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

Al Farabi, A.

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.