juridische differentiatie' in Bedner, 2017). Anders zal het oordeel van de rechtbank in de praktijk niet afdwingbaar zijn, en, nog belangrijker, zal het leiden tot conflicten en verlies van de sociale legitimiteit van de staat.

Hoofdstukoverzicht

Hoofdstuk 1 biedt een inleiding op het onderwerp en zet de thematische en theoretische oriëntaties van het proefschrift uiteen. Het omvat de onderzoeksachtergro-nd, vragen, kaders, de onderzoekscontext en de methodologie.

Hoofdstuk 2 bespreekt belangrijke ontwikkelingen op het gebied van huwelijks- en echtscheidingsnormen binnen de Islamitische Kamer van het Hooggerechtshof op nationaal niveau. Uit de discussie komt een consistente trend in de rechterlijke wetgeving naar voren, zoals blijkt uit de 'uitgebreide' en 'verfijnde' vorm van *isbat nikah*, de uitvinding van het 'gebroken huwelijk', en een aantal belangrijke ontwikkelingen om zowel mannen als vrouwen een betere en gelijkere toegang tot de rechter te bieden. Deze juridische doorbraken laten de autonomie van islamitische rechtbanken zien, vooral bij het overbruggen van de kloof tussen een formele toepassing van het recht en een gevoel van rechtvaardigheid in de samenleving. De autonomie van de rechters is van cruciaal belang omdat de meer responsieve houding hun sociale erkenning en de legitimiteit van de rechtbank in de ogen van de lokale samenleving vergroot. Uit een zorgvuldige analyse van de jurisprudentie blijkt echter ook dat accommodatie niet de enige logica is die werkt. Rechters van de Islamitische Kamer

van het Hooggerechtshof hebben er ook zeer zorgvuldig op toegezien dat ontwikkelingen niet indruisen tegen de gevestigde rechtsinterpretatie en 'kernwaarden in de islam' (vgl. Nurlaelawati & van Huis, 2020). De discussie in dit hoofdstuk laat zien dat de islamitische rechtbanken niet alleen als strategische plek hebben gediend voor de ontwikkeling van het recht, maar ook voor de ontmoeting van verschillende normatieve systemen.

Hoofdstuk 3 verlegt de aandacht naar Mukomuko, aan de westkust van Sumatra, dat dient als thuis voor drie verschillende gemeenschapsgroepen. Dit zijn: (1) matrilineaire gemeenschappen, die mensenheugenis in de stroomopwaartse en stroomafwaartse (*hulu-hilir*) dorpen hebben gewoond; (2) migranten, voornamelijk van het eiland Java, die verspreid zijn over verschillende enclave-nederzettingen, na de massale aankomst van door de staat gesponsorde transmigranten vanaf de jaren tachtig tot nu; en (3) stadsmensen, die een mengeling zijn van de eerste twee groepen en recentere migranten, en die in opkomende markten en administratieve centra in het huidige district Mukomuko wonen. Terwijl de meerderheid van de matrilineaire gemeenschap en de transmigranten uitsluitend binnen hun respectieve nederzettingen blijven, zijn de stadsmensen zich gaan vermengen, omdat meer diverse etnische groepen naast elkaar zijn gaan leven. Op het gebied van huwelijk en echtscheiding houden de matrilineaire gemeenschappen gewoonlijk hun matrilineaire adat, geërfd van Minangkabau, in acht, terwijl de migranten en de stadsmensen vaak verschillende tradities uit hun plaats van herkomst met zich meedragen. Het hoofdstuk beargumenteert dat deze multiculturele samenleving en de verschillende vormen van lokale normen die daartussen werkzaam zijn, een perfecte basis vormen voor dit proefschrift, dat probeert te begrijpen hoe het staatsrecht en zijn patriarchaal georiënteerde ideologie in de praktijk feitelijk werken.

Hoofdstuk 4 bespreekt de dagelijkse praktijk van huwelijk en echtscheiding onder moslims in Mukomuko. Het richt zich op de ervaringen van matrilineaire moslimgemeenschappen

die de *hulu-hilir*-dorpen in het district Mukomuko bewonen. In dit hoofdstuk wordt vooral gekeken naar de manier waarop deze mensen omgaan met de wetgeving vanuit de staat en de gelijkwaardige lokale *adat* van de meer matrilineair geïnformeerde islamitische wet bij het sluiten van hun huwelijk, het verkrijgen van hun echtscheidingen en het oplossen van daarmee samenhangende geschillen. Mukomuko is hiervan een voorbeeld, waarin de staatswet en de patriarchale ideologie daarvan op de proef worden gesteld. Ondanks de toenemende penetratie van het staatsfamilierecht, dat bedoeld is voor alle Indonesische moslims, zijn de lokale adat en zijn institutionele actoren (*orang adat*) in Mukomuko blijven bestaan en kunnen ze niet gemakkelijk worden omzeild, en is adat vaak sociaal belangrijker dan het staatsrecht. Bovendien is de lokale adat zeker lokaal meer ingeburgerd, in vergelijking met andere lokale normatieve systemen die worden waargenomen door de overgebleven Mukomuko-bevolking, die niet tot de matrilineaire adatgemeenschap behoort.

Hoofdstuk 5 onderzoekt zaken van Mukomuko bij twee islamitische rechtbanken, de Arga Makmur Islamic Court (2016-2018) en de Mukomuko Islamic Court (vanaf 2019). De zaken werden vooral aangespannen door mensen van migrantenafkomst. Dit kan worden toegeschreven aan het feit dat migranten, in tegenstelling tot de matrilineaire gemeenschappen, die hun toevlucht kunnen nemen tot hun adatraad, geen bindend forum hebben dat als alternatief dient voor de islamitische staatsrechtbank. Hoewel zaken uit de matrilineaire gemeenschap zeldzaam zijn, zijn de weinige gevallen die ik heb gevonden, met name zaken met betrekking tot eigendom, significant, als indicatoren voor de conflicten en mogelijke verzoeningen tussen het patriarchaal georiënteerde islamitisch recht van de staat en Mukomuko's *adat* van de meer matrilineair georiënteerde islamitisch recht.

Het hoofdstuk bespreekt ook de rol van tussenpersonen, die optraden als 'makelaars' tussen partijen en rechters in de

ontmoeting tussen staat en samenleving bij het islamitische gerechtshof. Hieronder vallen: (1) informele opstellers van zaken en (2) advocaten, die een voorkeur hebben voor staatsrecht, en (3) clanleiders en oudsten, die een voorkeur hebben voor de lokale matrilineaire adat. De rol van de eerste twee tussenpersonen is 'constructief' en 'prospectief' (vgl. Buskens, 2008, p. 153; Dupret & Drieskens, 2008, p. 9). Ze helpen partijen bij het goed opstellen van hun rechtszaken, waardoor rechters informatie krijgen ter onderbouwing van hun beslissingen. Hun hulp in dit opzicht is van cruciaal belang geweest, niet alleen bij het anticiperen op mogelijke fouten, maar ook bij het opzetten van binnenkomende rechtszaken op een manier die past bij de ontwikkelingen binnen het islamitische gerechtshof. De laatste twee tussenpersonen spreken vaak namens hun clanleden voor de rechtbank en assisteren hen bij het inroepen van hun matrilineaire adat. De rol van deze lokale tussenpersonen wordt nu echter steeds meer betwist, omdat rechters neigen naar een meer formalistische benadering van het recht en individuele burgers aanmoedigen om op eigen kracht voor de rechtbank te verschijnen. Als gevolg hiervan wordt de uitkomst van zaken voornamelijk bepaald door het islamitische staatsrecht.

Ten slotte concludeert Hoofdstuk 6 dat, ondanks de toenemende staatsinvloed, de dagelijkse praktijk van huwelijk en echtscheiding binnen de matrilineaire gemeenschap van Mukomuko, een overwegend een aangelegenheid van de gemeenschap blijft, gebaseerd op de lokale matrilineaire *adat*. Dit hoofdstuk bespreekt ook het voortbestaan van compromissen en conflicten bij het Hooggerechtshof en de lokale islamitische rechtbanken. Terwijl de Islamitische Kamer van het Hooggerechtshof aanzienlijke ruimte heeft voor compromissen, dragen lokale rechtbanken bij aan de spanningen. De verschillende logica van deze verschillende rechtsniveaus kan worden toegeschreven aan de toenemende trend naar een meer gecentraliseerde en gehomogeniseerde islamitische rechterlijke macht. Mijn eerdere opmerkingen hebben duidelijk aangetoond

dat deze trend problematisch is, vooral voor een divers land als Indonesië, waar de aandrang van de rechters in eerste aanleg om de lokale adat niet in aanmerking te nemen hun sociale legitimiteit in gevaar dreigt te brengen. Maar wat nog belangrijker is, is dat rechters op elk niveau altijd rekening moeten houden met lokale ideeën over rechtvaardigheid.

Curriculum Vitae

Al Farabi was born in Curup R/L Bengkulu, Indonesia on 9 December 1987. In 1999, he completed his primary education at *Madrasah Ibtidaiyah* Muhammadiyah Talang Ulu, in his hometown. From 1999-2005 he stayed in Ponorogo, East Java, to pursue his secondary education at Pondok Modern Darussalam Gontor. Subsequently, he spent a year doing an internship at PP Darul Istiqomah Bondowoso in East Java, and six months as a field facilitator for the Child Disaster Awareness for School and Communities (CDASC) programme, back in his hometown. In 2007, he moved to Yogyakarta to study Islamic Law at Sunan Kalijaga State Islamic University, where he obtained a Bachelor's degree in Islamic law (S.H.I) in 2011, and a Master's degree in the same field (M.H.I) in 2013, with a thesis called: "Unregistered marriages (*kawin kyai*) in Sinarrancang-Cirebon West Java and the local contestation between State Penghulu versus non-State Penghulu".

During his stay in Yogyakarta, Al Farabi undertook several non-degree courses and participated in several extra-curricular activities. He attended courses at Impulse and LBH, and participated as a research assistant in many projects at his university. He was also active in two student associations (the Muslim Students' Association and *Permahi*). In 2013, he completed a two-year English Extension Course (EEC) at Sanata Dharma University and a three-month intensive programme of Pembibitan Alumni PTAIN, organized by the Ministry of Religious Affairs (MoRA) and PPIM UIN Syarif Hidayatullah Jakarta. In 2014, he was selected to present his academic work at George-August University in Göttingen, Germany, with the cooperation of this university and UIN Sunan Kalijaga, and sponsored by DAAD.

In the same year, he was offered a non-tenured position as a lecturer in the Faculty of Law and Sharia at his home university.

In 2015, Al Farabi was awarded a scholarship by Lembaga Pengelola Dana Pendidikan (LPDP, the Indonesian endowment fund for education) of the Indonesian Ministry of Finance, to pursue his doctoral degree abroad. In January 2016, he came to Leiden in the Netherlands as a PhD researcher at Leiden University Institute for Area Studies (LIAS), under the supervision of Prof. Dr. Adriaan Bedner from the Van Vollenhoven Institute for Law, Governance and Society (VVI), and Prof. Dr. Léon Buskens from LIAS.

Al Farabi is currently a tenured lecturer at the Faculty of Sharia UIN Raden Mas Said Surakarta, where he teaches courses on Muslim family law and the anthropology of (Islamic) law. He can be reached via the following email address: alfarabi1987@gmail.com.

Propositions

1. Judges from the Islamic courts in Indonesia have engaged very actively in judicial lawmaking. They have shown their autonomy from the government and conservative Islamic organizations in making the law more female- and children-friendly.
2. The Islamic Chamber of the Indonesian Supreme Court has served as a strategic locus for legal development. This is problematic when it prevents lower court judges from taking the lead in legal innovation, since they are in a better position to assess the needs of the parties that appear before them.
3. The more centralised and homogenised the Islamic judiciary the more problematic, because the unified Islamic law is often at odds with existing local normative variations that operate across the archipelago.
4. In Mukomuko, the first instance judges' lack of autonomy in considering the adat has reduced the position of female litigants and their children, who are better served by their own adat rather than by state law.
5. Marriage and divorce serve as excellent lenses to examine the complex interplay between state and local Islamic law.
6. Even though marriage and divorce practices are increasingly influenced by the state's patriarchally inclined Islamic law, matrilineally-inclined Islamic law and its institutional actors have shown remarkable resilience.

7. In order to guarantee the effectiveness of state law a judge must take into account local ideas of justice (cf. the need for 'legal differentiation' in Bedner, 2017). If not, people will become reluctant to bring their disputes to court.
8. Judicial lack of consideration for local societal variation and the specific history of a particular region have been counterproductive, because they contradict the underlying purpose of Indonesian marriage law to better protect women and children and causes fragmentation on the part of the state.
9. Doing a PhD project while adjusting to new roles as a husband, a father, and a tenured lecturer is challenging and sometimes overwhelming. Hence genuine trust and support from supervisors and family are indispensable for the completion of a dissertation.

Matrilineal Islam

State Islamic Law and Everyday Practices of Marriage and Divorce among People of Mukomuko-Bengkulu, Sumatra, Indonesia

This dissertation approaches marriage and divorce among Muslims in 'peripheral' areas in Indonesia from various angles, employing legal analysis as well as historical and ethnographic research. The study seeks to understand the intricate relationship between the interpretation of Muslim family law as promulgated by the state, and the different forms of empirical laws or norms operating within Indonesia's multicultural Muslim society. Focusing on Mukomuko in Bengkulu province, on the west coast of Sumatra, this study discusses marriage and divorce practices in three different but connected sites: i.e. everyday practices at societal level; relevant cases available in the first instance Islamic courts; and landmark decisions and developments within the Islamic Chamber of the Indonesian Supreme Court, at the national level. Mukomuko is a case in point, in which the state's patriarchally-inclined Islamic law conflicts with matrilineal Muslim community traditions. This study reveals that even though marriage and divorce practices in Mukomuko are increasingly influenced by the state, matrilineally-inclined Islamic law and its institutional actors have shown remarkable resilience.