

ADMINISTRATIVE TRANSGRESSION AND JUDICIAL DISCRETION FOR THE SAKE OF CITIZENS' RIGHTS

The Legalisation of Unregistered Marriages in Indonesia

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Abstract

This article addresses how the legalization of unregistered marriages works in Indonesian day-to-day practices. It understands people's strategies to legalize their unregistered marriage and examines the state activities of granting legalization. It seeks to answer in what ways the legal validity of a marriage is important to Muslim citizens. The data in this paper results from the observation of marriage registration documents in a marriage registration office and the examination of legal reasoning used by Islamic judges in marriage legalization (*isbat nikah*) cases. This essay emphasizes that state recognition of a marriage cannot entirely substitute community-based legal norms. It also shows the importance of administrative transgression and judicial discretion played by street-level bureaucrats. By so doing, they have grounds to accord legalization. They apply a lenient approach towards marriage rules that is key to providing state recognition of unregistered marriages.

[Tulisan ini membahas bagaimana legalisasi perkawinan tidak tercatat diterapkan dalam praktik sehari-hari di Indonesia. Tulisan ini memahami strategi masyarakat dalam melegalisasi 'perkawinan tanpa pencatatan' dan menganalisis alasan negara dalam memberikan legalisasi. Ini untuk menjawab pertanyaan sejauh mana status sah dalam perkawinan penting bagi warga negara Muslim? Data dalam tulisan ini dihasilkan dari pengamatan dokumen pencatatan nikah di kantor pencatatan nikah dan pemeriksaan atas penalaran hukum dalam kasus pengesahan perkawinan (*isbat nikah*). Tulisan ini menekankan bahwa pengakuan negara atas perkawinan tanpa pencatatan tidak dapat menggantikan norma yang berlaku di masyarakat. Praktik di lapangan menunjukkan pentingnya pelanggaran administratif dan diskresi yudisial yang dimainkan oleh para

birokrat tingkat jalanan. Dengan cara demikian, mereka memiliki alasan untuk memberikan legalisasi. Mereka menerapkan pendekatan yang lunak terhadap aturan perkawinan yang merupakan kunci untuk dapat memberikan pengakuan negara atas perkawinan tanpa pencatatan.]

Keywords

Unregistered marriages, legal identity, administrative transgression, judicial discretion, citizens' rights

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Introduction

This essay deals with how state recognition of marriage works in Indonesian everyday practices. It understands different ways people strategize to have their marriage recognized by the state and examines processes in the state's activities of giving recognition. Through observation of marriage registration documents in the Muslim marriage registration office, I managed to identify administrative transgression that a marriage registrar does. In addition, I also examine conversations in the Islamic courtroom and legal reasoning used by Islamic judges in the cases of retrospective marriage legalization.

Discretion and transgression have been applied to a range of legal document issues. Transgression has simultaneously evolved into a strategy for informal marriage functionaries to keep hold of their crucial positions. The involvement of these unofficial leaders in some way constitutes citizens' rights. The significance of informal connections in

the development of state-citizen interactions has been highlighted by Berenschot and Klinken.¹ Additionally, Bedner and Van Huis have dealt with this problem. They emphasized pragmatism, which highlights a scenario in which state authorities give the weak party's interests top priority.² In this article, I contend that community-based legal standards cannot totally be replaced by the state's recognition of a marriage. It also demonstrates the significance of judicial discretion and administrative wrongdoing on the part of lower-level bureaucrats. By doing this, they have grounds for legalization. To allow for state recognition of unregistered marriages, they take a permissive stance toward marriage laws.

Muslims are permitted to retroactively legalize their unregistered marriages through a judicial process known as *isbat nikah*, according to the 1991 Compilation of Islamic Law (Kompilasi Hukum Islam, KHI). Even though this legislative requirement was created to cover marriages consummated before 1974, current judicial practice in religious courts demonstrates a predisposition to legalize unregistered marriage whenever it is consummated as long as it can be demonstrated to have adhered to Islamic precepts.³ The primary goal of marriage registration is to give the government more control over citizens' private lives.⁴ The legitimacy of activities carried out in line with customary law but in contravention of state regulations, according to Welchman, is one clear example of the bureaucratization and centralization of the state's authority over the Sharia postulate in marriage.⁵

¹ Ward Berenschot and Gerry van Klinken, "Informality and Citizenship: The Everyday State in Indonesia," *Citizenship Studies* 22, no. 2 (2018): 95–111.

² Adriaan Bedner and Stijn Van Huis, "Plurality of Marriage Law and Marriage Registration for Muslims in Indonesia: A Plea for Pragmatism," *Utrecht Law Review* 6, no. 2 (2010): 175–91, <https://doi.org/10.15408/jch.v9i1.16510>.

³ Euis Nurlaelawati, *Modernization, Tradition, and Identity: The Kompilasi Hukum Islam and Legal Practice in Indonesian Religious Courts*, 1st ed. (Amsterdam: Amsterdam University Press, 2010); Euis Nurlaelawati, "Pernikahan Tanpa Pencatatan: Isbat Nikah Sebuah Solusi?," *Musawa Jurnal Studi Gender Dan Islam* 12, no. 2 (2013): 261–77, <https://doi.org/10.14421/musawa.2013.122.261-277>; Stijn Cornelis van Huis and Theresia Dyah Wirastri, "Muslim Marriage Registration in Indonesia: Revised Marriage Registration Laws Cannot Overcome Compliance Flaws," *Australian Journal of Asian Law* 13, no. 1 (2012): 1–17; Bedner and Van Huis, "Plurality of Marriage Law and Marriage Registration for Muslims in Indonesia: A Plea for Pragmatism."

⁴ Bedner and Van Huis, "Plurality of Marriage Law and Marriage Registration for Muslims in Indonesia: A Plea for Pragmatism."

⁵ Lynn Welchman, *Women and Muslim Family Laws in Arab States: A Comparative Overview of Textual Development and Advocacy* (Amsterdam University Press, 2007).

Marriage registration seems to be purely administrative. It has a larger dimension in contrast. A marriage license is evidence of one's legal identity.⁶ In practical terms, a citizen may be denied access to rights or governmental protection if they cannot provide documentation proving their legal identification. Being a citizen and having a sense of belonging, as well as being able to execute one's legal rights and obligations are all aspects of one's legal identity.⁷ According to the state, the husband's image of himself as a citizen was explicitly (re)negotiated through marriage registration. In this way, citizenship is influenced by legal identification. In keeping with Klinken, I want to emphasize how citizenship changes in connection to the particular ways that local and state societies influence one another.⁸

In this article, I found out that people can employ a variety of methods provided by the Indonesian state to fit their circumstances into its overall framework. The state seeks to safeguard certain rights for women through legal instruments. However, if state marriage officials are accommodating and receptive in their implementation of the rule, producing a legal certificate may be doable.⁹ In practice, these officials must use judicial discretion and administrative infractions. Helping people obtain their rights to public services makes them feel respected. This explains why Husni's request to register their marriage was granted. This circumstance relates to Lipsky's 1980 work. His book, *Street-level bureaucracy: Dilemmas of the Individual in Public Services*, is important because it looks at how frontline employees behave in organizations that deliver policies. He calls these personnel on the frontline street-level bureaucrats. These are public servants who work directly with citizens and exercise a great deal of discretion in how they carry out their duties.¹⁰

⁶ Mia Harbitz and Bettina Boekle-Giuffrida, "Democratic Governance, Citizenship, and Legal Identity" (New York, 2009); Caroline Vandenabeele, "To Register or Not to Register? Legal Identity, Birth Registration, and Inclusive Development," in *Children Without a State: A Global Human Rights Challenge*, ed. Jacqueline Bhabha (Massachusetts: The MIT Press, 2011), 307–30.

⁷ Harbitz and Boekle-Giuffrida, "Democratic Governance, Citizenship, and Legal Identity."

⁸ Gerry van Klinken, "Citizenship and Local Practices of Rule in Indonesia," *Citizenship Studies* 22, no. 2 (2018): 114.

⁹ Stijn Cornelis van Huis, "Islamic Courts and Women's Divorce Rights in Indonesia: The Cases of Cianjur and Bulukumba" (PhD Dissertation. Leiden University, 2015); van Huis and Wirastrri, "Muslim Marriage Registration in Indonesia: Revised Marriage Registration Laws Cannot Overcome Compliance Flaws."

¹⁰ Michael Lipsky, *Street-Level Bureaucracy: Dilemmas of the Individual in Public Services* (New York: Russell Sage Foundation, 2010), 3; Lars Tummors and Victor Bekkers, "Policy Implementation, Street-Level Bureaucracy, and the Importance of Discretion," *Public Management Review* 16, no. 4 (2014): 527–47, <https://doi.org/10.1080/14719037.2013.841978>.

In countries with a majority of Muslims, discussions about family law have focused heavily on how the government should handle Islamic standards.¹¹ In contrast, my observation at the local level reveals that the concerns surrounding marriage registration center on the relevance of the state recognizing unions that have attained social legitimacy based on local legal standards. The issue is to what extent Muslim citizens care about marriage's legality. In order to respond to this query, I need to underline that community-based legal standards cannot totally be replaced by governmental recognition of a marriage.¹² It is possible that the state's conceptions of protection and recognition are very different from what individuals think.

The theoretical foundation of this essay is covered in the part that follows, where I discuss the ideas of legal identity and citizen rights. Section 3 addresses administrative violations committed during marriage registration by staff members of the marriage registration office. Section 4 discusses the methods used by Islamic courts to address matters of marriage legalization. Section 5 concludes.

Legal Identity and Citizens' Rights

The last several years have seen a rise in the importance of the question of legal identification. There is not just one way to define it. According to the Institute on Statelessness and Inclusion, legal identity is defined as “a set of elements and characteristics, the combination of which is unique to every person, which defines each person and governs their relationship, obligations, and rights under both private and public

¹¹ Annelien Bouland, “Family Law in Senegal: Opposition and Pragmatic Pluralism,” *Canadian Journal of African Studies* 56, no. 1 (2022): 161–80; Jan Michiel Otto, “Sharia and National Law in Indonesia,” in *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present*, ed. Jan Michiel Otto (Leiden: Leiden University Press, 2010), 433–90; Léon Buskens, “An Islamic Triangle: Changing Relationships between Sharia, State Law, and Local Customs,” in *ISIM Newsletter*, vol. 5 (Leiden: Institute for the Study of Islam in the Modern World, 2000), 8; Morgan Clarke, *Islam and Law in Lebanon: Sharia within and without the State* (Cambridge: Cambridge University Press, 2018); Kim Shively, “Entangled Ethics: Piety and Agency in Turkey,” *Anthropological Theory* 14, no. 4 (2014): 462–80, <https://doi.org/10.1177/1463499614539072>; Simon Butt, “Islam, the State and the Constitutional Court in Indonesia,” *Pacific Rim Law & Policy Journal* 19, no. 2 (2010): 279–301, <https://ssrn.com/abstract=1650432>; Muhammad Latif Fauzi, *Aligning Religious Law and State Law: Negotiating Legal Muslim Marriage in Pasuruan, East Java* (Leiden: Brill, 2023); Frances Hasso, *Consuming Desires: Family Crisis and the State in the Middle East* (Stanford: Stanford University Press, 2010).

¹² Maria Platt, *Marriage, Gender and Islam in Indonesia: Women Negotiating Informal Marriage, Divorce and Desire* (Oxon and New York: Routledge, 2017); Mies Grijns and Hoko Horii, “Child Marriage in a Village in West Java (Indonesia): Compromises Between Legal Obligations and Religious Concerns,” *Asian Journal of Law and Society* 5, no. 2 (2018): 453–66, <https://doi.org/10.1017/als.2018.9>.

law.”¹³ It simply means that someone is acknowledged as a person in front of the law. Recognition of a person's legal identification frequently depends on their holding of proper legal identity paperwork or other types of identity verification. The United Nations has incorporated legal identity into the Sustainable Development Goal (SDG). In order to achieve sustainable development, Goal 16 places a strong focus on the promotion of inclusive and peaceful societies as well as the provision of justice for everyone. Target 16.9 states that “by 2030, provide legal identity for all, including birth registration.”¹⁴

Human rights activists gave the concept of legal identification a lot of attention because it is a crucial first step in realizing one's rights. International or local human rights organizations have advocated for the value of legal identity in Indonesia.¹⁵ The Australia Indonesia Partnership for Justice (AIPJ) is one of them. Since a few years ago, the AIPJ has concentrated on the issue of the lack of official identity documents, which may restrict access to services and civic rights. One of their battles involved the passage of Population Administration Law 23/2006. Since that time, the state has served as a national model for civil registration and population management.

Legal identity has been linked to the issue of statelessness in numerous studies. This is a global issue. Numerous individuals lack legal identification documents, and an estimated 1.1 billion are stateless.¹⁶ They are unable to fulfill their potential as human beings because they lack access to services like healthcare and education due to their lack of legal status or effective citizenship. It is crucial and complex effort to ensure that each person is acknowledged as belonging and has access to the records demonstrating their legal status. Birth certificates and other official documents are the fundamental evidence of citizenship. Marriage certificates are also an essential part of identification documentation.

Citizenship and marriage registration have a crucial connection. Both involve the subject's distinctive status being recognized by the state. Relationships between the state and its citizens are a concern of citizenship. It is crucial because it gives people a feeling of identity and empowers them to exercise a variety of fundamental social, economic, and

¹³ The Institute on Statelessness and Inclusion, *Sustainable Development Goal 16.9: “Legal Identity”, Nationality & Statelessness* (London: Institute on Statelessness and Inclusion, 2018), 7.

¹⁴ UNDP, “Goal 16. Peace, Justice and Strong Institutions,” Sustainable Development Goals, n.d.

¹⁵ Novrizaldi, “Pemerintah Percepat Kepemilikan Akta Lahir Untuk Wilayah 3T Dan Kelompok Marjinal,” Perempuan & Anak, 2020.

¹⁶ Secretary-General United Nations, “Report of the Expert Group on Refugee, Internally Displaced Persons and Statelessness Statistics on Statelessness Statistics,” 2022.

political rights. Without a doubt, since *reformasi* (political reform), the quality of citizenship in Indonesia has improved as a result of the people's involvement in obtaining legal identification.

Following the end of Suharto's rule in 1998, the emergence of citizens' rights has been highlighted by the plethora of scholarly publications. The overthrow of the Suharto regime paved the way for democracy, a series of decentralization measures that gave local governments more autonomy and bureaucratic reform. This seemed to present chances to change governmental administration and service. This transformation has been ushered in by a number of laws, including the statute 25/2009 on public service and the Presidential Regulation 81/2010 on bureaucratic reform. However, we are aware that the emergence of a wave of religious, racial, and regional identity politics has challenged Indonesian citizenship and continues to do so.¹⁷ These dispersed identities, it is claimed, have become more pronounced since the political reform (*reformasi*) in 1998.

I would contend that the state's desire to safeguard the rights of its residents has increased the usefulness of marriage registration. People have few options because of the state's demand that having a legal identity determines certain privileges. One could counter that a religious marriage's legality and social acceptability are not always enhanced by the state's legal recognition of it. The issue at hand, however, is not whether or not the marriage is legal, but rather how much of a citizen's rights can be derived from a marriage. A citizen's ability to exercise rights may be restricted if they lack legal identification. Here, the method of having the right to receive state services has been successful in converting people to follow the official orientation. With this strategy, the state is not compelled to discuss or question religious perspectives on marriage.

Administrative Transgression in Marriage Registration

For more than 15 years, a couple has been wed. However, because their marriage was consummated in a customary manner, it was not recorded with the state office. I call them Husni, 42, and Anisa, 38. They do not possess a marriage license. Husni is listed as the *kepala keluarga* (head of the household), and Anisa is listed as the *istri* (wife) in the *Kartu Keluarga* (KK, family card). They are not considered to be a married pair under state law

¹⁷ Henk Schulte Nordholt, "Identity Politics, Citizenship and the Soft State in Indonesia: An Essay," *Journal of Indonesian Social Sciences and Humanities* 1 (2008): 1–21.

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hence this is not allowed. Despite the fact that Husni and Anisa are legally wed, they ran into a snag when they wanted to perform the *hajj* (pilgrimage). They were required to provide a marriage certificate as proof that their relationship was legitimate under state law. Their KK did not meet this requirement.

Husni chose not to go with this choice, nevertheless. He decided to file for marriage registration at the nearby marriage registration office. They would not have been married before; therefore, by doing this, they would have a new wedding date. Despite the fact that the new date of marriage has legal consequences for the children's standing in the family, they felt at ease with it. Because they were born before the marriage of their parents was officially registered, the children are not legitimate. Husni finds the process of registering his marriage at the marriage registry to be less expensive and more time-consuming than going to the Islamic court for *isbat nikah*.

This experience highlights the issue of the state-citizen dynamic in contemporary Indonesia.¹⁸ This interaction is able to take advantage of specific state incentives thanks to the KK. It cannot, however, satisfy the *hajj* documentation requirements. According to Harbitz and Boekle-Giuffrid, "every day in any given country around the world, individuals are denied access to fundamental services and rights because they cannot present positive proof of identity."¹⁹ Despite being aware of the circumstances, the relevant authority at the marriage registration office continued with the registration. Husni's case suggests the degree of pragmatism in daily bureaucracy. *Pengbulu* did so-called administrative transgression. The importance of administrative transgression has been apparent in the everyday practice of marriage bureaucracy in the marriage registration office. In order to understand how administrative transgression plays, it is helpful to understand the procedure of marriage registration.

The administrative matters of marriage registration are handled by a *modin*. He is a religious official appointed by a village leader to assist people with their marital affairs. A *modin* brings all the documents to the office. To support the validity of all the documents, the bride has to enclose certain proofs, namely an identity card and a birth certificate or a diploma. In Pasuruan, not all the brides have a birth certificate, among other reasons, due

¹⁸ Upik Djalins, "Becoming Indonesian Citizens: Subjects, Citizens, and Land Ownership in the Netherlands Indies, 1930-37," *Journal of Southeast Asian Studies* 46, no. 2 (2015): 227-45.

¹⁹ Harbitz and Boekle-Giuffrida, "Democratic Governance, Citizenship, and Legal Identity."

to the legal status of the parents' marriage.²⁰ In this case, a birth certificate can be replaced by a diploma. So, a diploma can substitute for other missing documents. Meanwhile, it is worth mentioning that the number of marriage registrations escalated dramatically since 2010 in Pasuruan. It can be assumed that before that year, numerous marriages were not registered. Due to the limited documents, it is hard to determine who serves as the *wali* (marriage guardian). In the interviews, the head of a local marriage registration office complained about the validity of a *wali* as written in the form. He argued that, in some cases, *modin* is inaccurate with it.

The problem of *wali* often comes up. Let me first explain the first case. Aisya is a daughter of Muhdor and Maimunah from a marriage that was not registered. The marriage took place in early 2000. For Maimunah, it was not her first marriage because she was a widow. Aisya attached the KK and a diploma for marriage registration. The KK was published years ago. In the KK, Muhdor was listed as the head of household while Maimunah was listed as a wife. This situation is unlikely to happen in the last few years since the government has changed its policy: if a family cannot present a marriage certificate to the civil registration office, the legal status of the parents must be written *belum kawin* (unmarried). The mother appears as the head of the household, while the husband emerges in the last row as *lainnya* (the other). Therefore, the status of Muhdor as the head of household does not automatically generate his position as the biological father of Aisya in the KK, due to the absence of the marriage certificate. Aisya has no father in the KK. Her diploma also mentions only the name of her mother.

In the application forms of marriage registration submitted to the marriage registration office, she had to mention the father who served to be her *wali*. Due to the unclear position of the father, Aisya was then invited to come to the marriage registration office to have *rafak*. *Rafak* is document verification at the Muslim marriage registration office; since Aisya did not have her parents' marriage certificates, the *modin* equipped Aisya with two letters from the village administration. First, a letter that declares the marital relationship between her father and her mother is valid according to Islamic law. Second, a letter that declares that Muhdor is her biological father that has the right to marry her off.

²⁰ Tim KPAI, "Perkawinan Tidak Dicatatkan: Dampaknya Bagi Anak," 2013.

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These letters worked very well. At this point, we see how administrative transgression was important to cope with peculiar cases.

As a street-level bureaucrat, *penghulu*'s position is critical, as he plays a critical role in these citizen entitlements. He directly provides public benefits through services or mediates between citizens.²¹ The immediacy of a change in policy in his interaction with citizens and its impact on people's lives is important to consider.²² The head of the marriage registration office proceeded with the marriage registration on the basis of the letters that should not exist according to the standard procedure. Bedner and Huis have remarked that the lowest levels of state administration play crucial roles in providing documentation for those who do not qualify.²³

Administrative transgression was done in Husni's case. As I claimed earlier, according to Indonesian law, the marriage registration office has no authority to legalize a marriage that had been concluded earlier with no registration. The authority belongs to the Islamic court. However, the head of the marriage registration office received the registration. At the time, because the KK mentioned their status as *kawin* (married), the marriage registration office asked Husni to declare on paper that he never registered his marriage before. Husni then asked the village administration to issue the letter as demanded. The letter wrote that Husni had never registered marriage in any marriage registration offices and, therefore, according to the marriage law, his legal status was *perjaka* (unmarried). Of course, this letter contradicts the legal status written in the KK.

Furthermore, transgression was also made in another case, as happened to Syamsul. Syamsul had different birthdates. The *penghulu* then made synchronization. The synchronization of the data is not necessarily based on a real situation. When there is a conflict of data, the validity of the data is usually based on a diploma. The argument was that it is uncommon to change the data in the diploma, but it is not that difficult to change the data in the civil registration documents as long as there is other legal proof. Since the government implemented the NIK (Nomor Induk Kependudukan, single identity number), the validity of the data has become a crucial issue. To give an example, now a parent

²¹ Lipsky, *Street-Level Bureaucracy: Dilemmas of the Individual in Public Services*.

²² Lipsky.

²³ Bedner and Van Huis, "Plurality of Marriage Law and Marriage Registration for Muslims in Indonesia: A Plea for Pragmatism."

cannot easily backdate the birthdate of his son or daughter to avoid child marriage and to qualify for marriage registration because an officer at a marriage registration office will check his/her birthdate in the civil administration office database. So, if he wants to do so, he must make it in the civil administration office by presenting reasonable arguments and adequate evidence. For this reason, since 2015, the NIK of the couple and the *wali* have been written in the marriage certificate, and the KK also mentions the marriage date. What follows is the case.

Syamsul was born in 1993. However, both the KK and the diploma mentioned different versions of the birthdate. I clarified this with the *modin*, and he said that both versions have no validity. Syamsul did not submit a birth certificate when he first registered. The teacher made the birthdate on the diploma at the elementary school. Syamsul then referred to the birthdate on his diploma as the basis of marriage registration. This case suggests that a citizen uses marriage registration as an opportunity to synchronize all personal details. This attitude is quite common among villagers. They usually come to the civil administration office to renew their marital status as ‘married,’ while adjusting the names and the birthdates according to the marriage certificate.

This section has shown the importance of a marriage certificate as a legal identity. Due to the complexity of the documents to pursue a marriage certificate, a *penghulu* has to do administrative transgression. This transgression is an impromptu solution to a one-by-one situation in that regulations do not correspond. *Penghulu* executes its grade of autonomy and transforms it into policy. In the following section, we turn to look at how marriage registration is dealt with in religious courts.

***Isbat Nikah* and Judicial Discretion**

In the previous section, we have seen how transgression is important in dealing with the documentation of marriage registration. Without transgression, marriage registration is not possible. Regardless, as I mentioned earlier, marriages that do not have state legality can request retrospective legalization through *isbat nikah* to the religious court. This section will elucidate how *isbat nikah* is practiced. In Bangil religious court, *isbat nikah* appears to be a vigorous solution for people who need to declare the legal status of their children. However, *isbat nikah* is not the only solution to this. In the case of Husni above, he apparently registered his unregistered marriage in the marriage registration office. If he

wishes to have the state recognition of his children, there is a possibility for proposing the Islamic court to legalize the legal status of the children (*asal usul anak*). An explanation of this child legalization will follow.

If we read the Marriage Law, it is stipulated that women cannot register a remarriage as long as their divorce from their first husband is not processed by the court. People often register their first marriage, but fail to go through a relatively complicated process of judicial divorce when they break up. According to state law, they are still married to the spouse from whom they divorced in a socially accepted view. From here, we can simply conclude that unregistered marriage is influenced by two factors. First, if one of the spouses has a legal limitation to registering it due to the absence of a divorce certificate. Second, local norms, predominantly derived from religious doctrine pertaining to the legality of marriage, clearly contribute to why certain marriages are not registered. It seems that there is no urgency to register a remarriage as long as it has conformed to Islamic principles and has social acceptance.

For the majority of Indonesians, religious legitimacy—which includes societal acceptance of marriages—is more significant than official recognition. Outside of marriage, cohabitation is frowned upon in Indonesia. As a result, the marriage ceremony serves as the societal norm and typically includes unofficial religious authorities. According to Sonneveld, it is not difficult to distinguish between formal marriages and informal marriages from a legal standpoint. From a sociological standpoint, the distinction is barely discernible.²⁴ Furthermore, Platt asserts that marriage generally continues to be a community-based activity in areas where the reach of the state is constrained.²⁵ Additionally, Bedner and Huis contend that from a social standpoint, state acknowledgment of a marriage is irrelevant in West Java.²⁶

The KHI regards marriage registration merely as an administrative obligation but emphasizes the legal status of marriage when it is registered. The legal drafters included an article on *isbat nikah*. *Isbat nikah* was meant to be a transitional article for those who had not

²⁴ Nadia Sonneveld, “Rethinking the Difference Between Formal and Informal Marriages in Egypt,” in *Family Law in Islam: Divorce, Marriage and Women in the Muslim World*, ed. Maaike Voorhoeve (London: I.B. Tauris, 2012), 77–107.

²⁵ Platt, *Marriage, Gender and Islam in Indonesia: Women Negotiating Informal Marriage, Divorce and Desire*.

²⁶ Bedner and Van Huis, “Plurality of Marriage Law and Marriage Registration for Muslims in Indonesia: A Plea for Pragmatism.”

yet registered their marriage according to the marriage law when it came into force.²⁷ In practice, however, because the formulation of the provision in the KHI is ambiguous, the judges apply this legal norm to make retrospective legalization over marriages that occur after 1974. Article 7 (2) of the KHI stated, “in the context of marriages that do not have a marriage certificate, one can ask for an *isbat nikah*”. The KHI then explains the types of marriages that can have an *isbat nikah*. These conditions are a) a marriage that seeks for divorce, b) the loss of a marriage certificate, c) the doubt of whether or not a marriage is valid, d) a marriage that is concluded prior to the 1974 marriage law, and e) marriage that is concluded by those who do not have obstruction according to the marriage law. Nurlaelawati has noted that these provisions are phrased ambiguously and indecisive about who is qualified for registration through the Islamic court. She argues that the loose implementation of the marriage registration provisions contradicts the goal of marriage registration itself because non-registration can easily be registered retroactively.²⁸

In Bangil religious court, there is a correlation between *isbat nikah* and legal identity. *Isbat nikah* appears to be a solution for those who claim the legal identity of the children. Almost all *isbat nikah* cases are driven by the need to have children’s birth certificates. This, for instance, happened to Pak Salim. He works as an official in village administration. Pak Salim was married to Samsia in June 1990, and the marriage was not done before a marriage registrar. It was not the first marriage. Pak Salim had already been married to another woman before. So, this was unregistered polygamy. With Samsia, he has a son. Pak Salim wanted to claim the legal status of his child. He thought that the son had the potential to have a better career. The son was going to apply for military, and it needs a birth certificate mentioning the names of the parents (*asal usul*). Without the marriage certificate of his parents, the son can have a birth certificate, but it only mentions the name of the mother. This is not enough for a particular need, such as applying for a military job.

Pak Salim then asked a *modin* to help him. The *modin* suggested Pak Salim request an *isbat nikah* from a religious court. Of course, this did not fit with the conditions written in the KHI. *Isbat nikah* is not to legalize a polygamous marriage. The *modin* then arranged all the things to make this initiative possible. The application letter (*surat permohonan*) was made

²⁷ Bedner and Van Huis.

²⁸ Nurlaelawati, *Modernization, Tradition, and Identity: The Kompilasi Hukum Islam and Legal Practice in Indonesian Religious Courts*.

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

I asked the *modin* who assisted Pak Salim why he did so, whereas it was a polygamous marriage. The *modin* argued that proposing an *isbat nikah* of the marriage includes a bigger *maslaha* (common good). He said it by relating *isbat nikah* to an Islamic legal maxim: If two harms conflict, the greater harm shall be taken into account by committing the lesser harm.²⁹ This means that the legal status of polygamy should be taken less prioritized because legalizing the marriage has a bigger benefit. He was conscious that the son of Pak Salim required his parents' marriage certificate so that he could have a birth certificate mentioning the names of the parents.

The court hearing usually lasts not so long, goes for around 15-20 minutes, and the decision is directly read at the end of the hearing. However, perhaps because I attended the hearing, the judges tended to be stricter and procedural. The hearing was then suspended a week after to hear the result of *musyawarah majlis* (judge deliberation). Three judges, one of whom was female, led the hearing. In the court hearing, the judges asked Pak Salim about how the marriage was concluded. He explained that it was led by Ustad Syafii with the attendance of Samsia's father, the *wali*, and two witnesses. The judges also asked about Pak Salim's relationship with Samsia and if they had a kin relationship that made them illegal to have sexual intercourse. In Islamic law, this relationship is known as *mabram*. It is unmarriageable kin with whom marriage or sexual intercourse would be considered illegal. Pak Salim then replied that they did not. The judges also asked them if the marriage did not have social consequences, and none complained if their marriage was legalized. Again, Pak Salim answered that the marriage was fine in local social views.

Pak Salim presented two witnesses in order to support his claim. A night before, the *modin* had advised them with potential questions and answers they needed to give. The judges invited them one by one to come into the courtroom. After being sworn, the judges asked their identity and their relationship with the applicants. The judges then asked if they

²⁹ Felicitas Opwis, "Maṣlaḥa in Contemporary Islamic Legal Theory," *Islamic Law and Society* 12, no. 2 (2005): 182–223.

knew and attended the marriage when it was concluded. They answered yes. The judges then asked them whether the marriage would implicate social problems or not. The judges also asked them if there was no kinship relationship between the applicants. The question over religious status of the applicants was asked, whether or not they have converted from Islam. Although the legal status of the applicants is written as unmarried, the judges still asked them about their legal status. The witnesses said that both Pak Salim and Samsia were unmarried. This means that the witnesses hide the fact that it was a second marriage for Pak Salim. In the end, both witnesses convinced the judges that it was the correct decision to legalize Pak Salim's marriage because he needed the marriage certificate to pursue the birth certificate of his son.

This application was finally accepted. A week later, the judges declared that there was no conflict between all the information given by the applicants and the witnesses. The decision then asserts that the marriage was conducted according to both Islamic law and national law, had no relation with other marriages, and was concluded not within the period of *'iddah* (waiting period). It then decreed that the family has run in harmony from which a son was born. As the legal basis, the decision mentions Article 2 of the marriage law that a valid marriage is concluded according to the religious requirements of the parties involved. It also included article 14 of the KHI on the conditions of marriage to declare that the marriage has met all the conditions. To strengthen its legitimacy, the decision refers to the Shafi'i classical treatise of *fiqh*. It quotes a statement from the well-known Habib Muhammad al-Masyhur's *Bughyat al-Mustarshidin* that says, "*fa'idhā shahadat lahā bayyinah 'alā waqfi al-da'wā, thabatat al-zanjīyyā*" (if the witnesses have supported the claim, then the marriage remains so).

An important point is that the judges pragmatically used article 7 (3) point e of the KHI to approve the claim. In most *isbat nikah* verdicts, the roles played by point e are quite critical. As long as the marriage is proved to be concluded by those who do not have obstruction according to the law, the judges must accept it. Indonesian legal scholars have problematized this point and regarded it as conflicting.³⁰ Point d clearly limits only marriages concluded prior to the legal obligation of marriage registration came into force that can have an *isbat nikah*. The law on religious courts also limits *isbat nikah* to marriages

³⁰ Nurlaelawati, "Pernikahan Tanpa Pencatatan: Isbat Nikah Sebuah Solusi?"

before 1974. However, the verdict ignores this limitation and remains confident with point e, article 7 of the KHI. Point e opens the room for all marriages, and without any restriction, one can request an *isbat nikah*. The judges used this ‘ambiguous’ point to legitimize their decision.

The verdict also argues that unregistered marriage causes severe problems in society. Interestingly, the decision also relates the claim to the problem of citizenship and child protection. The judges used Law 23/2002 on child protection to legitimize their decision. In the elucidation of the law, it is said that parents, family, and society are responsible for providing protection and facilities for the children. It is all intended to bring about the best life for children in order to make them potential and capable, having nationalism based on good behavior. The judges conferred the reasons proposed by the applicant that *isbat nikah* was meant to seek a birth certificate from which the protection of the children is presented. Here, we see that the judges have incorporated citizens’ rights issues into their judicial practice.

The accommodation of citizens’ rights in judicial decisions has been the subject of earlier scholars’ discussions. Judicial practice by religious courts in Indonesia has experienced significant changes. Van Huis looks at the decline of *fiqh* tradition, that is *khul*, in the legal practice of divorce in religious courts.³¹ Van Huis does not neglect the fact *fiqh*-based divorce mechanisms are still at play. This finding is quite similar to Nurlaelawati’s study where the judges are committed to *fiqh* in order to secure religious identity. Van Huis suggests that most of the elements in present-day wife-petitioned judicial divorce have their roots in the *syiqaq* (marital discord) divorce mechanism. Both the Supreme Court and the 1989 Law on the Islamic courts bring the meaning of the phrase ‘continuous and irreconcilable marital discord’ close to that of *syiqaq*.

This phenomenon way conforms to Rosen’s conception that encouraged the concept of law as a manifestation of a larger socio-cultural reality, simply referred to as law as a culture.³² Studying the local sharia court records (*sjill*) in the city of Sefrou, Morocco, he found that the oaths and the use of professional witnesses are not truly objective in nature,

³¹ Stijn Cornelis Van Huis, “Khul ‘over the Longue Durée: The Decline of Traditional Fiqh-Based Divorce Mechanisms in Indonesian Legal Practice,” *Islamic Law and Society* 26, no. 1–2 (2019): 58–82, <https://doi.org/10.1163/15685195-00254A05>.

³² Lawrence Rosen, *Law as Culture: An Invitation* (Princeton: Princeton University Press, 2006).

but a matter of the *qadi's* construction and the result of a process of negotiation which makes him convenient to make decisions.³³ He, therefore, situated the qadi in a wider cultural dimension in the city. In Bangil, the judges understand the situation that unregistered marriages are a common practice. The state has no choice other than to give them legal recognition when it is asked. Applying a strict interpretation of the conditions of *isbat nikah* does not address problems in society. The judges pragmatically implement point e of Article 7 of the KHI in order to accommodate the applicant's wishes.

Legal anthropologists put emphasises the multiplicity of legal basis and institutions that co-determine the structure, norms and interpretations of the law.³⁴ *Isbat nikah* provides a room where judges exercise the plurality of legal orders.³⁵ The judges have examined 'the dialectic, mutually constitutive relation between state law and other normative orders'.³⁶ Legal pluralism is justified as a technique of governance on pragmatic grounds.³⁷ From the decision, we see law offers a legitimate frame of reference in which political, economic and legal interests are defended.³⁸ The judges also found it important to have a different legal norm, i.e., traditional *fiqh* or theological doctrines. However, this does not reflect conservatism among the judges as they liberally interpreted them to support their judgment.

Concluding Remarks

In this essay, I have shown different ways villagers may take in order to legalize their unregistered marriage and their children. The legal status of marriage has to do with the protection of the rights to obtain the state services of family members and, more widely with bringing about public order.³⁹ Marriage registration makes women and their children

³³ Lawrence Rosen, *The Anthropology of Justice: Law as Culture in Islamic Society* (Cambridge: Cambridge University Press, 1989).

³⁴ Fernanda Pirie, *The Anthropology of Law* (Oxford: Oxford University Press, 2013).

³⁵ Arskal Salim, "Dynamic Legal Pluralism in Indonesia: Contested Legal Orders in Contemporary Aceh," *Journal of Legal Pluralism and Unofficial Law* 42, no. 61 (2010): 1–29.

³⁶ Sally Merry, "Legal Pluralism," *Law and Society Review* 22 (1988): 869–896.

³⁷ John Griffiths, "What Is Legal Pluralism?," *The Journal of Legal Pluralism and Unofficial Law* 24 (1986): 5.

³⁸ Keebet Von Benda-Beckmann, "Transnational Dimensions of Legal Pluralism," in *Begegnung Und Konflikt – Eine Kulturanthropologische Bestandsaufnahme*, ed. Wolfgang Fikentscher (Munich: C. H. Beck, 2001), 44.

³⁹ Sheila Menz, "Statelessness and Child Marriage as Intersectional Phenomena: Instability, Inequality, and the Role of the International Community," *California Law Review* 104, no. 2 (2016): 497–543; Ashraf Zahedi, "Transnational Marriages, Gendered Citizenship, and the Dilemma of Iranian Women Married to Afghan Men," *Iranian Studies* 40, no. 2 (2007): 225–39.

become entitled to the state services and protected by law against the disadvantageous consequences of a divorce or a husband's death, such as being unable to claim alimony and maintenance. However, Husni was not interested in the legal status of marriage. Husni was in search of state recognition of his marriage in the form of a marriage certificate just to be able to go to Mecca. Husni and his wife are not concerned about whether or not their marriages are legally valid according to the national laws. As long as the marriage has social acceptance, they feel convenient. Scholars have emphasized the significance of social acceptance rather than state legality.⁴⁰

People in Indonesia can proceed with an array of mechanisms so that they can align their situation with the state's framework. The first way is by concluding a 'new' marriage ceremony in the marriage registration office. This marriage is usually done solely for the sake of the marriage certificate and is, of course, meaningless for the legal status of the children. Administrative transgression accompanies this process. As a street-level bureaucrat, *penghulu* needs to exercise its autonomy to draw a case-by-case policy to make this marriage possible. The second way is legalization through the proposal for an *isbat nikah* to the Islamic court. In fact, *isbat nikah* has been important in giving legalization to a marriage, which is not possible according to standard procedure. This includes polygamous marriage and underage marriage. Of course, this requires the caution of the judges. The judges work relatively in line with procedural law. However, the decision to give legalization is mainly based upon whether or not a marriage has been concluded in line with Sharia law and the extent to which the marriage implicates social relations.

The belated registration done by the marriage registration office and the retrospective legalization made by the Islamic court demonstrates a crucial step to providing legal identity for those who do not qualify.⁴¹ Moreover, *isbat nikah* mechanism is closely interweaved with Nurlaelawati's finding. She remarked that, in many cases, judges found it hard to apply the rules by which they should formally observe. Because the judges cannot force society to stick to the state law, they tend to go along with the temporal interests of the justice seekers in the courts, although they decide contradictory to rules as interpreted

⁴⁰ Sonneveld, "Rethinking the Difference Between Formal and Informal Marriages in Egypt"; Bedner and Van Huis, "Plurality of Marriage Law and Marriage Registration for Muslims in Indonesia: A Plea for Pragmatism."

⁴¹ Bedner and Van Huis, "Plurality of Marriage Law and Marriage Registration for Muslims in Indonesia: A Plea for Pragmatism."

by the state.⁴² Here, we see that the judges prioritized public good rather than applying the words of the law.

The above different ways should be understood as the state's strategy to regulate marriage and family. The government is aware that strictly imposing a legal norm on the legal obligation of marriage registration is far from success. However, it is impossible to let unregistered marriage as it is. For the sake of the protection of citizens' rights, these different ways are made available. Furthermore, controlling a marriage by the state is an uneasy task in a country like Indonesia where there is a wealth of perception of both the national law and Islamic law amongst Muslim society. Therefore, the Indonesian legal system provides a wide ample of legal and judicial opportunities as long as supporting its effort to control. In the implementation, the practice leads not only to administrative transgression and judicial discretion but also to overlapping authorities. The discretion not only results from the absence and the vagueness of the legal norms but also the deliberate interpretation made by public officials and judges.

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