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Islamic Law and Social Change:

The Religious Court and the Dissolution of Marriage among Muslims in Lombok, Indonesia

By

Mohamad Abdun Nasir

Doctor of Philosophy

Graduate Division of Religion

West and South Asian Religions

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Abstract

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By Mohamad Abdun Nasir

Divorce suits initiated by Muslim women (*cerai gugat*) constitute the greatest number of legal cases filed before the religious courts in Indonesia. In recent years, women who sued their husbands for divorce have outnumbered men who repudiated their wives and registered the repudiation in the religious courts. Fifty-five percent of family disputes brought before the religious courts from 2007 to 2009 in Indonesia were concerned with *gugat* divorce. This dissertation focuses on case studies of the Islamic family law of divorce and examines *gugat* divorce cases in one local religious court in Central Lombok, Indonesia. It examines the dynamics of Islamic law and legal reform, legal awareness, and gender and power relations that influence the ways in which the laws regarding divorce are (re)interpreted and contested among litigants and judges. It also analyzes how such contestations shape the nature of Islamic divorce in contemporary practice. The dissertation draws its information from case studies of marital disputes, courtroom discourses of Islamic law, and litigants' strategies in negotiating divorce. It also analyzes the procedures and legal sources used by the court and the strategies of judges in dealing with *gugat* divorce. Three main conclusions are argued in this dissertation. First, the incorporation of the Shari'a law of divorce into state law transfers Islamic legal authority from the hands of Muslim religious scholars to the state. However, this does not occur without opposition from the traditional scholars. They often challenge the legitimacy of the state to determine what Islamic law is. Second, the law of *gugat* reconfigures unbalanced gender and power relations between Muslim spouses and enables women to acquire greater access and power in marital dissolution. Third, although Shari'a law theoretically becomes more rigid when transformed into state law, in practice it remains fluid. While *fiqh* and customary norms continue to be important sources of legitimacy for marriage and divorce of Muslims in Lombok, the reinterpretation of Islamic law by the state and its reintroduction through the courts offer more room for negotiating disputes among litigants.

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INTRODUCTION

A. Research Objective and Problem

In Indonesia, as in many Muslim countries, religious courts are symbols of Islamic authority and thus religious courts play an important role in maintaining the reputation of Islamic law, as well being agents of change or continuity. Religious courts in Indonesia have significantly developed and demonstrated their influence on society after a series of legal-substantial, technical-procedural and administrative reforms were introduced from the 1970s through the first decade of the 21st century.[1] Whereas religious courts have long served as a locus of conflict resolution for Indonesian Muslims who seek to resolve disputes regarding personal and family issues such as marriage and divorce, inheritance, and Islamic endowments, their jurisdiction now includes disputes regarding economic interests based on the Shari'a banking system.[2] One recent phenomenon of Islamic law and its application in religious courts in contemporary Indonesia deals with divorce lawsuits (*cerai gugat*) petitioned by Muslim women. This issue alone has provided the largest number of cases handled by the religious courts throughout the country in the last three years.

Women's presence in Islamic courts is by no means a new phenomenon. Historical studies show that in the courts of the Ottoman Empire in sixteenth-century Turkey and in Palestine and Syrian Courts in the seventeenth and eighteenth centuries, many women resorted to

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[1] Daniel L. Lev, *Islamic Courts in Indonesia: A Study in the Political Bases of Legal Institutions* (Berkeley: University of California Press, 1972) and Mark E. Cammack, "The Indonesian Islamic Judiciary," in R. Michael Feener and Mark E. Cammack (eds.), *Islamic Law in Contemporary Indonesia: Ideas and Institutions* (Cambridge, MA: Harvard University Press, 2007), p. 146-169.

[2] Jan Michiel Otto, "Shari'a and National Law in Indonesia," in Jan Michiel Otto (ed.), *Shari'a Incorporated: A Comparative Overview of the Legal Systems in Twelve Muslim Countries in Past and Present* (Leiden: Leiden University Press, 2010), p. 433-490.

the courts to resolve their disputes.[3] Even as early as the fifteenth century in Granada, Spain, Muslim women brought their property claims to the courts.[4] They filed various legal claims, ranging from divorce, maintenance, and claims for property shares, to child guardianship. Similar practices continue in the present time. There seems to be a general pattern in the legal issues that Islamic courts in Muslim societies such as Morocco, Iran, Malaysia, and Zanzibar deal with. Most Muslim women use Islamic courts in these countries to file maintenance claims for either themselves or their children. Meanwhile, Muslim men go to Islamic courts to register divorces or, in other cases, to ask the help of judges to compel their wives to return home.[5]

What is novel about women's presence in religious courts in contemporary Indonesia, however, and which distinguishes them from their counterparts in other Muslim countries, is that women in Indonesia can petition for divorce. There are two categories of divorce petitions in the court: *talak* divorce (*cerai talak*), which is pronounced and registered by the husband, and *gugat* divorce (*cerai gugat*), which is filed by the wife. Recently, the Directorate of Religious Courts Body of the Supreme Court (*Badilag*) released data on the increase in divorce cases over the last three years.[6] In 2007, out of a total of 200,795 cases in all religious courts in the country, a majority of 111,145 (55.352%) cases dealt with *gugat* or female-initiated divorce. The number of men who registered divorce cases (*talak*) in the courts in the same year was 63,943 (31.845 %). The percentage of *gugat* divorce cases rose in the two subsequent years. The Directorate noted

[3] Leslie P. Pierce, *Morality Tales: Law and Gender in the Ottoman Court of Aintab* (Berkeley: University of California Press, 2003) and Judith E. Tucker, *In the House of the Law: Gender and Islamic Law in Ottoman Syria and Palestine* (Berkeley: University of California Press, 1998).

[4] Maya Shatzmiller, *Her Day in Court: Women's Property Rights in Fifteenth-Century Granada* (Cambridge, MA: Harvard Law School, 2007).

[5] Ziba Mir-Hosseini, *Marriage on Trial: A Study of Islamic Family Law Iran and Morocco Compared* (London: I.B. Tauris, 1993), Michael G. Peletz, *Islamic Modern: Religious Courts and Cultural Politics in Malaysia* (Princeton: Princeton University Press, 2002) and Erin E. Stiles, *An Islamic Court in Context: An Ethnographic Study of Judicial Reasoning* (New York: Palgrave Macmillan, 2009).

[6] Badilag 2010. These data can be downloaded from the Directorate of Religious Court Body's website at http://www.badilag.net/index.php

that out of the 245,023 cases in 2008, 143,747 (58.67%) were concerned with *gugat* divorce and 77,773 cases (31.74%) were concerned with *talak* divorce. In 2009, the number of *gugat* divorce cases increased significantly to 171,477 (60.221%) while *talak* divorces were 86.592 (30.411%) of the total of 284,749 cases. From 2007 to 2009, these two categories of divorce constituted the first and second most important issues handled by the religious courts in those years. The overall divorce rate declined for a time after the introduction of the Marriage Law of 1974 because of stricter divorce regulations. The divorce rate also diminished in other years due to the reduced frequency of arranged marriages by parents, the rising age of marriage, stricter legal and procedural requirements, and increasing educational levels and economic and living standards of the population.[7] However, the latest data from the Directorate of the Religious Courts Body show a growing trend toward female-initiated divorce.[8]

Although the Directorate has identified five major causes of divorce, the data do not explain the patterns of divorce clearly. The first cause of divorce that the Directorate identified was disharmony, followed by personal irresponsibility, economical problems, love affairs, and jealousy.[9] These are very general causes of marital breakdown. The data also do not specify which factors triggered male-initiated *talak* divorces or female-initiated *gugat* divorce. The causes of divorce that are enumerated by the Directorate also do not indicate the gender of the petitioners. If disharmony is highly significant in provoking divorce, it is unknown whether the wife or the husband most often initiates divorce and why. The data also do not explain whether love affairs leading marriages into trouble occur more often in urban than in rural areas, or whether marriages are more stable among well educated people than among less educated

[7] Tim B. Heaton, Mark E. Cammack and Larry A. Young, "Why is the Divorce Rate Declining in Indonesia?" *Journal of Marriage and Family*, 63 (May, 2001): 480-90.

[8] The data from other than *Badilag* do not distinguish the initiator of divorce.

[9] See again footnote number 6.

people. In short, the data are too broad to examine the pattern and reasons of divorce and to analyze litigants' class (low or middle), occupation (farmer, trader, civil servant etc.), geography (urban or rural) or educational (illiterate-literate, Islamic-general schools, levels etc.) backgrounds. Thus, the data need further amplification. One way to achieve this is to investigate divorces at the local and regional levels, where religious courts operate.

Therefore, this dissertation looks more closely into the broad features of divorce and its procedures through an empirical investigation of one local religious court. My fieldwork was conducted at the Religious Court of Praya, Central Lombok. The reason why I singled out this particular site is because the percentage of *gugat* divorces in this court is much greater than the national average. The Religious Court of Praya noted that 482 divorce petitions were received in 2009. Of these, 307 (63.69%) cases pertained to *gugat* divorce and only 32 (6.64%) cases dealt with *talak* divorce.[10] These preliminary data provide a vantage point to investigate the phenomenon of *gugat* divorces in Lombok.[11] The two main reasons for divorce at this locale were negligence and perpetual quarrels between the spouses. Two other reasons included moral corruption and domestic violence.[12] However, as with the national data, the data from the Praya Religious Court do not include information on the social backgrounds of litigants. The data are still very general and ignore the different strategies men and women use to deal with divorce. Moreover, no voices, perspectives, or experiences from the litigants and judges who handle divorces cases are presented in the data.

[10] The 2009 Praya Religious Court Report. The data can be downloaded from the court's website at www.pa-praya.net/sip. The other issues were permission for polygamy (1), re-confirmation of marital status (3), divorce suits and joint property (6), legalization of marital status (6), custodian (4), inheritance (11) and caseloads from December 2008 (12).

[11] Unfortunately, this is the only data of divorce available and accessible from the court's website.

[12] The data do not elaborate these specific causes by, for example, classifying particular behaviors that can be categorized into each cause. *Ibid*.

Using data from the Directorate of the Religious Courts Body and the Praya Religious Court, I identified the four key issues regarding divorce lawsuits (*cerai gugat*) upon which this study is focused: gender, power relations, legal awareness and evolution of Islamic law. The first point refers to the fact that divorce is a highly gendered issue. Men must go to court to register their divorces (since they can repudiate their wives anywhere), while women resort to the courts to *sue* their husbands for divorce; this is the only way they can pursue a divorce. Unlike what many might presume about Islamic law—that the law is discriminative against women in terms of divorce because Muslim men hold the right to repudiate their wives unilaterally—the most recent data of *gugat* divorce in Indonesian religious courts demonstrate a new pattern. Although women are not entitled in Islamic law to repudiate their husbands by verbally declaring "divorce phrases," which their husbands are allowed to do, women now constitute the majority who initiate divorce in general. This practice reflects a change in gender relations and has influenced Islamic family law in contemporary practice. Islamic law determines different rights and obligations for men and women in accordance with their gender. As Judith Tucker observes, in almost all aspects of the law, women, because of their gender, are discriminated against, including in marriage and divorce; such legal strictures put women at a disadvantage except in matters relating to property owned personally by them, since they are better able to fully articulate their rights and agency.[13] However, considering divorce in contemporary Indonesia, Tucker's contention seems to be no longer relevant because women can now realize their rights and agency beyond the realm of property issues. Whereas theoretically, men have the authority to repudiate their wives unilaterally, in practice, divorce has now become the domain of women, at least at court, as the data of divorce from the religious courts show.

[13] Judith E. Tucker, *Women, Family and Gender in Islamic Law* (Cambridge, UK: Cambridge University Press, 2008), p. 218-219.

The second interesting point derived from divorce lawsuits concerns changing power relations in Indonesian Muslim households as well as the changing meaning of shame, which has altered the boundary between the public and private spheres. In general, kinship systems in Indonesia are bilateral, with the exception of Minangkabau's matrilineal system. Although women enjoy a relatively higher status in the bilateral kinship systems of Southeast Asia than do women in other parts of the Muslim world,[14] patriarchy in Indonesia has been reinforced by the state's gender ideology, which to some extent might undermine women's status and social position. The Indonesian Marriage Law No. 1/1974 states, "The husband is the head of the family and the wife is the mother of the household."[15] This stipulation was revived in the Compilation of Islamic Law endorsed in 1991.[16]

Furthermore, in certain regions of Indonesia, such as in Lombok, patriarchy is conspicuous.[17] In this region, men assume a dominant role, including in family matters because women's authority is commonly limited to the management of domestic household affairs and child nurturance, even though women actively engage in the public domain as traders in the market and as workers in the rice fields.[18] Gender ideology throughout the region maintains that women have to serve their husbands and family and keep domestic conflicts secret. A household

[14] Jane Atkinson and Shelly Errington (eds.), *Power and Difference: Gender in Island Southeast Asia* (Stanford: Stanford University Press, 1990) and Aihwa Ong and Michael G. Peletz (eds.), *Bewitching Women, Pious Men: Gender and Body Politics in Southeast Asia* (Berkeley: University of California Press, 1995).

[15] Compilation of Islamic Law No. 1/1991, Chapter VI, Article 31 (b).

[16] *Ibid*., Article 79 (1).

[17] Sven Cederroth, "Islam and Adat: Some Recent Changes in the Social Position of Women Among Sasak in Lombok," in Bo Utas (ed.), *Women in Islamic Societies: Social Attitudes and Historical Perspectives* (London: Curzon, 1983), p. 160-171 and Jocelyn Grace, "Sasak Women Negotiating Marriage, Polygyny and Divorce in Rural East Lombok," *Intersection: Gender, History and Culture in the Asian Context*, Issue 10, (August, 2004): 1-19.

[18] Ruth Krulfeld "Sasak Attitudes towards Polygamy and the Changing Position of Women in Sasak Peasants Villages," in L. Dulse E. Leacock and S. Ardemer (eds.), *Visilocality and Power* (New Delhi: Oxford University Press, 1986), p. 194-208.

problem is shameful (*aib*) and exposure is taboo. Airing domestic quarrels by the wife in religious courts violates gender norms and disgraces the family.[19]

However, the fact that women now resort to the religious courts to petition for divorce implies changing power relations between the spouses. June Starr and Jane Collier argue that the law encodes imbalanced power relations among legal subjects. They contend that law is not neutral but preserves inequality. However, they remind us that laws are open to contestation by various legal subjects, who come to courts with diverse and often conflicting interests.[20] In this regard, law creates hegemony and resistance simultaneously. Susan Hirsch and Mindie Lazarus-Black argue that law requires people to accept and follow its commands to behave in a certain way or to do one thing while forbidding another.[21] It thus imposes order and command from the top. However, people also use the law and its institutions such as the courts to resist domination. This perspective helps to explain how *gugat* judicial divorce in Indonesia implies a change in asymmetrical gender and power relations between Muslim spouses.

The third interesting point from the data of divorce is the emergence of people's awareness of using the religious courts to resolve their marital disputes. The reform of religious courts in Indonesia has improved the court's performance in handling personal and family matters amongst Muslims. According to the Religious Judicature Act of 1989, the court may not reject a filed case on the grounds that no law or code exists about the matter. If a filed case is supported by proper documents and convincing arguments, the court must proceed to trial.[22] In other words, there is in theory hardly any misapplication of disputes to the court because of the

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[19] Wini Tamtiari, *Awig-Awig: Melindungi Perempuan dari Kekerasan dalam Rumah Tangga* (Yogyakarta: Ford Foundation and Universitas Gadjah Mada, 2005), p. 37-9 and p. 59-61.

[20] June Starr and Jane F. Collier (eds.), *History and Power in the Study of Law: New Directions in Legal Anthropology* (Ithaca and London: Cornell University Press, 1989), p. 9.

[21] Mindie Lazarus-Black and Susan F. Hirsch (eds.), *Contested States: Law, Hegemony and Resistance* (London and New York: Routledge, 1994).

[22] Religious Judicature Act 7/1989, Article 56.

lack of the law's clarity. Judges have to engage in deliberate efforts of legal reasoning (*ijtihād*) to classify, verify and mete out judgments, even if the existing code does not provide sufficient grounds for a ruling. By contrast, in American lower courts, judges may decline a proposed case on the grounds that the dispute is not a proper legal case.[23] The Religious Judicature Act also requires Indonesian religious courts to handle incoming disputes efficiently and quickly and to charge petitioners with the least cost.[24] Moreover, the Second Amendment of the 1989 Religious Judicature Act states that the poor deserve free legal assistance.[25] The Director of the Religious Courts Body asserted in a recent statement that "for the sake of justice for the poor, the court must be active [in dealing with disputes brought by them to the court]."[26] Because of such measures, the court is an active agent of social change in society.

The fourth point concerns the reinterpretation and evolution of Islamic law. John Esposito shows that the state's initiative to codify some aspects of Islamic law (*siyasa shari'yya*)[27] relating to personal status and family matters have greatly altered the nature of Shari'a law and have reconfigured women's legal status. Indonesian Muslim Women in the past had various mechanisms to obtain divorce from court through *khuluk* (*khul',* divorce sought by wives in which they compensate their husbands by way of forfeiting their rights of support or of paying ransom), *taklik talak* (*ta'liq ṭalāq*, conditional divorce or divorce that occurs after husbands breach the marriage contract), *syiqaq* (*shiqāq,* judicial divorce on the grounds of irreconcilable spousal conflicts), and *fasakh* (*faskh*, marital dissolution by court on the grounds

[23]Sally Engle Merry, *Getting Justice and Getting Even: Legal Consciousness among Working Class Americans* (Chicago: The University of Chicago Press, 1990).
[24] Religious Judicature Act 7/1989, Article 58 (2).
[25] The Second Amendment of the Religious Judicature Act No. 50/2009, Chapter 60 B (2).
[26] Badilag, April 21, 2010.
[27] John L. Esposito, *Women in Muslim Family Law* (New York: Syracuse University Press, 2001).

of valid causes or reasons).[28] However, these mechanisms did not necessarily help women effectuate marital dissolution easily: many women were unable to abandon a troubled union due to complicated divorce procedures that required male consent. Not until the state reinterpreted Shari'a law and unified the procedure of female divorces into *gugat* could women achieve equality with men in effectuating marital dissolution. This means that the reinterpretation of Shari'a law in Indonesian marriage and divorce codes has fundamentally transformed Islamic family legal discourses and practices. Islamic law is thus not static, but, as Abdullahi An-Na'im[29] and Knut Vikør[30] argue, develops in accordance with socio-historical challenges that influence the ways in which Muslims perceive and practice it. However, the state's efforts in reinterpreting Islamic law challenges the *'ulamā'*, as the most authoritative agent of tradition in Islam,[31] who insist that a legitimate understanding and application of the Shari'a can only be acquired through the works of authoritative Muslim jurists. Looking at the social position of the *'ulamā'* in Lombok and the role of state officials (judges) and legal institutions (religious courts) in offering new interpretations of Islamic law will help reveal how Islamic authority has become fragmented and is being contested at the state level.

B. Shari'a Law and State Law in Indonesia

The relationship between Shari'a (as embodied in *fiqh*) and state law is paramount in understanding judicial divorce at the religious courts in Indonesia. Shari'a, *fiqh* and state law are distinct concepts and yet they are closely related to each other at certain points. Shari'a literally

[28] I will keep using the Indonesian translation of these words instead of the original Arabic. Except if the equivalent words are not found in Indonesian, the original Arabic terms will be used.

[29] Abdullahi Ahmed An-Na'im, "Shari'a and Islamic Family Law: Transition and Transformation," in Abdullahi Ahmed An-Na'im (ed.), *Islamic Family Law in A Changing World: A Global Resource Book* (London and New York: Zed Books, 2002), p. 1-22.

[30] Knut S. Vikør, *Between God and the Sultan: A History of Islamic Law* (Oxford: Oxford University Press, 2005).

[31] Muhammad Qasim Zaman, *The 'Ulama in Contemporary Islam: Custodian of Change* (Princeton: Princeton University Press, 2002).

means "way," "path" or "the road to the watering place;"[32] it is defined as God's law for the way of living as a Muslim. *Fiqh* literally means "understanding" or "knowledge;"[33] it constitutes the independent interpretation of the Shari'a by scholars and jurists. Meanwhile, laws are also enacted by the state as legal codes, such as Compilation of Islamic Law (*Kompilasi Hukum Islam/KHI*), which was promulgated through Presidential Decree No. 1/1991.[34]

However, the relationship between these three concepts is complicated. Shari'a is revealed through scriptural texts such as the Qur'an and the Prophet's sayings (*ḥadīth*), which covers a broad range of Islamic subjects, from theology, law, ethics, and liturgy, to human relations. *Fiqh* elaborates on the Shari'a using particular methodologies, called *uṣūl al-fiqh.* Today, its domain is largely limited to liturgical observances (*'ibādat*) such as ablution (*wuḍu*), prayer (*ṣalāt*), fasting (*ṣawm*), alms tax (*zakat/sadaqa*), and pilgrimage (*ḥajj*), and certain human transactions (*mu'amalat*). Marriage (*munākaḥat*) and divorce (*ṭalāq*) fall under the category of human transactions. Therefore, the scope of *fiqh* is now narrower than that of Shari'a, although in earlier times the scope of *fiqh* also covered theology and creeds.[35] Because *fiqh* is a product of human understanding, its rulings are always relative and somewhat subjective. Consequently, dissenting opinions among jurists are inevitable.[36]

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[32] Joseph Schacht, "Shari'a," in M. Th Houstma, A.J., Wensinck, T.W. Arnold, W. Heffening and E. Lévi-Provençal (eds.), *First Encyclopedia of Islam*, Vol. III (Leiden: Brill, 1987), p. 320-324.

[33] Intisar A. Rabb, "Fikih", in John L. Esposito (ed.), *The Oxford Encyclopedia of the Islamic World*, Vol. 2 (Oxford: Oxford University Press, 2009), p. 255-258.

[34] On the study of the application of this Compilation at the religious courts, see Euis Nurlaelawati, *Modernization, Tradition and Identity: The Kompilasi Hukum Islam and Legal Practice in the Indonesian Religious Courts* (Amsterdam: Amsterdam University Press, 2010).

[35] Baber Johansen, *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim Fiqh* (Leiden: Brill, 1999), p. 1.

[36] On the distinction between *Shari'a* and *fiqh*, see Bernard G. Weiss, *The Search for God's Law: Islamic Jurisprudence in the Writing of Saif al-Dīn al-Āmidī* (Salt Lake and Herndon: University of Utah Press and International Institute of Islamic Thought, 2010), p. 1-16, and Yvonne Yazbeck Haddad and Barbara Freyer Stowasser, "Introduction," in Yvonne Yazbeck Haddad and Barbara Freyer Stowasser (eds.), *Islamic Law and the Challenges of Modernity* (New York: Altamira Press, 2004), p. 1-17. On the development of *fiqh*, see Johansen, *Contingency in a Sacred Law*, p. 1-76.

Some argue that it is difficult to make a clear-cut distinction between Shari'a and *fiqh* since the understanding and application of Shari'a, especially its norms of law, cannot be achieved except through *fiqh*.[37] What can be clearly distinguished, however, is that Shari'a and *fiqh* are different from modern legal codes. While Shari'a refers to general "Islamic religious norms" and *fiqh* serves as an elaboration of Shari'a and is always flexible and plural, codification is fixed, and is limited to a particular aspect of Shari'a and *fiqh.* Codification also differs from one Muslim country to another, depending on which school of *fiqh* is adopted.

Debates continue as to whether or not Shari'a and *fiqh* can be codified and enacted as state law. According to Ann Elizabeth Mayer, the main disagreement centers around the question of whether Shari'a (and I would say *fiqh* as well) is "a methodology or a body of substantive rules."[38] Here, methodology is understood as an authoritative hermeneutic device to understand God's law, used by qualified jurists, and which cannot be made permanent through codification. Those who perceive Shari'a as a set of God's laws that can be directly deduced from the Qur'an or *ḥadīth* believe that Shari'a can be codified into state law simply by incorporating scriptural legal prescriptions into state law. There are at least two distinct versions of this debate.

The first view rejects any attempt to codify Shari'a or *fiqh* as state law. The arguments for this rejection revolve around the differences between Shari'a and *fiqh* on one hand and state law on the other. "Traditional Islamic law," Joseph Schacht argues, "being a doctrine and a method rather than a code is by its nature incompatible with being codified and every codification must subtly distort it."[39] According to this view, *fiqh* is both the essence and the

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[37] Knut S. Vikør, "The Shari'a and the Nation State: Who Can Codify the Divine Law," in Bjøn Olav Utvik and Knut S. Vikør (eds.), *The Middle East in A Globalized World: Papers from the Fourth Nordic Conference on Middle Eastern Studies* (London: C. Hurst and Co Ltd., 2000), p. 220-250.

[38] Ann Elizabeth Mayer, "The Shari'a: A Methodology or a Body of Substantive Rules," in Nicholas Herr (ed.), *Islamic Law and Jurisprudence* (Seattle: University of Washington Press, 1990), p. 177-198.

[39] Joseph Schacht, "Problems of Modern Islamic Legislation," *Studia Islamica,* 12 (1960): 108.

methodology of Islamic law. By codifying *fiqh*, the state, which as a political institution is not independent, distorts Islamic law because, as An-Na'im contends, this "would require state institutions to choose among competing interpretations of Shari'a."[40] According to this view, codification demolishes the methodological legacy of Shari'a and thus impoverishes Shari'a as an institution.[41]

Furthermore, as Wael Hallaq demonstrates, the weakening of the institutional bases of Shari'a, namely the institutions of the *madrasa* (Islamic schools) and the *waqf* (Islamic religious endowments), marks a decline in Shari'a.[42] Because Shari'a is interpreted in *madrasas* by jurists independent from state funding and intervention, the weakening of these classical institutions, which coincided with the encroachment of European colonialism in many Muslim countries, undermined the institutional foundations of Shari'a. The creation of new legal and judicial systems in many Muslim countries following the European model further marginalized Shari'a, which, Hallaq argues, can now no longer be restored.[43] Accordingly, Frank Griffel contends, "the process of canonization of law during the nineteenth and twentieth centuries has shaped the understanding of Shari'a probably more than anything else. Many Muslims today understand Shari'a as a canonized code of law that can be easily compared with the European code."[44]

A second view endorses the state's role in Shari'a legislation. The proponents of this view emphasize the essence of Shari'a as an ideal, not as a procedure or a form of authority. So

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[40] Abdullahi Ahmed An-Na'im, "Shari'a in the Secular State: A Paradox of Separation and Conflation," in Peri Bearman, Wolfhart Heinrichs and Bernard G. Weiss (eds.), *The Law Applied: Contextualizing the Islamic Shari'a* (London and New York: I.B. Tauris, 2008), p. 322.

[41] Abdullahi Ahmed An-Na'im, *Islam and the Secular State: Negotiating the Future of Shari'a* (Cambridge, MA: Harvard University Press, 2008), p. 1-2.

[42] Wael B. Hallaq, "Juristic Authority vs State Power: The Legal Crises of Modern Islam," *Journal of Law and Religion*, 19:2 (2003/2004): 243-258.

[43] Wael B. Hallaq, "Can Shari'a be Restored?" in Yvonne Y. Haddad and Barbara Stowasser (eds.), *Islamic Law*, p. 21-53.

[44] Frank Griffel, "Introduction," in Abbas Amanat and Frank Griffel (eds.), *Shari'a: Islamic Law in the Contemporary Context* (Standford: Standford University Press, 2007), p. 13.

long as Shari'a principles can be maintained in legislation, so that modern codes do not contravene the substance of Shari'a, then in the words of Oussama Arabi, "Positivisation, or the process of integration of Shari'a into modern states' political structure does not result in abandonment of Islam's ethical and religious spirit."[45] Arabi, one of the major protagonists of Islamic legislation, argues that on the basis of his examination of Egyptian laws, judges are very creative in articulating Islamic codes and their sources to achieve objectives of law that are relevant to the classical theories and sources of jurisprudence.[46] He goes on to argue that "there is in principle no binding corpus of Islamic law in the domain of non-textual innovative rulings, and the state, consequently, is to have a free hand to remold human relations in harmony with the universal religious and moral values."[47] To him, the state is qualified to be an agent of the legislation of Islamic law. This role, which, according to Clark Lombardi, can be justified by the theory of "*siyasa shar'iyya*," is acceptable so long as Shari'a legislation does not command its Muslim citizens to disobey God and can promote welfare for them.[48]

Indonesian discourses of Islamic law follow these debates to a great extent. While some scholars argue that Shari'a can become the source of reform for the state constitution,[49] others suggest that its applications are in many instances symbolic[50] and cause "dissonance."[51] Some Muslim religious scholars from a traditionalist background regard *fiqh* as the religious norm for Muslims' daily lives rather than state law. They promote the idea that the domain of *fiqh* is in

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[45] Oussama Arabi, *Studies in Modern Islamic Law and Jurisprudence* (The Hague: Kluwer International Law, 2001), p. 194-195.

[46] *Ibid.*

[47] *Ibid*., p. 205.

[48] Clark B. Lombardi, *State Law as Islamic Law in Modern Egypt: The Incorporation of the Sharī'a into Egyptian Constitutional Law* (Leiden: Brill, 2006), p. 19.

[49] Nadirsyah Hosen, *Shari'a and Constitutional Reform in Indonesia* (Singapore: ISEAS, 2007).

[50] Cate Sumner and Tim Lindsey, *Courting Reform: Indonesia's Islamic Courts and Justice for the Poor* (Sydney: Lowy Institute, 2010), p. 6 and Tim Lindsey, *Islam, Law and the State in Southeast Asia, Volume I: Indonesia* (London and New York: I.B. Tauris, 2012), p. 6.

[51] Arskal Salim, *Challenging the Secular State: The Islamization of Law in Modern Indonesia* (Honolulu: University of Hawaii Press, 2008), p. 1-5.

social and religious norms (*Fikih Sosial*).[52] Others do not mind *fiqh* being partly adopted as state law, but this does not presuppose changes in substance of *fiqh*; the state may codify *fiqh* but not alter its substance.[53] As for government officials who support codification, they view modern Muslim marriage and divorce codes as nothing other than *fiqh*, which is merely expressed in the language of modern codes (*fikih dalam bahasa undang-undang*), such as Compilation of Islamic Law.[54]

The notion of the "Shari'atization" of state law extends beyond the domain of family law. This proposal is raised by Islamists, who envision the total application of Shari'a law in Indonesia, including in the application of criminal law.[55] Shari'atization gained political weight during the decentralization of government that occurred during the reform era following the downfall of the New Order Regime in 1998.[56] The euphoria of reform and democratization led to a greater autonomy of laws at the provincial and regional levels. Some provincial and district governments endorse Shari'a bylaws (*Perda Syariah*). These bylaws are concerned with a wide ranges of issues, from the obligation to read the Qur'an on the part of state employees to prosecution of gambling and alcohol drinking. However, these local initiatives are more politically motivated than substantially well-prepared legal reforms. Not surprisingly, secular and national parties are also among the supporters of attempts to legislate Shari'a on the regional level.[57]

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[52] R. Michael Feener, *Muslim Legal Thought in Modern Indonesia* (Cambridge: Cambridge University Press, 2007), p. 155- 181.

[53] Nurlaelawati, *Modernization, Tradition and Identity*, p. 108.

[54] *Ibid*., p. 94.

[55] Tim Lindsey and Jeremy Kingsley, "Talking in Code: Legal Islamization in Indonesia and the MMI Shari'a Criminal Law," in Bearman, Heinrichs and Weiss (eds.), *The Law Applied*, p. 295-320.

[56] On a general overview of Shari'a and politics, see Robert W. Hefner (ed.), *Shari'a Politics: Islamic Law and Society in the Modern World* (Bloomington: Indiana University Press, 2011).

[57] Robin Bush, "Regional 'Shari'a' Regulation in Indonesia: Anomaly or Symptom," in Greg Fealy and Sally While (eds.), *Expressing Islam: Religious Life and Politics in Indonesia* (Singapore: ISEAS, 2008), p. 174-191.

M.B. Hooker argues that Shari'a in Indonesia is not applied thoroughly but is always applied selectively. "Whether derived from Islamic scholarship or the imposition of European definitions of law," he says, "selection and variant forms have a long history in Indonesian syari'ah text." This process has created what he calls the "Indonesian National Shari'a School (*Madzhab National*)."[58] Indeed, the creation of an Indonesian *fiqh* school was proposed in the second half of the twentieth century by Indonesian scholars, such as Hazairin and Hasbi As-Shiddiqi, who maintained that Indonesian values should feature the form of *fiqh* that applied in that country.[59]

Whether one agrees with it or not, "Shari'a legislation" is a fact of life in contemporary Indonesia. Jan Otto argues, "Although criticized and contested by many different--if not all--sides, the incorporation of Shari'a by the state remains essentially a fact of life. About this incorporation different political camps use different discourses to further their goals. So, it is not uncommon to see that certain acts of incorporation are regarded as Islamization of national law by one camp and as annexation of Shari'a by the state by another."[60] According to Franz and Keebet von Benda-Beckmann, "Depending on which of the features of the courts are examined, and in which relational context they are situated, religious courts can be seen as either an exponent of 'religion or religious law' or as 'state law'."[61] This holds true especially if we distinguish Islamic law from state law and *adat* law. The von Benda-Beckmanns argue that the status of religious courts can be viewed differently, depending on which court is perceived. Religious courts will appear as 'religious' if they are "compared with civil courts, which apply

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[58] M.B. Hooker, *Indonesian Syariah: Defining a National School of Islamic Law* (Singapore: ISEAS, 2008), p. 3.

[59] Feener, *Muslim Legal Thought*, p. 54-80.

[60] Otto (ed.), *Shari'a Incorporated*, p. 27.

[61] Franz von Benda-Beckmann and Keebet von Benda-Beckmann, "Beyond the Law and Religion Divide: Law and Religion in West Sumatra," in Thomas G. Kirsch and Bertram Turner (eds.), *Permutation of Order: Religion and Law as Contested Sovereign* (Burlington: Asghate, 2009), p. 232-233.

state or *adat* law. But from the perspective of a village decision making body, such as a village *adat* council, an *ulama* issuing a *fatwā* or desiring the establishment of *kadhi* courts, both religious and civil courts are just 'state courts'...[I]n the same way, the substantive law that religious courts apply can be hailed as Islamic law, as distinct from *adat*/state law, or be denigrated as adultered government regulations if compared with the strict interpretation of religious scholars."[62]

C. Research Questions

In this study, I examine the court's role and the patterns of *gugat* divorce, including their causes and social contexts concerning class, legal consciousness, and gender and power relations. The phenomenon of rising *gugat* divorce rates constitutes an entry point to investigate the reform of Islamic law in Indonesia in its modern institutional context and to study the social factors that shape its practice. The chapters of this dissertation examine the following questions:

1. What motivates women in Lombok to file for divorce? What are their social backgrounds? How do they obtain access to the court?
2. What does the rising rate of divorce lawsuits mean for gender relations in contemporary Lombok? Why have women become the majority of divorce seekers in religious courts?
3. How do Islamic laws of marriage and divorce establish unbalanced power relations between the husband and the wife? How do these laws stimulate resistance from the wife? What resources does the wife have to challenge asymmetrical power relations imposed by the laws and patriarchal society?
4. How do social context, class, court reform, legal awareness, and gender and power relations shape divorce practices in Lombok and transform them into new practices such

[62] *Ibid*.

as *gugat* divorces? How are *gugat* divorces similar to, or different from other divorce categories such as *khuluk*, *fasakh*, and *taklik talak*?

5. What does the soaring rate of divorce suits filed by women in Lombok reveal? What does the enormous percentage of divorce suits petitioned by women tell us about Islamic law and social change in contemporary Lombok and in Indonesian Muslim society more generally?

D. Previous Research on Divorce in Muslim Societies

Islamic courts and divorce in Muslim societies have been the subjects of various studies, which have different objectives and orientations and adopt distinct approaches and theories. My research is a continuation of this scholarly tradition but focuses on a specific category of divorce and poses a different set of questions about divorce and religious courts in contemporary Indonesia. My research offers an empirical account of the practice of the Islamic law of divorce in a local religious court in Central Lombok, Indonesia. It offers a direct and living picture of divorce among male and female disputants, judges and other court staff who handle their disputes. It also examines the social contexts, such as legal awareness and gender and power relations that shape divorce and vice versa.

Islamic courts and divorce may be studied as a separate issue or under a single rubric in which divorce is an integral part of court jurisdiction. As a separate object of study, divorce, along with marriage, inheritance, guardianship, and other personal and family issues, is often categorized as an important aspect of Islamic family law. The main objective of this approach is to elaborate the basic terminologies, classifications, conditions, and procedures of divorce. In this approach, divorce procedures are explained in detail to acquire a comprehensive understanding

of how the Islamic law of divorce functions. Previous studies have presented comparatively different views of divorce among Islamic legal schools and their methods of interpretation of the textual sources on divorce such as the Qur'an and Ḥadīth. [63] Other studies have focused on Muslim jurists' writings on divorce and analyze them in relation to social development and the status of women.[64] The strength of these works lies in their offering a comprehensive textual knowledge of Islamic law. Because of such a strong textual orientation, however, they do not discuss how divorce is experienced empirically in different contexts of Islamic history and society.

Other studies attempt to elucidate divorce as a historical phenomenon in Muslim society and examine how divorce was practiced at a particular time in the past and how this illustrates the social condition of Muslim women.[65] The purpose of these studies is to reject misperceptions of women as passive victims under Islam and patriarchy in Middle Eastern societies. These studies rely on diverse historical data. For example, a study of divorce by Yossef Rapoport, who uses historical data from court documents, endowment documents, and Muslim female personal biographies and autobiographies, shows how divorce and marriage practices in medieval Cairo, Damascus, and Jerusalem reflected the ways of life of these metropolitan areas.[66] At times, divorce occurred frequently among high-class women because of their relative economic independence. By contrast, Iris Agmon and Judith Tucker derive their data from court documents

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[63] Keith Hodkinson, *Muslim Family Law: A Sourcebook* (London: Croom Helm, 1984), Safia Iqbal, *Women and Islamic Law* (New Delhi: Adam Publishers, 2004), Sibli Mallat (ed.), *Islamic Family Law* (London: Graham and Trotman 1990), David Pearl, *Muslim Family Law* (London: Sweet and Maxwell, 1998) and Ahmed Shukri, *Muslim Law of Marriage and Divorce* (Piscataway, NJ: Gorgias Press, 2009).

[64] Susan A. Spectorsky, *Chapter on Marriage and Divorce: Responses of Ibn Ḥanbal and Ibn Rahwayh* (Texas: Austin University Press, 1993) and *Women in Classical Islamic Law: A Survey of the Sources* (Leiden: Brill, 2010).

[65] Amira El Azhary Sonbol (ed.), *Women, the Family and Divorce Laws in Islamic History* (New York: Syracuse University, 1996) and Tucker, *In the House of the Law* (1998).

[66] Yossef Rapoport, *Marriage, Money and Divorce in Medieval Islamic Society* (Cambridge, UK: Cambridge University Press, 2006).

(*sijil*) and fatwas respectively.[67] Their data suggest that both court archives and the *fatwas* issued by the Palestinian Mufti al-Ramlī demonstrated a commitment to justice for women. The question that often emerges from using such sources in historical analysis is whether or how far court documents, *fatwas*, and personal notes can represent an accurate picture of Muslim women in history.

Many studies of divorce in Indonesia have employed sociological and demographic perspectives. Scholars maintain that the divorce rate correlates with social and demographic factors, such as living standard, family income, educational level, marital age, region, and ethnicity.[68] Using surveys and statistical data on the Indonesian family, these studies mostly attempt to explain the causes of divorce. These studies reveal that education and age at marriage,[69] increasing self-determination in choice of marriage partners,[70] and the introduction of the Marriage Law of 1974,[71] have constituted crucial factors for preventing marital instability leading to divorce, even though the law has no a direct impact on the practice of divorce out of court among Muslims.[72] These studies use data on divorces that occurred mostly before and during the 1990s and thus leave the current phenomenon of *gugat* divorce unexplored.

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[67] Iris Agmon, "Muslim Women in Court According to the *Sijil* of Late Ottoman Jaffa and Haifa," in Sonbol (ed.), *Women, the Family*, p. 126-42 and Tucker, *In the House of Law* (1998).

[68] Gavin W. Jones, *Marriage and Divorce in Islamic South-east Asia* (Kuala Lumpur: Oxford University Press, 1994), and Mark E. Cammack and Tim B. Heaton, "Explaining the Recent Upturn in Divorce in Indonesia: Developmental Idealism and the Effects of Political Changes," *Asian Journal of Social Science*, 39 (2011): 776-796, Mark E. Cammack, Lawrence A. Young and Tim B. Heaton, "Legislating Social Change in an Islamic Society: Indonesia's Marriage Law," in Tim Lindsey (ed.), *Indonesia: Law and Society* (New South Wales: Federation Press, 2008), p. 288-312.

[69] Philip Guest, "Marital Dissolution and Development in Indonesia," *Journal of Comparative Family Studies*, 23:1 (Spring, 1992): 95-113.

[70] Gavin W. Jones, Yahya Asari and Tuti Djuartika, "Divorce in West Java," *Journal of Comparative Family Studies*, 24:3 (Autumn, 1994): 395-412.

[71] Heaton, Cammack and Young, "Why is the Divorce Rate Declining in Indonesia?" (May, 2001): 480-90.

[72] Mark E. Cammack, Lawrence A. Young and Tim B. Heaton, "The State, Religion, and the Family in Indonesia: The Case of Divorce Reform," in Sharon K. Houseknecht and Jerry G. Pankhurst (eds.), *Family, Religion and Social Change in Diverse Societies* (New York and Oxford: Oxford University Press, 2000), p. 175-204.

Studies of Islamic courts outside of Indonesia focus on divorce and other family disputes such as property claims, inheritance, maintenance, child custody, and other family-related disputes and look at these issues as the domain of Islamic courts' jurisdiction. [73] However, these studies have distinct orientations with respect to focus, method, and theory. Some studies explore court archives and documents to identify and systematize legal cases in general without giving due attention to the social contexts in which they originate, as if the law and the court operate as independent institutions.[74] One exception to this trend is the study of Islamic courts and divorce in Libya conducted by Aharon Layish, who provides an analysis of the interaction of Islamic law and customary law in the realm of family law.[75] He confirms that in Qadhdhafi's Libya customary law remained powerfully operative beyond the court while Shari'a law controlled divorce proceedings at the court in Libya.

Some scholars have analyzed the court's jurisdiction over divorce from a historical perspective and suggest that even though divorce law was a highly gendered domain, contrary to widely-held assumptions of legal discrimination against women, it did not necessarily undermine women's rights when implemented at court.[76] Working with the documents of the Aintab Ottoman Court, Leslie Pierce shows how state law and Shari'a law created ambiguities when dealing with women. On one hand, women encountered procedural impediments against going to the court and consequently their fathers, brothers or sons had to act on their behalf, thus strengthening gender hierarchy. On the other hand, these constraints produced different strategies

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[73] Maya Shatzmiller, *Her Day in Court* (2007), Haim Gerber, *State, Society and Law in Islam: Ottoman Law in Comparative Perspectives* (Albany: State University of New York Press, 1994).

[74] Judith Djamour, *The Muslim Matrimonial Court in Singapore* (London: Athlone, 1966), Ron Shaham, *Family and the Courts in Modern Egypt: A Study Based on Decisions by the Shari'a Courts 1900-1955* (Leiden: E.J. Brill, 2007) and Lynn Welchman, *Beyond the Code: Muslim Family Law and the Shari'a Judiciary in the Palestinian West Bank* (The Hague: Kluwer International Law, 2000).

[75] Aharon Layish, *Divorce in the Libyan Family: A Study based on the Sijils of the Shari'a Courts of Ajdabiyaa and Kufra* (New York: New York University Press, 1991).

[76] Tucker, *In the House of the Law* (1998).

that women pursued to resolve their legal problems, thus empowering them indirectly.[77] The history of the Islamic court in late Ottoman Palestine offers a different picture of Islamic law, legal culture, and modernity. The court in late Ottoman Palestine was not inimical to modern reforms, as the term "kadi-justice" coined by Max Weber implies, because, among other things, it assigned professional attorneys (*wakil da'awi*) to support its operation.[78]

Several studies of religious courts and divorce have also been carried out by anthropologists. Hildred Geertz, for example, was the first anthropologist to study the Javanese family, in which marriage and divorce were integrally connected to the Javanese kinship system and the system of gender.[79] One salient feature of marriage at the time she conducted her research was that parents, not the bride and groom, arranged most marriages; consequently, divorce and re-marriage were not uncommon.[80] The percentage of divorces to marriages was considerably high; it reached 45.0% in 1943, 52.0% in 1952 and 47.2% in 1953.[81] However, what is lacking in Geertz's analysis pertains to her explanation of the laws that regulated marriage and divorce, a point that anthropologist Hisako Nakamura (1983) also emphasizes.[82] Nakamura identified Geertz's mistakes in understanding the Islamic law of divorce on four levels: administrative, institutional, social, and personal.[83] Unlike Geertz, who begins her analysis with the concept of kinship, Nakamura begins her anthropological study by exploring the normative Islamic legal doctrines of divorce and looking at the ways in which these doctrines

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[77] Pierce, *Morality Tales*, p. 2.

[78] Iris Agmon, *Family and Court: Legal Culture and Modernity in Late Ottoman Palestine* (New York: Syracuse University Press, 2006), p. 169-170.

[79] Hildred Geertz, *The Javanese Family: A Study of Kinship and Socialization* (New York: The Free Press, 1961).

[80] Masri Singarimbun and Chris Manning, "Marriage and Divorce in Mojolama," *Indonesia*, 17 (April 1974): 67-82.

[81] Geertz, *The Javanese Family*, p. 69.

[82] Hisako Nakamura, *Divorce in Java: A Study of the Dissolution of Marriage among Javanese Muslims* (Yogyakarta: Gadjah Mada University Press, 1983).

[83] *Ibid*., p. 102-16.

influenced marriage and divorce procedures at various institutional sites such as at marriage counseling and registration offices (BP4 and KUA) and the religious court (PA).

Michael Peletz, who worked on Malaysian Islamic courts, questions the validity of the Weberian thesis about irrationality underlying Islamic judicial practice. Peletz examines the cultural and political economy of Malaysian Islamic courts in the context of the global discourses of modernity, globalization, and "Asian values."[84] He argues that Islamic courts in Malaysia promote "a certain type of modernity and civil society that is characteristically Asian and Malaysian."[85] Ziba Mir-Hosseini's research compares courts in Iran and Morocco and finds differences between them in the patterns of divorce and the use of the courts. While in Iran marriage breakdowns frequently occur among the middle and upper classes, in Morocco marriage is most fragile among the lower classes.[86] While in Iran there are no significant class and gender differences amongst people who go to court, in Morocco mostly women from the lower strata resort to court to file claims for maintenance.[87] Susan Hirsch's ethnographic work examines discourses of dispute in an Islamic court in Kenya and analyzes how such discourses reshape notions of gender through legal processes. Drawing on the theory of gender indexing, which asserts that "complexes of speech features (e.g., styles or genre) that are culturally associated with gendered behavior index, or point to, gender when produced by speakers," Hirsch underlines the social creativity of language and argues that gender notions are partly constituted through interactional speech among disputants.[88] An ethnographic study of Islamic courts in Zanzibar by Erin Stiles investigates how court actors, namely judges, clerks, and

[84] Peletz, *Islamic Modern*, p. 3.
[85] *Ibid*., p. 278.
[86] Mir-Hosseini, *Marriage on Trial*, p. 194.
[87] *Ibid.*
[88] Susan F. Hirsch, *Pronouncing and Persevering: Gender and the Discourses of Disputing in an African Islamic Court* (Chicago and London: The University of Chicago Press, 1998), p. 5.

litigants, understand Islamic law and how the court produces legal documents.[89] Stiles focuses on the disputes brought to the court, an approach that she believes will offer a better exposition of how judicial reasoning takes place. Although these studies deal with Islamic courts and some of them focus on divorce, they do not pose specific questions regarding Islamic law or examine the application of Islamic law, except for Mir-Hosseini's.[90] By contrast, the present study focuses on *gugat* divorce and examines the differences between such divorces and other categories of divorce in Islamic law as applied in Indonesia.

As for studies focusing on Indonesia specifically, religious courts in Indonesia have drawn wide attention from scholars from different disciplines, ranging from religious and Islamic studies, to law, politics, anthropology, and history. Daniel S. Lev is interested in why Islamic courts in Indonesia are able to survive and even grow stronger while in other countries Islamic courts have been constricted or abolished.[91] According to him, the answer lies in the politics of Islamic conservatism that provides the ground upon which the legal institution builds. He also examines the institutional development of the court and its role in coping with the issues of divorce and inheritance, the two legal fields that the court mostly dealt with in the 1970s. Drawing on Harris-Jenkins' perspectives of judicial professionalism and reform and Weber's theory of bureaucracy, Nur Fadhil Lubis explores the development of religious courts from the late colonial era to the New Order period, focusing on the court's increasing professionalism and institutional and bureaucratic improvements.[92] It was during the New Order period that religious courts gained official legal status and unification in their titles and jurisdictions in Indonesia.

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[89] Stiles, *An Islamic Court in Context* (2008).
[90] Mir-Hosseini, *Marriage on Trial* (1993).
[91] Lev, *Islamic Court in Indonesia.* p. ix.
[92] Nur Ahmad Fadil Lubis, "Islamic Justice in Transition: A Socio-Legal Study of the *Agama* Court Judges in Indonesia," *PhD Dissertation* (Los Angeles: University of California, 1994).

This marks the end of the legacy of the colonial policy on Islam that made religious courts inferior *vis a vis* other courts in the Indonesian legal and judiciary system.

Mark E. Cammack focuses on the enactment of the Religious Judicature Act of 1989 as a turning point in the development of religious courts and the institutionalization of Islamic law in Indonesia.[93] This law transformed religious courts into a modern judiciary and integrated them into the national judiciary system under the Supreme Court, a process that came to fruition between 1999 and 2004.[94] John Bowen is concerned with religious courts as a domain where public reasoning regarding religion, law, and politics are exercised. He examines how members of a plural, multi-cultural society manipulate the law in the context of legal pluralism to regulate their lives and how such contestation influences the notion of the nation-state.[95] In his study, the issues of inheritance and interreligious marriage that Indonesians contest at local and national levels exemplify the intertwining of Islamic public reasoning and customary and state laws. Kate O'Shaughnessy compares the data of divorce acquired from both civil and religious courts and approaches divorce cases as micro histories reflecting the relations between gender norms and the state. Her work specifically examines arguments over the Marriage Law of 1974 and women's responses to this law.[96] Euis Nurlaelawati's work is the most recent study of religious courts in Indonesia; she investigates the use of the 1991 Compilation of Islamic law by judges to adjudicate disputes brought before them. Her findings show that at present many judges refer to classical Islamic legal texts when they do not find the answer to the disputes they handle in the

[93] Mark E. Cammack, "Islamic Law in Indonesia's New Order," *International and Comparative Law Quarterly*. 38:53, (1989): 53-73.

[94] Cammack, "The Indonesian Islamic Judiciary," p. 146-69.

[95] John R. Bowen, *Islam, Law and Equality in Indonesia: An Anthropology of Public Reasoning* (Cambridge: Cambridge University Press, 2003).

[96] Kate O'Shaughnessy, *Gender, State and Social Power in Contemporary Indonesia: Divorce and Marriage Law* (London and New York: Routledge, 2009).

Compilation of Islamic law.[97] This is one of the ways in which judges help preserve the Islamic identity of the court.[98]

Two recent publications on the incorporation of Sharia law into the state legal system in Indonesia and Islamic divorce law in Indonesia have addressed *gugat* divorce. However, neither has examined the phenomenon of rising *gugat* divorce rates nor have they regarded this phenomenon as an entry point to reveal the implementation of the Islamic law of divorce and the nature of the social changes that influence it. Jan Michiel Otto discusses how Islamic law, including divorce, and its current developments are integrated into state law. He explores the normative legal foundations and sources of *gugat* divorce laid down in state laws, such as the Marriage Law of 1974 and its general regulation of 1975.[99] Unlike Otto's approach, Cammack, Donovan and Heaton's approach to divorce is textual and historical. They explain various categories of the dissolution of marriage through which wives can pursue a divorce, such as *taklik talak, fasakh,* and *syiqaq,* as these are outlined in the Indonesian marriage law. Then they examine the ways in which these categories have been applied in religious courts in recent years.[100] My ethnographic work focuses on *gugat* divorce and highlights the differences of *gugat* from previous types of female divorce. As I will explain, former categories and procedures of female divorce are no longer used. Moreover the data of these two previous studies are mainly based on court documents, not on the litigants' firsthand experience of divorce and empirical observation from the courtroom, as I have done.

Scholars have also conducted research on various legal issues in Lombok. However, none of this work has dealt with *gugat* divorce in the religious court. None of these researchers has

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[97] Nurlaelawati, *Modernization, Tradition and Identity* (2010).
[98] *Ibid*., p. 222.
[99] Otto, "Sharia and National Law in Indonesia," p. 433-490.
[100] Mark E. Cammack, Helen Denovan and Tim B. Heaton, "Islamic Divorce Law and Practice in Indonesia," in Feener and Cammack (eds.), *Islamic law in contemporary Indonesia,* p. 100-127.

worked on religious courts in Lombok, asking how the law regarding a specific kind of divorce is executed and contested and how social change shapes such contestation. Han Hädergal's and Alfons van der Kraan's works focus on the history of Lombok prior to the twentieth century, describing the conflicts and interactions between the Sasaks and the Balinese and between them with the Dutch.[101] M. Cameron Hay's research is concerned with general health issues on the island and the role of traditional female healers in coping with illness and negotiating life and death among the rural Sasak people. [102] Linda Bennett focuses on the formation of sexual subjectivity of single women in urban areas in Mataram, Lombok and argues that Islam is not the sole ideology that has influenced such attitudes. She maintains that cultural factors and the personal experiences of women also shape their perception of and approach to sexuality, courtship, and reproductive health issues. [103]

Sven Cederroth and Leena Avonius discuss vernacular Islam in northern Lombok called *wetu telu*, in contrast to orthodox Islam called *waktu lima*, which covers the majority of Muslims in Lombok. While Cederroth focuses on the beliefs, cosmology, and ritual practices of *wetu telu*,[104] Leena Avonious examines the implications of the 1998 legal reform and administrative decentralization in Indonesia on the reconstitution and re-empowerment of local customs, such

[101] Han Hädergal, *Hindu Rulers, Muslim Subjects: Lombok and Bali in the Seventeenth and Eighteenth Centuries* (Bangkok: White Lotus, 2001) and Alfons van der Kraan, *Lombok: Conquest, Colonization and Underdevelopment 1870-1940* (Singapore: Heinemann, 1980).

[102] M. Cameron Hay, *Remembering to Live: Illness at the Intersection of Anxiety and Knowledge in Rural Indonesia* (Ann Arbor: The University of Michigan Press, 2002) and "Women Standing between Life and Death: Fate, Agency, and the Healers in Lombok," in Lyn Parker (ed.), *The Agencies of Women in Asia* (Singapore: Marshall Cavendish International, 2004), p. 26-61.

[103] Linda Rae Bennet, *Women, Islam and Modernity: Single Women, Sexuality and Reproductive Health in Contemporary Indonesia* (London: RoutledgeCurzon, 2005).

[104] Sven Cederroth, *The Spell of the Ancestors and the Power of Mekkah: A Sasak Community on Lombok* (Göteborg, Sweden: Vasastadens Bokbinderl, 1981) and "Perceptions of Sasak Identity," in Michael Hitchcock and Victor T. King (eds.), *Images of Malay-Indonesian Identity* (Kuala Lumpur: Oxford University Press, 1997), p 161-75.

as *wetu telu*, as an important aspect for development in Post-New Order Lombok.[105] In another study, Cederroth compares the social status of women from a traditional village who follow *adat* rules and women from another village who follow orthodox Islam where divorce, remarriage, and polygamy frequently occurred. Cederroth found that the women in the traditional village enjoyed less freedom in marriage because of strict *adat* rules on marriage. However, *adat* prevented a high rate of divorce and limited the practice of polygamy in the traditional village. [106]

Jocelyn Grace's study explores the ways in which women negotiate divorce and polygamy in eastern Lombok. She states that there was no unified pattern of negotiation among the women on these issues and "their attitudes about marriage partners, polygamy, and divorce are shaped in varying ways by local interpretations of the law and ideology of *adat*, Islam, and the state."[107] In her ethnographic study of polygamy in the *pesantren* of East Lombok, Bianca J. Smith found that women used a range of magical forces and prayers that they had learned from a local Muslim religious scholar (*tuan guru),* who himself practiced polygamy, to either embrace polygamous marriage or reject men who wanted them to be their second wives.[108] Wini Tamtiari investigated the causes of the high incidence of domestic violence in four villages in East Lombok. According to her, poverty, low education, early age of marriage, and patriarchy contribute to the violence. The establishment of local sanctions based on the *adat* rule for punishing violence (*awiq-awiq*) did not successfully reduce the problem due to the non-formal adjudication of custom and the lack of agreement among the people about this rule and its

[105] Leena Avonius, "Reforming Wetu Telu: Islam, Adat and the Promises of Regionalism in Post-New Order Lombok," *PhD Dissertation* (Leiden: Leiden University, 2004).

[106] Cederroth, "Islam and Adat," p. 160-71.

[107] Grace, "Sasak Women Negotiating Marriage," p. 14.

[108] Bianca J. Smith, "Stealing Women, Stealing Men: Co-creating Cultures of Polygamy in a *Pesantren* Community in Eastern Indonesia," *Journal of International Women's Studies,* Vol. 11, No. 1 (November 2009): 189-207.

sanctions.[109] Two recent studies on Lombok have been conducted by Jeremy Kingsley and Maria Platt. While Kingsley focuses on communal conflicts and the role of local religious authorities (*tuan guru*) in conflict management,[110] Platt examines the agency of rural Sasak women in arranging marriages.[111]

Unlike most of these other scholars, I situate my research within the scholarly debates on Islamic courts and divorce. All of the works that I have briefly reviewed above are rich resources. However, my own research differs from them in some important respects. First, my project is not primarily a textual study of divorce, although I do not completely disregard the normative and textual bases of divorce laws. Second, my project is not a chronological study of divorce occurring at particular historical junctures or in a certain period of the past. Instead, I focus on recent developments. Third, thematically, I focus on a specific kind of divorce, one that is petitioned by the wife before the religious court.

The present work is an ethnographic study of Islamic courts and divorce in that it bears some similarities to studies of Islamic courts and divorce conducted by anthropologists. I also use some of the theories that scholars in the anthropology of law and Islamic legal studies have introduced. However, I focus on a different perspective of divorce, emphasizing factors such as legal awareness and gender and power relations. I view *gugat* divorce as a window to understand recent social changes in contemporary Indonesian Muslim society and to examine how these changes have influenced and reshaped the Islamic law of divorce in Indonesia. This approach provides an empirical account of divorce and thus enhances previous textual studies of divorce. It considers practice a pivotal aspect in understanding Islamic law. Thus, I situate myself

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[109] Tamtiari, *Awig-Awig: Melindungi Perempuan* (2005).

[110] Jeremy K. Kingsley, "*Tuan Guru*, Community and Conflict," *PhD Dissertation* (Melbourne: The University of Melbourne, 2010).

[111] Maria Platt, "Patriarchal Institution and Women's Agency in Indonesian Marriages: Sasak Women Navigating Dynamic of Marital Continums," *PhD Dissertation* (Monash, Australia: La Trobe University, 2010).

between two methodological poles: between those who have been trained primarily in Islamic Studies and Islamic law and those who have primarily come from anthropology and gender studies backgrounds.

E. Theoretical Approach and Methodology

A. Theoretical Approach: Scholars in the field of anthropology have developed theories of law, power and gender. Scholars of Islamic law have introduced perspectives on the historicity and reform of Islamic law. Both approaches provide useful theoretical frameworks for my research. In this dissertation, I use the perspectives of law and power,[112] gender and legal discourse,[113] and legal awareness[114] as my main frameworks to analyze the *gugat* divorce phenomenon in Indonesian religious courts. This phenomenon can also be explained from the perspective of *siyāsa shari'yya* (Islamic legal policy),[115] since the state's initiative to codify certain aspects of Islamic law relating to personal status and family matters has altered the nature of Shari'a law. These changes have both increased the influence of formal Islamic law[116] and have reconfigured women's legal status. A historical perspective suggests that Islamic law is not static but develops in accordance with socio-historical challenges that influence the ways in which Muslims perceive and practice it.[117]

In an edited critical work on the study of law, June Starr and Jane Collier discuss how the law encodes unbalanced power relations among legal subjects and how an historical approach to

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[112] Lazarus-Black and. Hirsch (eds.), *Contested States: Law, Hegemony and Resistance* (1994) and June Starr and Jane F. Collier (eds.), *History and Power in the Study of* Law (1989).

[113] Hirsch, *Pronouncing and Persevering* (1998).

[114] Merry, *Getting Justice and Getting Even* (1990).

[115] John L. Esposito, *Women in Muslim Family Law* (New York: Syracuse University Press, 2001) and Mohammad Hashim Kamali, *Shari'a Law: An Introduction* (Oxford: One World, 2008).

[116] Sami Zubaida, *Law and Power in the Islamic World* (London and New York: I.B. Tauris, 2003).

[117] Wael B. Hallaq, *Shari'a: Theory, Practice, Transformation* (Cambridge, UK: Cambridge University Press, 2009), An-Na'im, *Islamic Family Law in a Changing World* (2002) and Vikør, *Between God and the Sultan* (2005).

the law helps one understand the operation of the law and the limits of its power.[118] Their work attempts to address the operation of law and its institutions and how they interact with broader social interests, such as politics, economy, ideology, and class in diverse historical contexts. Concepts from this work that are relevant to my research include "asymmetrical power relations and legal change" and "legal ideas and processes that shape and change the dynamics of relations among groups."[119] Starr and Collier remind us that "legal orders should not be treated as closed cultural systems that one group can impose on another, but rather as 'codes,' discourses, and languages in which people pursue their varying and often antagonistic interests."[120]

In this regard, law creates hegemony and resistance simultaneously. Susan Hirsch and Mindie Lazarus-Black propose a model for the analysis of law and power relations, which often act paradoxically. They conceive of power as "fluid and dynamic, constitutive of social interactions, and embedded materially and symbolically in legal processes."[121] Following Michel Foucault, they do not define power as sui generis but as fluid, contested, and exercised.[122] In this understanding, "law entails power that not only establishes hegemony but also stimulates oppositional discourses."[123] On one hand, the law requires people to accept and follow its commands to behave in certain ways or to do one thing while forbidding another. Law thus imposes order from the top. On the other hand, people use the law and its institutions such as courts to resist domination. Hirsch and Lazarus-Black note that "women often experience this paradox of law since many of them live under multiple dominations, some of which are created by law; however, the law simultaneously empowers them to contest power and gender biases."[124]

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[118] Starr and Collier (eds.), *History and Power in the Study of Law* (1989).
[119] *Ibid*., p. 6-14.
[120] *Ibid*., p. 9.
[121] Lazarus-Black and Hirsch (eds.), *Contested States*, p. 1-2.
[122] *Ibid*., p. 3.
[123] *Ibid*., p. 9.
[124] *Ibid*., p. 21.

In another work, Hirsch examines through discourses of disputation in a Kenyan religious court the ways in which women challenge religious and gender norms that require them to be obedient and patient when their husbands repudiate them.[125] These women come to the Islamic court to relate their narratives of domestic conflicts, an attitude that violates gender norms that require women to be silent regarding marital conflicts. Recourse to the court has led gender roles to be "made, remade and transformed in fundamental ways through legal institutions and the discourse of disputing."[126]

I have found these perspectives helpful in investigating law, power and attitudes towards gender in *gugat* divorce in Indonesia. The divorce rate among Muslims in Indonesia is very high. However, divorce remains discursively and practically associated with men's privilege and power in classical Islamic legal discourses. As a result, women tend to be regarded as passive legal subjects in the works of classical Muslim jurists. Therefore, the rising number of divorce suits filed by wives has created a rupture in the perception of divorce in Indonesia. In my study, I situate this phenomenon in the current history of Indonesian Islamic law influenced by the social context of emerging legal awareness among Muslims, especially by women, in their increasing access to the courts, shifting power and gender relations, and changing the boundaries of public and private domains. Although some provisions in the Marital Law No. 1/1974 and the Islamic law of marriage and divorce, laid down in Religious Judicature Act No. 7/1989 and Compilation of Islamic Law No. 1/1991, promote equity for men and women,[127] these laws still enshrine elements of patriarchy. They assign gender identity, rights, and obligations for men and women differently and give men a specific authority that women do not possess. However, these laws

[125] Hirsch, *Pronouncing and Persevering* (1998).
[126] *Ibid*., p. 3.
[127] Adriaan Bedner and Stijn van Huis, "Plurality of Marriage Law and Marriage Registration for Muslims in Indonesia: A Plea of Pragmatism," *Utrecth Law Review,* 6:2 (June, 2010): 175-91.

have also triggered oppositional discourses. The right of women to be present in court to petition divorce, to challenge men's prerogative to the right of divorce, and to break down gender ideology and public and private boundaries, all imply a power struggle and an interplay between gender-based hegemony and an understanding of law as a locus of resistance.

Sally Merry defines legal awareness as "the ways people understand and use law…expressed by the act of going to court as well as by talks about rights and entitlements."[128] This awareness results from various factors, such as individual understanding of the law and familiarity with legal rights that forge people's experience and response to the law.[129] Such awareness cannot be divorced from institutional changes and the state's policy on the law. Merry explains that legal reforms in twentieth-century America "contributed to the creation of a new understanding of the relationship between the legal system and the disadvantaged, and more broadly, between the lower-class individual and the state."[130] Similar to this American experience, the reform of religious courts in Indonesia has increased women's awareness to claim their rights, seek justice, and contest gender biases through the courts. The reforms of the religious courts have circumscribed asymmetrical power relations between spouses, although they are still preserved in the current laws of marriage and divorce.

In this study, I am not interested in defining Islamic law in general, but in critically examining how the law works and who contests it. I want to avoid an "essentialist approach" that tends to use Islamic legal doctrines and rules as a guideline to conceive current practices of the law,[131] as if legal practices are solely determined by the normative doctrines of the law. On the

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[128] Merry, *Getting Justice and Getting Even,* p. 5.

[129] Patricia Ewick and Susan S. Silbey, *The Common Place of Law* (Chicago: The University of Chicago Press, 1998).

[130] Merry, *Getting Justice and Getting Even,* p. 78.

[131] Baudouin Dupret, "The Practice of Judging: The Egyptian Judiciary at Work in a Personal Status Law," in Khalid Muhammad Mas'ud, Rudolph Peters and David S. Power (eds.), *Dispensing Justice in Islam: Qadis and*

contrary, I try to reveal how social factors reshape contemporary divorce practices that are distinguished from the practices described in the classical textual sources. I use the empirical approach of ethnography as a supplement to textual scholarly debates on Islamic law. Law is not a closed system that is immune from other social discourses. According to Baudouin Dupret, "A rule does not exist for itself and it is not followed because it is there. A rule exists only as the incorporation of a comprehension which one considers being adequate to others."[132] This does not mean, however, that I completely avoid the normative aspect of classical Islamic law. This is because, as a recent study has revealed, judges in Indonesian religious courts still refer to classical Muslim jurists' works to adjudicate legal disputes brought before them.[133] In general, Islamic law is best approached as a discourse, defined in the broadest sense, which includes norms, codes, language, interpretation, courtroom debates, and practices.[134]

B. Methodology: This study is based on twelve months of fieldwork in Lombok, Indonesia, from November 2010 through October 2011. I conducted my research mainly in the Religious Court of Praya, Central Lombok, and in three other religious courts on the island. Although focusing primarily on the district religious court of Central Lombok, I also attended other religious courts in Mataram, East Lombok and West Lombok. Other sites that I dealt with were the office of marriage registration (*Kantor Urusan Agama/KUA*) and Islamic schools (*pesantren* and *madrasa*) in this central region as well as the Religious High/Appellate Court (*Pengadilan Tinggi Agama/PTA*) in Mataram. While in the courts, I observed the daily routine of judicial practices and consulted data on legal cases received by these courts. At the office of the

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their Judgments (Leiden: E.J. Brill, 2006), p. 143-68 and *ibid*, "What is Islamic Law," *Theory, Culture and Society*, 24:2 (2007): 80-100.

[132] Jörn Tielmann,"Book Review Baudouin Dupret: Au nom de quell droit. Répertoires juridiques at reference religieuse dans la société égyptienne musulmane contemporaraine," *Die Welt des Islams,* 46 (2006): 92.

[133] Nurlaelawati, *Modernization, Tradition and Identity* (2010).

[134] Jorgen S. Nielsen and Lisbet Christoffersen (eds.), *Sharia as Discourse: Legal Tradition and the Encounter with Europe* (Burlington: Asghate, 2010).

marriage registrar I obtained data on the statistics of marriage and the role of this office in offering advice to conflicting spouses. At Islamic schools, I talked to *tuan guru* about *fiqh* and divorce from the perspective of *fiqh* and observed Islamic religious learning activities (*pengajian*) to understand how Islamic subjects are taught to students and the implication of this for the formation of *fiqh*-minded discourses on Islamic family law in Lombok. I also went to rural areas and observed circuit court sessions conducted by the religious courts at remote village areas. The circuit court serves to provide easier access to litigants in remote areas, who have limited transportation to the main court, which is situated in town.

My principal methods of data collection included courtroom observation, interviews, and group discussions. I also consulted court archives and documents and gathered other related printed materials, such as newspapers, reports, and journals regarding my topic of investigation. In the courtroom, I observed and took notes on the dialogues between judges and litigants. I watched and listened carefully to what these actors did and said. When I had questions about particular issues that occurred during the hearings, I asked the judges for clarification at the end of divorce hearings or other sessions. Outside the courtroom, I also talked to judges and clerks about court procedures and their experience of handling cases.

Although I have a limited understanding of the Sasak language of Lombok, I was able speak in Bahasa Indonesia with Sasak people, the indigenous population of Lombok, because most of them also speak Indonesian. Regarding my subjectivity as a male researcher and sensitivity to the topic that I was concerned with, I invited female colleagues or translators to accompany and help me during my interviews with female informants, especially in rural areas where gender segregation and male-female interactions are subject to rather strict ethical-social norms. At the end of my field research, I discussed my provisional findings with the parties I

worked with and with other individuals interested in my project in order to get critical comments and valuable feedback from them.

Most of my conversations with litigants were carried out in the court either prior to or upon the end of the hearing sessions. Although not all litigants were willing to share their stories, many were willing to talk with me. Often, they initiated the conversation since they knew that I was present most the time when their cases were heard. Since divorce and other cases involved disputing parties, I seldom talked to one party when the other party was present. I did not use structured questions during these discussions but listened to the litigants' stories. Only when litigants' narrations were unclear did I pose questions to them for further clarification. Once I conducted a focus group discussion with members of women-headed families (*Pekka*) about their experiences in accessing the court. During this discussion some of the women shared their marriage grievances with me.

Although I attended hundreds of hearings of divorce cases, I specifically followed 137 completed cases from the beginning until the issuance of court decisions. These cases consisted of 125 *gugat* (female-initiated) divorces and 12 *talak* (male-initiated) divorces. This number roughly represents one third of the total annual cases of each divorce category at the Praya religious court. I also collected information regarding the plaintiffs' demographic backgrounds, such as social status or roles, age, education, and occupation. From some litigants, I gained detailed information about the origin of their disputes, which were not revealed in courtroom hearings or were not written in the petitions and court decisions. In addition, I attended at least one complete case of each of other types of non-divorce cases, such as child custodianship, validation of unrecorded marriages, inheritance and substitute marriage guardianship, which occurred during the course of my fieldwork. This was important in order to analyze the work of

the religious courts in general and to examine the pattern and logic of Islamic legal reasoning in particular.

My ethnographic fieldwork also included the collection and analysis of textual and printed data regarding religious court decisions.[135] These collections contain rich information of past legal cases and the ways in which the courts judged them. The state has compiled records of past court decisions on divorce and other cases across the country, which cover periods as early as the end of the nineteenth century. These are important sources of information that help reveal the revolutionary nature of judicial divorce initiated by women in contemporary Indonesia. I compared past judicial divorces with more recent data to elucidate the state's and the religious court's changing approaches to divorce. These court archives, for example, demonstrate that former types of female judicial divorce, such as *khuluk*, *fasakh*, *taklik talak*, and *syiqaq* are no longer used in contemporary courts.

F. Chapter Outline

Chapter One of this dissertation offers a historical analysis of the Indonesian religious courts and their contexts and challenges in Lombok. It examines the courts as the domain where Islamic law is applied and debated and to what extent it is enforced. Although traditionalist Muslims, modernist Muslims and Muslim women activists engage in debates over the ideal form of Islamic law to be applied in Indonesian religious courts, they are unable to determine which Islamic laws should be adjudicated at the religious courts because the state controls the court's jurisdiction. This chapter also provides the historical and demographical contexts of Lombok, where Islam and local custom (*adat*) play complementary roles in regulating the affairs of the

[135] On the ethnographic method that use textual-printed data, see Brinkley Messick, "Shari'a Ethnography," in Bearman, Heinrichs and Weiss (eds.), *The Law Applied*, p. 173-193.

Muslim family, such as marriage and divorce. In addition, this chapter details the operation of the religious courts at the local and regional levels and analyses the cultural contexts of Lombok that influence the court. It also discusses conflicts that the religious courts encounter, especially from local Muslim religious scholars (*tuan guru*). A narrative of a conflict between a judge and a *tuan guru* during the occasion of a circuit court hearing is presented to illustrate the contestation of Islamic legal authority and the right of the state to define the nature of Islamic practice.

Chapter Two focuses on judicial practices at the religious court of Central Lombok and details its competence and its jurisdiction. The chapter describes the physical layout of the courthouse and describes court personnel, judges and clerks, the procedure and categories of litigation as well as access to the court by litigants. It specifically analyses the court's lack of success in convincing conflicting parties to reconcile. The chapter also offers data on legal cases received by the court over the last few years. By presenting different types of legal cases, such as validation of unregistered marriage (*isbat nikah*), inheritance (*waris*), polygamy and substitute marriage guardianship (*wali pengganti*), the chapter examines the principles of Islamic legal reasoning as they are reflected in these cases and the ways in which judges decide them. In addition, the chapter presents data regarding *talak* and *gugat* divorces and the litigants' backgrounds. The primary concern of the chapter is to provide an analysis of litigants' first-hand experiences of divorce, the strategies that they use at court to settle their marital disputes, and their reasons for divorce.

Chapter Three examines the impact of the introduction of Muslim family codes of marriage and divorce in the state laws of Indonesia. It focuses on the shifting boundaries of Islamic law and state law, as well as the changing relations between Muslim spouses. For litigants, judicial divorce is sought for different objectives. Cases involving extrajudicial triple

divorce (*ṭalāq bā'in kubra* or *talak tiga*) are presented to illustrate questions about the legal limits of divorce in Islamic and Indonesian law. These cases show that Muslims in Lombok tend to resolve disputes over extrajudicial triple divorce on the basis of the classical Islamic legal perspectives that they acquire in Islamic schools. Although most judges do not acknowledge the validity of extrajudicial divorce, they hold different opinions on this matter. Meanwhile, litigants might use any law or mechanism to settle their extrajudicial divorce disputes in the most convenient way. The last part of the chapter analyses contradictions and paradoxes of Islamic law in Indonesia. The state interpretation of Islamic law constrains women's agency while at the same time offers them the power to resist a law that still preserves gender biases and elements of patriarchy. Several divorce cases are presented to illustrate this paradox. Women also use the court to subvert hegemonic local practices of Islamic law, such as unilateral male extrajudicial repudiation and polygamy.

Chapter Four relies mainly on data from religious court documents, including pre-reform court decisions on divorce, to investigate the limits of the law and judicial discretion, the evolution of Islamic divorce laws in Indonesia, and the normative grounds for the changing attitudes of the religious courts to divorce. Religious court decisions on divorce reveal that *fiqh* and *adat* are complementary sources to state law that judges still consider when the current law codes lack clarity. While in the past *fiqh* was the dominant source of reference for judges, its authority has now diminished since the state has replaced it with modern codes. Current codes still maintain many of the classical Islamic divorce rulings but rework them in a way that is relevant to the state's objective of court reform and the unification of the law. The chapter presents a number of former (pre-reform) court decisions on judicial divorce to demonstrate the difference between former and present practices of male repudiation (*talak*). It also presents a

number of divorce cases that were formerly initiated by women through various mechanisms, such as *khuluk*, *fasakh*, *syiqaq* and *taklik talak*. Modern Muslim marriage and divorce codes have collapsed all of these procedures into *gugat*. This demonstrates that the reinterpretation of Shari'a law by the state and its application at the religious courts have changed the role of gender in Muslim divorce practices and have allowed women to access the court for divorce more easily than in the past.

CHAPTER ONE

RELIGIOUS COURTS: HISTORY, CONTEXT AND CHALLENGE IN LOMBOK

Chapter one examines three aspects of religious courts: history, contexts and challenges. Before discussing the religious courts in Lombok, the chapter first analyzes the history and phases of religious court development and reform in Indonesia. It specifically looks at religious courts as an entry point to understand the relations between the state and Islam, and the extent to which Islamic law has been realized, renegotiated and contested in Indonesia.

Turning to the religious court in Lombok, the second part of the chapter elucidates the socio-historical contexts in which the religious court operates at the local level. Since the domain of the religious court is mainly concerned with Muslim family law, and because this study particularly focuses on marital dissolution, the second part of this chapter explores the local custom of marital elopement (*merarik/selarian*), its norms and practices, as a prelude to understanding marital disputes and judicial divorce on the island. This part aims to show how Islam and local custom (*adat*), as they are constituted in Lombok's history and culture, exert strong influences on, and become a substantial ground for, customary marriage. Consequently, the religious courts, as the main alternative institution where marital disputes are adjudicated and resolved, have to grapple with this issue.

Although the courts have been modernized and equipped with sophisticated technologies and computer and internet-based services—and thus have significantly reduced their previous technical and administrative inadequacies—their substantive rules and authority are being questioned as a result of different interpretations of Islamic law between representatives of the

state (the judges) and local Muslim religious scholars (*tuan guru*). The third part of this chapter offers a narrative of a fierce debate between a judge and a local prominent Muslim figure during a circuit court hearing to highlight the contestation of authority between Islamic religious scholars and the judges. It raises the question: "Why do local *'ulamā'* oppose the courts and what is the cultural logic of their opposition?" It argues that the established *fiqh* tradition of Islamic institutional learning such as *pesantren* and *madrasa* constitutes the backbone of religious authority in Lombok. It also argues that recourse to *fiqh* literature is important among the local *'ulamā'* and constitutes a prominent basis of local reasoning in dealing with Muslim family disputes. The religious courthouse in Lombok marks a spatial boundary of contestation over authority in Islamic law between local Muslim religious scholars and the court judges.

A) RELIGIOUS COURTS, ISLAMIC LAW AND JUDICIAL REFORM

The existence of religious courts reflects dimensions of struggle over Islam and particularly over Islamic law in Indonesia. Although it is too simplistic to assess this struggle from the standpoint of religious courts alone, the dynamics of religious courts—their changing status, their extending and/or dwindling domain, and the transmutation of the state's substantive law—help to elucidate the relationship between the state and Islam on one hand and the state's efforts to appropriate Islamic law within the Indonesian context on the other. Both the colonial rulers and the modern nation-state of Indonesia faced numerous questions regarding the proper place of Islam and its institutions. For both, the question has been how to properly position Islam and to what extent Islamic norms should be accepted and practiced. These questions affect the religious courts since the courts are considered as the expression of Islamic power and authority.

The modern Islamic struggle is very much concerned with which version of Islamic law should be applied in religious courts. Modernist Muslims tend to adopt reformed Shari'a law while the traditionalists prefer classical Islamic law (*fiqh*), as it was developed by classical-medieval Muslim jurists. Muslim women activists strive to introduce reformed Islamic law imbued with a spirit of gender justice and the eradication or moderation of patriarchal elements in *fiqh*. However, neither modernists nor traditionalists nor Muslim women activists, but the state determines the extent to which Islamic law can be accepted at court. The failure of two recently proposed reforms of Islamic family law, namely the Counter Legal Draft to the Compilation of Islamic Law of 2004 and the Muslim Marriage Law Bill of 2008, constitute discursive battles among Muslims and the state as to how to define Islamic law. The failure of these reforms affirms that the old traditionalist paradigm, enshrined in *fiqh*, has not totally vanished.

The competence of Indonesian religious courts in the period of the Islamic kingdoms (from the middle of fifteenth through eighteenth century) covered a wide jurisdiction but diminished gradually after the Dutch imposed their control over them in 1882. The colonial regime marginalized Islamic courts and made them subservient to the civil courts in 1937, and this situation continued up to and through Indonesian independence. Only after the issuance of the Religious Judicature Act 7/1989 did religious courts achieve an equal status with other tribunals and receive an extended jurisdiction. The next reform took place in 2004, when the religious court was incorporated into the Supreme Court. This policy of judicial centralization ended the politics of dualism, where previously the religious courts were organizationally, financially and administratively supervised by the Department of Religion but were technically guided by the Supreme Court. The religious courts now are under the current centralized supervision of the Supreme Court.

This does not mean, however, that Islamic law has been removed entirely from religious courts and replaced by other legal sources; rather, it is applied and reinterpreted under the framework of the national judiciary system. Interestingly, the competence of the religious courts expanded beyond their conventional domain of family law and now includes Shari'a-based economics and limited aspects of Islamic criminal law, especially in Aceh, Sumatra.[1] This change demonstrates that only after being fully integrated into the state judiciary system has fundamental transformation and development of the Islamic administration of justice unfolded.

1) Religious Courts in the Era of the Islamic Sultanates until the Middle of the Twentieth Century

Religious courts, or their early prototypes of adjudication such as *taḥkīm* (informal appointment of an arbitrator by the disputants to settle their disputes) and *tawliya* (delegation of authority), were inseparable administrative and judicative parts of the Islamic sultanates throughout the Nusantara archipelago, which stretched from Aceh in North Sumatra and Palembang in South Sumatra, to Banten, Cirebon and Mataram in Java, to South Sulawesi and Banjar, Pontianak and Kutai in Kalimantan.[2] According to van de Velde, as quoted by Daniel Lev, Islamic courts had operated in many regions of Java since the sixteenth century,[3] presumably dating back to Demak, which emerged as the first Islamic Sultanate in Java (1490-1550) upon the downfall of Majapahit at the end of the fifteenth century.[4] Although their titles,

[1] Jan Michiel Otto, "Sharia and National Law in Indonesia," in Jan Michiel Otto (ed.), *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present* (Leiden: Leiden University Press, 2010), p. 461-477.

[2] Daniel S. Lev, *Islamic Courts in Indonesia: A Study in the Political Bases of Legal Institutions* (Berkeley: University of California Press, 1972), p. 10 and Euis Nurlaelawati, *Modernization, Tradition and Identity: The Kompilasi Hukum Islam and Legal Practice in the Indonesian Religious Court* (Amsterdam: Amsterdam University Press, 2010), p. 41-42.

[3] Lev, *Islamic Court*, p. 10.

[4] Although Hisyam's study does not particularly examine an earlier period of the Mataram Sultanate, his data suggests that *pangulu* existed in the court of Demak Sultanate in the sixteenth century. *Serat Pancaniti*

structures and competence varied from one sultanate to another, religious courts assumed the same main task, namely administering Islamic justice. In Banten Sultanate, for example, the jurisdiction of the Islamic court covered criminal law, although the implementation of rulings was often substituted by paying fines.[5] The Supreme Court judge, known as *Pakih Najamuddin*, not only guarded and administered Islamic law and appointed religious officials at the lower echelons, but he was also involved in political intrigues and diplomacy.[6]

In the hinterland of Java, when the Central Javanese Mataram Kingdom converted to Islam, Sultan Agung (r. 1613-45) introduced Islamic law and appointed a special officer called *pangulu* who was responsible for supervising religious and judicial affairs.[7] To support the administration of justice, the sultan established the *surambi* court, which was held on the verandah of the grand mosque. Previously this court had always been conducted at the *setinggil* or palace terrace.[8] Like their fellows in Banten, Javanese *pangulus* were well educated in Islamic subjects and were experts in Arabic literature and texts of Islamic law (*fiqh*).[9] The jurisdiction of the *surambi* court included divorce (*cerai*), conditional divorce (*taklek*), reconciliation (*rujuk*), bride-price (*srikawin*), spousal support (*napkah*), alimony, and the rights and obligations of

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manuscript, of the Surakarta Sultanate Library reveals the list of *pangulu* from Demak. See Muhammad Hisyam, *Caught between Three Fires: Penghulu under the Dutch Political Administration 1882-1942* (Jakarta: INIS, 2001), p. 8, 16 and 21.

[5] Martin van Bruinessen, "Shari'a Court, Tarekat and Pesantren and Religious Institutions in the Banten Sultanate," *Archipel* 50 (1995): 171.

[6] *Ibid*., p. 168-172.

[7] John Ball, *Indonesian Legal History 1602-1848* (Sydney: Oughtershaw Press 1982), p. 45.

[8] *Ibid*.

[9] According to Hisyam, the sources used at the Javanese *pangulu* courts were derived mainly from the Shāfi'ī school literature, such as *Muḥarrar* (Javanese: *Mukarror*, Dutch: *Mogharrer*) by al-Rāfi'ī (d.623 H/1226 AD), *Maḥallī* (Javanese: *Makali*) by Aḥmad al-Maḥallī (d. 864 H/1460 AD), *Tuḥfat al-Muḥtāj fī Sharḥ Minhāj al-Ṭālibīn* (Javanese: *Tupah*) by al-Haytamī (d. 973 H/1566 AD), *Fatḥ al-Mu'īn fī Sharḥ Qurrat al-'Ayn* (Javanese: *Patakulmungin*) by al-Malibārī (d. 975 H/1567 AD) and *Fatḥ al-Wahhāb fī Sharḥ Minhāj al-Ṭullāb* (Javanese: *Patakulwahab*) by al-Anṣārī (d. 926 H/1520 AD). See Hisyam, *Caught*, p. 27-28. These are popular literature read in *pesantren*. See Martin van Bruinessen, "*Kitab Kuning*: Books in Arabic Scripts Used in the Pesantren Miliue," in *Bijdragen tot de Taal, Land-en Volkenkunde*, No. 146 Vol. 2/3 (1990): 226-269. There are a numbers of books on Islamic subjects (law [*fiqh*], theology [*tawhid*] and sufism [*tasawwuf*]) written in Javanese language that use Arabic script (*Arab pegon*). One of the objectives of these localized texts was to make them easily accessible for laymen Muslim people. See Saiful Umam, "Localizing Islamic Orthodoxy in Northern Coastal Java in the Late 19th and Early 20th Centuries: A Study of Pegon Islamic Texts," *PhD Dissertation* (Honolulu: University of Hawai'i, 2011).

spouses (*bebekten*).[10] When intending repudiation, a husband was required to come to a local religious official (*ketib*) to pronounce *talak* because the *surambi* court would only hear divorce claims initiated by the wife.[11] Conditional divorce in Indonesia thus had their roots in Sultan Agung's reign.[12] The *surambi* court also adjudicated criminal cases such as injury and murder (*raja tatu* and *rojo pati*) as well as inheritance (*waris*), land endowment (*wakap*), joint property (*gono-gini*) and testaments (*wasiat*).[13] This was more or less the situation of the Muslim judiciary up to the end of the eighteenth century,[14] and was recognized by the Dutch, who refused to interfere in local legal practices.[15]

However, a gradually changing policy toward Islamic courts, as a part of the colonial general policy toward Islam, began as the Dutch colonial administration became fully established at the beginning of the nineteenth century. As colonial rulers, the Dutch were vigilant over any powers and practices that were potentially disruptive to their dominance.[16] A series of revolts against the colonial government in the course of the century led by Muslim leaders further increased the colonial regime's alertness to Islamic resistance.[17] The Dutch displayed an ambiguous stance toward religious courts and steadily reduced their prominence. On the one

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[10] Hisyam, *Caught*, p. 28.

[11] *Ibid*., p. 29.

[12] See Hisako Nakamura, "Conditional Divorce in Indonesia," *Occasional Publications No. 7*, Islamic Legal Studies Program, Harvard Law School (2006), p. 11-17.

[13] Hisyam, *Caught*, p. 29. Milner suggests that Muslim judges (*kadi*) and *fiqh* texts, or some practices that followed the prescription of Islamic law such as avoidance of eating pork, drinking wines and charging interest (*riba*), had existed in Southeast Asian Islamic kingdoms such as in Aceh, Malacca, Kedah, Brunei and Southern Philippine as early as 15th century. Although these institutions or practices do not indicate a comprehensive application of Islamic law, they constitute clear evidence that part of Islamic law was applied in those regions prior to the encroachment of European colonialism. See A.C. Milner, "Islam and the Muslim State," in M.B. Hooker (ed.), *Islam in Southeast Asia* (Leiden: Brill, 1983), p. 23-29.

[14] Unfortunately existing scholarship on the religious courts in Indonesia has focused mainly on Java.

[15] Nurlaelawati, *Modernization*, p. 46. See also Nico Kaptein, "Fatwas as a Uniting Factor in Indonesian History," in Johan H. Meuleman (ed.), *Islam in the Era of Globalization: Muslim Attitudes toward Modernity and Identity* (London and New York: RoutledgeCurzon, 2002), p. 75-76.

[16] Benda discusses at length the foundation of the Dutch colonial policy to Islam. See Harry J. Benda, *The Crescent and the Rising Sun: Indonesian Islam under the Japanese Occupation* (The Hague and Bandung: van Hoeve, 1958), especially chapter one, p. 9-31.

[17] For example, Padri Rebellion in Minangkabau (1821-1838), Tjirebon (1802-1806), Diponegoro (1825-1830) and Banten (1888) wars in Java. *Ibid*., p. 18. Another war in Aceh starting in 1873 and lasting in 1913.

hand, the colonial government issued *Staatsblad* 152/1882, which admitted the existence of religious courts (*priesterrad*/*raad agama*) in each district of Java and Madura and integrated them into the colonial judiciary system. This integration and bureaucratization, as Hisyam has argued, brought about several changes regarding administration, organization, recruitment and procedure, from the indigenous-traditional to the westernized modern judiciary.[18] On the other hand, the position of religious courts was made inferior to civil courts (*landrad*) since they could not execute their own verdicts unless otherwise authorized by the civil courts.[19] This marked the first modernization and co-optation of religious court by the modern secular state.

Another co-optation resulting from ambiguous colonial policy was launched through the issuance of the 1937 *Staatsblaad* No. 610, 638 and 639. These laws authorized the creation of an Islamic appellate court (*Mahkamah Tinggi Islam/Hof voor Islamietische Zaken*) for Java and Madura. It also acknowledged the existence of religious courts in South Kalimantan (*Kerapatan Qadi*) and established an Islamic court of appeal (*Kerapatan Qadi Besar*) in this region.[20] However, the position of customary practices or *adat* was upheld in certain fields as superior to Islamic law. For example, in *Staatblads* 116/1937, all property disputes regarding inheritance and land endowment among Muslims were relegated to the civil courts, not religious courts, and had to be adjudicated by *adat*.[21] This policy incited harsh criticism and objection from the traditionally association of religious court judges and clerks (*Perhimpoenan Pengoeloe dan Pegawainja*/PPDP), who contended that the application of *adat* law in Muslim inheritance cases

[18] Hisyam, *Caught*, p. 65.

[19] Lev, *Islamic Courts*, p. 11, Hisyam, *Caught*, p. 55- 64 and Nurlaelawati, *Modernization*, p. 46. It was stated that the competence of religious courts included matrimonial law but they were not entitled to examine and rule any legal claim in this domain if it entailed payment or transfer of property because the claim should be filed in the civil courts. *Staatsblad* No. 156, Chapter Two (A: 2). Notosusanto reproduced fully the Indonesian version of this ordinance. See Notosusanto, *Organisasi dan Jurisprudensi Pengadilan Agama di Indonesia* (Jogjakarta: Jajasan Badan Penerbit Gadjah Mada, 1963), p. 112.

[20] *Ibid*. p. 124-132.

[21] Lev, *Islamic Court*, p. 19-21, Hisyam, *Caught*, p. 84 and Nurlaelawati, *Modernization*, p. 49.

was traditionally inconsequential.[22] In this objection, the Head of the Islamic Appellate Court Mohammad Adnan demonstrated how an inheritance claim filed in one religious court in Central Java was mistakenly covered by the *adat* law of Blambangan,[23] the easternmost part of East Java, which was the center of a Hindu-Javanese Kingdom in the fourteenth century.[24] However, the colonial government did not rescind the regulation and the *adat* scholars were strongly in support of it.[25] The message of the regulation was obvious: namely maintaining *adat* legitimacy while debasing the authority of the religious courts. This situation continued up until the Japanese occupation of Indonesia (1942-1945) without any significant change.[26] However, the brief Japanese occupation benefited Islamic courts indirectly. The Japanese established *Shumubu* in 1943,[27] which later became the Department of Religious Affairs, to which the administration of religious courts after independence was transferred from the Ministry of Justice.

2) Religious Courts after Independence: Survival and Consolidation

[22] Lev, *Islamic Court*, p. 22-24 and Nurlaelawati, *Modernization*, p. 48.

[23] Adnan also brought six other examples indicating the confusion of *adat* applications in the civil courts and showed it to the government representative G.F. Pijper. These cases stemmed from civil courts in Solo, Rembang, Tegal and Pati in Central Java, Surabaya in East Java and in Ampenan, Lombok. Their dialogue was recorded in PPDP journal *Diwan Resmi*, reproduced in the Noeh and Basiths' book. See Zaini Ahmad Noeh and Abdul Basith Adnan, *Sejarah Singkat Pengadilan Agama Islam di Indonesia* (Surabaya: Bina Ilmu 1983), p.145-153. An excerpt of their dialogue was also presented by Lev. See Lev, *Islamic Court*, p. 23-24.

[24] As Hisyam noted, the objection against the *Staatsblad* rested chiefly on four main points. First, *adat* law varied from one place into another and caused confusion and uncertainty as a source of law. Second, replacing Islamic law of inheritance (a. *farā'iḍ*), which enjoyed a long application among the Muslims, with *adat* was commensurate to substituting religion. Third, religious courts suffered financial losses since most cases involving property claims, from which religious courts obtained income to fund their operation, were taken over by civil courts and, forth, the regulation denigrated the social-religious status of *pangulu*. Hisyam, *Caught*, p. 84-85.

[25] These scholars included Snouck Hurgronje (1857-1936), van Vollenhoven (1874-1933) and Javanese priyayi Soepomo (d. 1958). See Nurlaelawati, *Modernization*, p. 48-49.

[26] The Japanese just renamed religious courts as *Sooryoo Hooin* and the religious appellate court as *Kaikyoo Kootoo. Ibid.*, p. 50.

[27] *Ibid*. See also Lev, *Islamic Court*, 44. For detailed analysis of Islam during the Japanese time in Indonesia, see Benda, *The Crescent and the Rising Sun* (1958).

Regulation 19/1948, drafted by the Ministry of Justice of independent Indonesia, [28] aimed to unify the courts under three judiciaries, namely civil, administrative and military, but was never implemented due to refusal from Muslims and the second Dutch aggression in 1949.[29] A decade later, some provincial governments called for the central government to establish new religious courts in their regions, or if they were already in existence, to admit them legally. The central government responded by issuing Regulation 45/1957 for the creation of religious courts beyond Java, Madura and South Kalimantan.[30]

Judicial Authority Law 14/1970 and Marriage Law 1/1974 illustrate a further phase of religious court reforms. The Judicial Authority Law acknowledged the religious court as one of four fundamental legal tribunals, which terminated the plurality of types of religious courts.[31] The law also expanded the jurisdiction of religious courts. The 1974 Marriage Law extended the domain of the religious courts and granted them more definite jurisdictions than before.[32] According to the Department of Religious Affairs, the caseloads received by the religious courts multiplied tremendously after 1974. The total number of cases were 36,871 in 1975, but dramatically increased to 142,069 and 206,145 in 1976 and 1977 respectively.[33] However,

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[28] Law No.1/1951 was another example in this regard. Lev, *Islamic Court*, p. 64-65.

[29] *Ibid*. See also Nurlaelawati, *Modernization*, p. 51-52. Lukito, however, argues that the politics of legal unification after Independence weakened *adat* courts, which were later erased, rather than the Islamic courts because *adat* courts based on local norms and power, might endanger the principle of the unity of Indonesia. See Ratno Lukito, "Law and Politics in Post-Independence Indonesia: A Case Study of Religious and Adat Court," in Arskal Salim and Azyumardi Azra (eds.), *Shari'a and Politics in Modern Indonesia* (Singapore: ISEAS, 2003), p. 25.

[30] Lev, *Islamic Court*, p. 89. On the Regulation and its explanation, see Noeh and Basith, *Sejarah*, p. 164-173.

[31] Prior to the enactment of the law, the status of the religious courts was based on different laws, such as *Staatblads* No. 152/1882, *Staatblads* No. 116 and 610/1937 and the State Regulation No. 45/1957.

[32] According to *Staatblads* No. 152/1882 and No. 116 and 610/1937, the jurisdiction of religious courts in Java, Madura and South Kalimantan covered nine domains all of which related to matrimonial law. Religious courts in other islands had less competence, but included inheritance (*waris*), land endowment (*wakap*), gift (*sedekah*) and state/community treasury (*baitul mal*). The Marriage Law endowed a wider jurisdiction although it was mostly concerned with matrimonial law. See Departemen Agama, *Standarisasi Pengadilan Agama dan Pengadilan Tinggi Agama* (Jakarta: Direktorat Badan Peradilan Agama, 1983), p. 13-14.

[33] *Ibid*, p. 1.

religious courts still needed the civil court's endorsement of their decisions.[34] This signified the persisting domination of civil courts over religious courts as a legacy of colonial legal policy, which was supported by the secular-nationalists.

The lower status of religious courts as "a second tribunal" in post-Independence Indonesia revealed that the state was still unwilling to fully accept them.[35] However, the consolidation and expansion of religious courts advanced after the enactment of Religious Judicature Act 7/1989, as this era witnessed the restoration of state-Islam relations.[36] This Act granted full independence to the religious courts: civil court endorsement would no longer be needed except in disputes over property rights.[37] This was the last foothold of the civil court in religious court terrain before being removed through the first amendment of the law in 2006.[38] Since then religious courts have rarely been overseen by civil tribunals, and their status became equal to other tribunals after being integrated into the Supreme Court in 2004.

3) Islamic Law and Religious Court Reform

If the change of status and competence of the religious courts illustrate the state's acknowledgement of Islam by the judiciary, the Compilation of Islamic Law by Presidential Instruction 1/1991 illustrates an ongoing endeavor among Muslims to deal with Islamic law in the context of the Islamic tribunal. Indonesian Muslims have strived to discern which, and to

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[34] Article 62 (2) of Marriage Law 1/1974 reads as follow: "every religious court decision needs to be endorsed by a civil/general court."

[35] According to Effendi, the political constellation was fueled by an uneasy relationship between Islam and the state since many Muslims still wanted an Islamic state, an ideology that was questioned by Muslim intellectuals of the 1970s. Bahtiar Effendi, *Islam and State in Indonesia* (Singapore: ISEAS, 2003), p. 151-150.

[36] Effendi clearly mentioned the Religious Judicature Act, along with the permission to use *jilbab* as a school uniform and the birth of Indonesian Muslim Intellectual Association (ICMI), as fruits of the state accommodation to Islam. *Ibid*., p. 151-177.

[37] The 1989 Judicature Act, Article 50 states "should any dispute over an object of property right in marriage, inheritance and endowment claims arise, the civil court would examine and decide it before being implemented by religious courts."

[38] Article 50 (2) of the 2006 First Amendment of the 1989 Religious Judicature Act.

what extent, Islamic laws should be adjudicated in religious courts and whether reformed Islamic law, its classic-medieval formulation, or some sort of combination with other sources, is the most relevant. These debates mirror one aspect of the evolution of Islamic law in the country from the classical Sunni, and predominantly Shāfi'ī, school to the modern re-interpretation of Islamic law mediated by the state. In this process, *adat*, the "Indonesian madzhab," and global discourses on women's rights and gender all blend together to shape current discourses of Islamic law at religious courts.

In former times, the traditional *'ulamā'* dominated the religious court judiciary, whose basic training in Islam was acquired from the *madrasa* and *pesantren*.[39] Mastering Islamic law constituted a basic prerequisite for becoming a *pangulu* and to preside over an Islamic court.[40] The legal sources were mostly derived from classical works within the tradition of the Shāfi'ī school.[41] In spite of the Dutch restriction of certain fields of Islamic law, especially criminal law in 1831,[42] matrimonial law remained applicable in Islamic courts under the *pangulu*'s authority. The colonial government conceded this authority to the *pangulu* since marriage was closely related to Muslim personal convictions.[43]

A gradual move to broaden legal sources only began after independence in the mid-twentieth century. The Minister of Religion circulated Instruction B/I/735/1958, which listed certain scholarly legal works as approved judicial sources. It introduced *al-Fiqh 'alā Madhāhib al-'Arba'a* by ʿAbd al-Raḥmān al-Jazīrī (d. 1941).[44] However, this was the only example out of

[39] Hisyam, *Caught*, p. 38-40.
[40] *Ibid*.
[41] See again footnote number 8.
[42] Hisyam, *Caught*, p. 28.
[43] Deliar Noer, *Administration of Islam in Indonesia* (Jakarta and Kuala Lumpur: Equinox Publishing 2010), p. 55-62.
[44] Abdurrahman, *Kompilasi Hukum Islam* (Jakarta: Akademika Pressindo 1992), p. 22.

the thirteen approved sources that was not a work of Shāfi'ī jurists.[45] The Ministry of Religion at the time was still held by a representative from *Nahdlatul Ulama*, the guardian of traditional Islam.[46] Consequently, the domination of the Shāfi'ī school in the courts was inevitable, as Notosusanto has observed. He notes how Islamic magistrates blindly cited the views of classical jurists and uncritically applied them to the cases they examined.[47] Instead of dispensing fair justice, this approach produced rulings that created a burden on justice seekers.

One example of this comes from the religious court in Magelang, Central Java. It was reported that a man repudiated his wife with one *talak*. He had intercourse with her before her *idda* (three month waiting period) was over and they continued to live together for years and had three children. The man, however, never explicitly expressed his intention of reconciliation (*rujuk*) and his silence stimulated his wife's suspicion. After being asked several times by his wife to get a reconciliation certificate, he turned to the religious court to ask for a ruling to legalize the reconciliation. On October 3, 1959, the religious court of first instance ruled the reconciliation invalid but the intercourse was considered neither legal nor invalid (*shubhat*), a decision that was later reinforced by the Islamic Appellate Court on September 6, 1960. The courts' argument ran as follows: First, the man never explicitly pronounced his intention to return to his wife and, second, he was reluctant to seriously reconcile due to his negligence to address this issue for years. According to Notosusanto, both courts strictly adopted the Shāfi'ī

[45] These work include *Ḥāshiyat Kifāyat al-Akhyār* by al-Bayjūrī (d. 1860), *Fatḥ al-Mu'īn fī Sharḥ Qurrat al-'Ayn* by al-Malībārī (d. 1567), *Ḥāshiya 'alā al-Taḥrīr* by al-Sharqāwī (d. 1737), *Sharḥ Kanz al-Rāghibīn* by al-Qalyubī (d. 1659), *Fatḥ al-Wahhāb fī Sharḥ Minhāj al-Tullāb* by al-Anṣārī (d. 1520), *Tuḥfat al-Muḥtāj fī Sharḥ Minhāj al-Ṭālibīn* by al-Haytamī (d. 1566), *Targhīb al-Mushtaqq* by al-Haytamī (d. 1566), *al-Qawānīn al-Shar'iyya li Ahl al-Majālis al-Ḥukūmiyyat wa al-Iftā'* by Sayyid Uthmān ibn Yaḥya (d. 1914), *al-Qawānīn al-Shar'iyya* by San'an Daḥlān, *Jawharat al-Farā'iḍ* by 'Alī ibn Ghānim al-Masūrī, *Bughyat al-Mustarshidīn* by Ḥusayn al-Bā'alawī, *al-Fiqh 'alā al-Madhāhib al-'Arba'a* by al-Jazīrī (d. 1941) and *Mughnī al-Muhtāj fī Sharḥ Minhāj al-Ṭālibīn* by al-Shirbīnī (d. 1569). *Ibid.*

[46] Nurlaelawati, *Modernization*, p. 53.

[47] Notosusanto, *Peradilan Agama Islam di Jawa dan Madura* (1953) and *Organisasi dan Jurisprudensi Peradilan Agama* (1963).

legal doctrine that requires reconciliation to be uttered verbally. If the judges had considered other views, such as the Ḥanafī or Ḥanbalī, which maintain verbal expression unnecessary and spousal reunion sufficient to effectuate reconciliation, they would have produced a more suitable ruling since the couple already had three children.[48] In another case, an eighteen year old marriage was annulled by the religious court in Bojonegoro, East Java, when the spouse turned to the court to obtain marriage legalization in 1961. The bride was still a minor (about twelve years old) at marriage in 1949 and it was her brother, not her father, who acted as her guardian. According to the judge, this contradicted *fiqh* and therefore the marriage was annulled.[49]

Commenting on problems like these, Lev states that "it was always recognized that Islamic judges were badly educated in any standards. Islamic legal education had never, as Snouck pointed out, been paid much attention. This showed up in the lack of Indonesian Islamic scholarly activity, until the modernist movement gave rise to a new challenging scholarship."[50] Lev was not alone in this critique. Noer, for example, contends that although Islamic courts had been able to fulfill their function to settle marital disputes among Muslims, the judge's decisions impaired court performance. What the judges often emphasized in their judgments, he argued, was simply obeying the norm of *fiqh* rather than examining the merit of legal cases.[51]

In the 1950s, a special school for judges, the Religious Judge Education School (*Pendidikan Hakim Agama*), was established where the graduates could pursue a higher degree specializing in Islamic law at a State Institute of Islamic Studies (*Perguruan Tinggi Agama Islam* or, later, *Institut Agama Islam Negeri*).[52] However, not until the beginning of the 1980s was a

[48] Notosusanto, *Organisasi,* p. 76-77.
[49] *Ibid*., p. 47.
[50] Lev, *Islamic Court*, p. 104-105.
[51] Noer, *Administration*, p. 63.
[52] Nurlaelawati, *Modernization*, p. 58. See also Fathurrahman Djamil, "Program Akademik Fakultas Syariah dan Peningkatan Kualitas Calon Hakim pasca UU No. 7/1989," in Cik Hasan Bisri (ed.), *Peradilan Islam di Indonesia: Bunga Rampai* (Bandung: Ulul Albab Press, 1997), p. 231-238.

systematic effort made to address the problem.[53] The project called the Standarization Plan purported in general to respond to ever-increasing caseloads received by the courts since Marriage Law 1/1974 had been enacted a decade earlier. According to Mark Cammack, the lack of religious court personnel both in terms of number and qualification had not been resolved sufficiently. Each court generally had only one full-time judge plus part-time associate judges and limited staff, who possessed inadequate managerial and bureaucratic skills to efficiently work out court administration.[54]

The Standardization Plan proposed that each first instance and appellate religious court would be staffed by 37 to 45 personnel. Each court would have one chair, one deputy chair and three to nine judges, as well as a number of clerks and other administrative staff and a driver.[55] The plan increased basic academic training for judges and clerks. They were required to have an undergraduate diploma from a Shari'a law school or a similar relevant degree (including from a secular law school).[56] It was the first time that Islamic judges were required to be university or college graduates. In 1994, the religious courts had a total staff of 4,686, 1,219 of whom had full undergraduate degrees (*sarjana*), while the 954 others held partial undergraduate degrees (*sarjana muda*) from universities or colleges.[57] Ninety per cent of the 2,741 total Islamic judges graduated from Islamic law schools and eight per cent held a master's or equivalent degree in 2004.[58] As of 2008, 3,410 Islamic judges held at least a university diploma. Of these, 2,367 (69.41%) held undergraduate degrees, 1,037 (30.41%) completed a master's degree, and 6 (0.18%) had doctoral degrees.[59]

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[53] See Departemen Agama, *Standarisasi Pengadilan Agama*, 1983.
[54] Cammack, "The Indonesian," p. 151.
[55] Departemen Agama, *Standarisasi*, p. 89-93.
[56] *Ibid*. This requirement is later reinforced in the Religious Judicature Act 7/1989.
[57] Zaini Amad Noeh, "Lima Tahun UUPA: Sebuah Kilas Balik," in Bisri (ed.), *Peradilan Islam*, p. 300.
[58] Cammack, "Islamic Judiciary," p. 161-163.
[59] Badilag, *Profile Peradilan Agama 2009* (Jakarta: Badilag, 2009), p. 24-25.

In terms of legal sources, the Standardization project aimed to enrich library resources by adding many more collections, which included not only *fiqh*, but also *tafsīr* (Qu'ranic exegesis), *hadīth* (Prophetic tradition), copies of state regulations, and dictionaries.[60] The Qur'anic exegesis collections, for example, featured *Tafsīr al-Manār* by Muḥammad Abduh (d. 1905) and Rashīd Riḍā (d. 1935) at the top of the list. This literature is much more popular among the modernist than the traditionalist Muslims.[61] Other literature, such as *al-Jāmi' lil-Aḥkām al-Qur'ān* by the Mālikī jurist al-Qurṭubī (d. 1273) and *Tafsīr al-Aḥkām* by the Ḥanafi jurist al-Jaṣṣāṣ, were hardly read in *pesantren*, the traditional educational background of Islamic judges at the time. *Tafsīr al-Jalālayn*, by Jalāluddīn al-Maḥallī (d. 1409) and Jalāluddīn al-Ṣuyūtī (d. 1505), which was widely read in *pesantren*, was at the bottom of the list.[62]

New non-Shāfi'ī *fiqh* literature was also introduced. These works included *Bidāyat al-Mujtahid* by the philosopher and Mālikī jurist Ibn Rushd (d. 1198), *Al-Muḥalla* and *Iḥkām fī Uṣūl al-Aḥkām* by Ibn Ḥazm (d. 1064) of the Ẓahirī school, *Irshād al-Fuḥūl* by the Yemeni Shi'i jurist al-Shawkanī (d. 1834) and *Fiqh al-Sunna* by the contemporary Egyptian Scholar Sayyid Sābiq (d. 2000). The list also included *Kitāb al-Umm* by al-Shāfi'ī (d. 820), which in fact was rarely used by the *pangulu* or *pesantren* students despite the fact that they were the followers of this school. They read the works belonging to the Shāfi'ī jurists rather than works of the school's founder. The introduction of a variety of new collections meant that the traditionalist legal preferences for the Shāfi'ī school were gradually challenged.

The first systematic reform of substantive Islamic law began in 1985 when the Department of Religion and the Supreme Court initiated a joint committee to compose a

[60] Departemen Agama, *Standarisasi*, p. 45-48.

[61] In his investigation about Islamic literature used at *pesantren*, Bruinessen found this work was read only in two *pesantren* in Central Java and another one in East Java. Bruinesses, "Kitab Kuning," p. 253-254.

[62] *Tafsīr Jalālayn* was read widely in many *pesantrens* both in Sumatra and Java. *Ibid*.

compilation of Islamic law as the standard reference for religious court judges.[63] The basic argument of the project revolved around the lack of a uniform legal reference for Islamic judges and the need to adapt *fiqh* to the Indonesian context.[64] In addition to gathering materials from all Sunni law schools, the committee visited other Muslim countries to gain preliminary comparative perspectives about the legislation of Islamic law in those countries. The spirit to create an "Indonesian *fiqh*" was realized by inserting Indonesian customs, such as joint property (*gono-gini*), substitute bequest (*wasiat wajiba*), and modified conditional divorce (*ta'lik talak*) into the Compilation.[65] The draft was also intensively and widely discussed by Muslim scholars and academicians from Islamic universities across the country prior to its enactment, thus fulfilling the principle of consensus (*ijmā'*) of Muslim scholars in Indonesia.[66] This was undoubtedly the most comprehensive and systematic effort of reform where the idea of Indonesian *fiqh* was stressed.

However, this successful story of legal reform was not fully hailed. Muslim women activists associated with the team of gender mainstreaming (*Pengarus Utamaan Gender*, PUG) of the Ministry of Religious Affairs, proposed a Counter Legal Draft (CLD) to remove gender biases in the Compilation.[67] The proponents approached Islamic law from the principles of gender equality, democracy, pluralism, and human rights to interrogate the biases in the Compilation. On several points, the CLD draft goes beyond the boundaries of the classical

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[63] Imam Ahmad Mawardi, "The Political Backdrop of the Enactment of the Compilation of Islamic Laws in Indonesia," in Salim and Azra (eds.), *Shari'a*, p. 128.

[64] Voices of reform of Islamic law also stemmed from independent scholars, such as Hasby As-Siddiqy, Hazairin, Munawar Cholil, just to name few, who all but emphasize the urgent of establishing Indonesian *madzhab*. See R. Michael Feener, *Muslim Legal Thought in Modern Indonesia* (Cambridge: Cambridge University Press, 2007).

[65] Ratno Lukito, *Islamic Law and Adat Encounter: The Experience of Indonesia* (Jakarta: Logos, 2001).

[66] Mawardi, "The Political," p. 130-131.

[67] Siti Musdah Mulia and Mark E. Cammack, "Toward a Just Marriage Law: Empowering Indonesian Women through a Counter of Legal Draft to the Compilation of Islamic Law," in Feener and Cammack (eds.), *Islamic Law*, p. 128-145.

interpretation of Islamic law.[68] For example, the draft proposes that the parties can officiate their own marriage contract without a guardian (*wali*) unless if they are legally and independently unable to do so. *Mahar* (*mahr*)[69] is liable for both the bride and the groom. In terms of divorce, both the husband and the wife have an equal right and position before the law and should follow the same procedure of divorce should they wish to separate. The waiting period (*idda*) after divorce applies to both the husband and the wife. The draft lifts the ban on interreligious marriage and prohibits polygamy. The Ministry of Religious Affairs initially backed the CLD proposal but withdrew after the draft provoked harsh criticism from Muslim organizations in 2004.[70] The draft was eventually withdrawn.

Another draft proposed by the Department of Religion in 2008 was apparently intended to substitute the Compilation with a new one, which was legally more binding than the Compilation. It was meant to be a uniform law code used at religious courts. Although this draft was less controversial, it suffered a similar fate as the CLD. The draft had no significantly different stipulations from the Compilation except for violations against the law, which could be prosecuted as crimes. In other words, a violation of family law would constitute a criminal offense. Chapter 21 of the Bill, for instance, subsumes unregistered marriages, divorces out of court and polygamous marriages without prior permit under the category of criminal offenses liable to a fine up to Rp. 6 million or six months in jail.[71] Temporary marriage (*mut'a*) was

[68] *Ibid*., p. 139-142.

[69] *Mahr* is a sort of bridal gift given by the bridegroom to the bride. According to *fiqh*, this gift is required at the marriage contract for it is essential for the legality of marriage. The gift, can be in cash or other valuable items, becomes a personal property of the bride. See O. Spies, "Mahr," in C.E. Bosworth, E. van Donzel, B. Lewis and CH. Pellat, The Encyclopedia of Islam, New Edition (Leiden: Brill, 1991), p. 78-79. *Mahr* has been translated into Indonesian as *mahar* or *maskawin*. For consistency, I will keep using the Indonesian word of *mahar* because this is not different so much from its original Arabic word (*mahr*). I will not translate it into English as "dower," "dowry," "bride-wealth," or "bride-price," for these do not exactly convey the same meaning of *mahar*. See Jack Goody and Stanley Jeyaraja Tambiah, *Bridewealth and Dowry* (Cambridge: Cambridge University Press, 1973).

[70] *Ibid*., p. 143-144.

[71] Muslim Marriage Law Bill 2008, Articles 143, 145 and 146.

prohibited and the perpetrator was to be imprisoned for three months.[72] The same punishment was charged to a man who impregnates a woman and refuses to marry her.[73] Severe punishment, up to Rp. 12 million in fines or one year of imprisonment, would be imposed on the marriage registration official who failed to properly obey the Bill.[74] It also prohibited anyone from officiating an improper marriage or falsely and illegally acting as the bride's guardian. This was considered a serious violation liable for three years imprisonment.[75] If the Bill had passed, there would have been fundamental changes not only in the application of Islamic law but also in the configuration of the religious court. The religious courts elsewhere in Indonesia would likely resemble *Mahkamah Syar'iyyah* in Aceh in terms of competence, in that they would handle a limited range of criminal laws.[76]

The current Supreme Court and the Directorate of Religious Courts (*Badilag*) take another strategy, from legislation to the internal empowerment of religious courts and judges. They seek to establish networks and cooperation with non-governmental organizations and foreign funding agencies to meet this objective. For example, in 2008 the National Commission of Women in cooperation with *Badilag* published a pamphlet called "Islamic Judges' Reference of Domestic Violence."[77] This publication was funded by the Indonesian-Australian Legal Development Facilities (IALDF) and aimed to provide a guide for judges to deal with legal cases petitioned by women on the grounds of violence. In 2009, *Badilag*, the World Bank, and the Asia

[72] *Ibid*., Article 144.
[73] *Ibid*., Article 147.
[74] *Ibid*., Article 148.
[75] *Ibid*., Articles 149 and 150.
[76] In Aceh, since 2003 *pengadilan agama* has been re-named to *mahkamah syar'iyyah* with wider jurisdictions. *Qanun* No. 5/2000 and No. 11/2002 provided a constitutional basis for *mahkamah syar'iyyah* and extended their competence in the fields of Islamic creeds (*'aqīda*), worship (*'ibādat*) and propagation (*shi'ar*). The laws also authorize the court to impose imprisonment and public canning. See Moch. Nur Ichwan, "The Politics of Shari'atization: Central Governmental and Regional Discourses of Shari'a Implementation in Aceh," in Feener and Cammack (eds.), *Islamic Law*, p. 193-215 and Tim Lindsey and M.B. Hooker, with Ross Clarke and Jeremy Kingsley, "Shari'a Revival in Aceh," in Feener and Cammack (eds.), *Islamic Law*, p. 216-254.
[77] Faqihuddin Abdul Kodir and Ummu Azizah Mukarnawati, *Referensi bagi Hakim Peradilan Agama tentang Kekerasan dalam Rumah Tangga* (Jakarta: Komnas Perempuan, 2008).

Foundation were involved in a project to compose a handbook called "Judges' Reference Collection for Standard Evaluation for Gender Sensitivity Application at *Mahkamah Syar'iyah* in Aceh." There are seven chapters in this booklet detailing a gender-based perspective in interpreting Islamic texts and for applying this method in examining and ruling on legal cases.[78]

Gender has become one of the court's major concerns for several reasons. First, women now constitute the majority of court plaintiffs. Within the last few years, divorce claims by women (*cerai gugat*) have dominated all categories of legal cases filed in the religious courts. From a total of 200,795 cases that all religious courts in the country heard in 2007, a majority of 111,145 (55.352%) cases dealt with *gugat* divorce petitioned by women. The percentage of *gugat* claims rose in the two subsequent years, reaching 143,747 (58.67%) out of 245,023 cases in 2008 and 171,477 (60.220%) of 284,749 cases in 2009.[79] Second, the substantive laws still contain patriarchal biases that Muslim women activists are eager to expel (although to no avail, as the failure of both the CLD and Marriage Law Bill have demonstrated). Furthermore, the gender composition of judges is uneven. There were 659 (21.61%) female judges out of the 3,049 total judges at the religious courts of first instance in 2009. However, the percentage of female judges at appellate religious courts was lower, only 19 (5.55%) out of 342 judges.[80] The presence of women as judges in Islamic tribunals is only a recent phenomenon. Woman were appointed as judges in Islamic courts in Indonesia for the first time in 1954 and the first woman to chair a religious court was Ernawati, who ironically occupied the position in Madura, East Java in 1986, a strong center of traditional Islam.[81] Within the next few years, gender issues, in

[78] Abd. Moqsith Ghazali et. al., *Kumpulan Referensi Standar Evaluasi Hakim dalam Menerapkan Sensitivitas Jender di Mahkamah Syar'iyah Aceh* (Jakarta: Badilag, World Bank and Asia Foundation, 2009).

[79] Badilag, Annual Report in 2007, 2008 and 2009. The data accessed online from the Badilag site www.badilag.go.id

[80] Badilag, *Profile*, p. 25-27.

[81] Djazimah Muqoddas, *Kontroversi Hakim Perempuan pada Peradilan Islam di Negara-negara Muslim* (Yogyakarta: LKiS, 2011), p. 162 and 167.

addition to other agendas such as improving the courts' technical capacity, bureaucratic efficiency and transparency, will likely become a major concern of religious court reform.

Before discussing how these developments and reforms have taken place in the religious courts in Lombok, I shall analyze Lombok's history, demography and culture. In Lombok, both Islam and *adat* are prominent, including in matters of family and marriage, and form the contextual background of the operation of the religious courts.

B) ISLAM, *ADAT* AND CUSTOMARY MARRIAGE IN LOMBOK

This section demonstrates the predominance of both Islam and *adat* in regulating marriage in Lombok and analyzes how this challenges the religious court as an institution where marital disputes are settled. Understanding the roles of Islam and *adat* cannot be acquired without knowing how they are historically constituted in Lombok. While *adat* and Islam remain guides for supervising aspects of people's lives on the island, the state emerges as a new power offering alternative discourses through codified laws and the courts. Despite current economic initiatives and social changes, *adat*, Islam and the state play important roles in the dynamics of contemporary Muslim families among the Sasak, the indigenous and majority ethnic group of Lombok.

1) Lombok at a Glance: History and Demography

Lombok is located in the eastern part of Indonesia and along with the island of Sumbawa forms the current province of Nusa Tenggara Barat (NTB). Historically, the island has been subject to foreign socio-religious influences and political domination from Java, Bali, and

Makassar and from the Dutch and the Japanese before becoming part of Indonesia. In the fifteenth century, as the earliest sources show, Lombok became part of the Kingdom of Java. It was mentioned in the Javanese *Negarakertagama* chronicle as the farthest eastern territorial part of the Majapahit Kingdom.[82] During this period, Islam was introduced by Javanese Sufi Muslim preachers in Bayan, North Lombok, but the process of conversion was incomplete because the preachers left Lombok to advance their next mission to the east. Consequently, Islam in the region was blended with local belief systems. Some people converted completely while others only partly embraced the religion. Those who were averse to conversion fled into the forest and highland areas and defended their *Boda Sasak* religion, as the chronicle *Babad Lombok* describes it.[83]

Other influences from Lombok's western and eastern neighbors emerged in the seventeenth century, when the Hindu Balinese Karangasem competed with Muslim Makassarese to conquer Lombok, known as a fertile land and major rice producer.[84] The Balinese established their power in western Lombok, while the Makassarese took a stronghold in the eastern part of the island. This division created a polarization of the island, where the western part of the island was subject to the political domination of the Balinese and the eastern part was under the influence of the Muslim Makassarese. A fierce war between the two broke out in 1677, after which the Balinese successfully expelled their rivals from the island and forced them back to their base in Sumbawa.[85] The Balinese emerged as the new sole rulers over their Muslim subjects, defeating local Muslim Sasak rulers in Langko, Penjanggik and Selaparang in the mid-

[82] See Alfons Van der Kraan, *Lombok: Conquest, Colonization and Underdevelopment 1870-1940* (Singapore: Heinemann, 1980), p. 2.

[83] *Ibid*., p. 3.

[84] Kraan, *Lombok*, p. 4. See also Hans Hägerdal, *Hindu Rulers, Muslim Subjects: Lombok and Bali in the Seventeenth and Eighteenth Century* (Bangkok, Thailand: White Lotus Press, 2001).

[85] Kraan, *Lombok*, p. 4 and Hägerdal, *Hindu*, p. 61-62.

eighteenth century despite a series of insurgent revolts in East Lombok.[86] The arrival of the Dutch on Lombok in 1891 was welcomed by the Muslim East Sasak leaders, who saw them as a prospective ally against the Balinese. With the help of Sasaks from East Lombok, the Dutch attacked the Balinese fortresses and palaces in Mataram and Cakranegara in 1894,[87] after the Hindu Raja of Lombok refused to accept a new treaty proposed by the Dutch that would make him a symbolic ruler without significant power and authority.[88] The attack terminated the Balinese domination of Lombok and established the Dutch as the new rulers.

To support their governance, however, the Dutch not only retained the Balinese, but also used the Sasak *adat*-nobles as colonial administrators.[89] The Dutch exploited the economic resources of the island and levied high taxes on its population, causing starvation and food shortages.[90] This economic exploitation and the restoration of the former Balinese model of rule widened the gap between the Balinese and Sasak aristocracies and the Sasak peasants, who valued Islam as a common identity. Although the situation remained largely the same until the Japanese occupation from 1942-1945, Indonesia's Independence in 1945 brought about further socio-political changes in Lombok.

Post-Independence Lombok witnessed a new type of political configuration among various political parties such as *Partai Nasional Indonesia* (PNI) led by President Sukarno and Muslim parties, such as *Masyumi* and *Nahdlatul Ulama,* for which most Sasak Muslims cast their votes.[91] Meanwhile, the *adat*-based aristocrats aligned themselves with the nationalist

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[86] *Ibid*., p. 107-109 and Kraan, *Lombok*, p. 4-6.
[87] Kraan, *Lombok*, p. 83-99.
[88] *Ibid*., p. 74-83.
[89] *Ibid*., p. 101-102.
[90] *Ibid*., p. 173.
[91] According to Ecklund, in the 1955 election Muslim parties controlled the votes in Lombok. Masyumi earned 49.8% and PNU obtained 20%. Meanwhile the nationalist PNI received 15.2% of the vote. Quoted from Jeremy K. Kingsley,"*Tuan Guru*, Community and Conflict in Lombok, Indonesia," *PhD Dissertation* (Melbourne: Melbourne University, 2010), p. 105.

parties and some others leaned towards the Communist party, whose land reform agenda concerned the aristocrats because land constitutes one of the crucial interests of *adat* communities.[92] This political configuration proved to be disadvantageous after the downfall of Sukarno and the Communist party's dissolution in 1965. Suharto took control and backed by military and Islamic organizations, launched campaigns against the communist and leftist groups. *Adat* leaders and their followers in Lombok were forced to convert to a more strict form of Islam for political reasons since the communists, their allies and sympathizers became targets of assassination.[93] This marks the most dramatic political defeat of *adat* in Lombok.[94]

Sasak Muslim leaders continued to support and affiliate themselves with Suharto's ruling party of *Golongan Karya* (Golkar), and this political endorsement was important for the victory of the ruling party in most elections during the Suharto regime (1966-1998) and advantageous to the position of Islam as well.[95] Through direct provincial elections and multi-party systems, as parts of the national political reform and the wave of democratization and decentralization upon the downfall of the New Order regime in 1998, the province witnessed for the first time a Sasak governor of NTB in 2003. Before that year a Sasak had never held this position, despite being the majority ethnic group in the province. History was repeated once again when Zainul Majdi, a doctor who graduated from al-Azhar Islamic University of Cairo and the grandchild of the most

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[92] Judith Ecklund, "Marriage, Seaworms and Song: Ritualized Responses to Cultural Change in Sasak Life," *PhD Dissertation* (New York: Cornell University, 1977), p. 47-48. See also David D. Harnish, *Bridges to the Ancestors: Music, Myth and Cultural Politics at an Indonesian Festival* (Honolulu: Hawaii University Press, 2010), p. 33-34.

[93] On this topic on Java and Bali see Robert Cribb, *The Indonesian Killings of 1965-1966: Studies from Java and Bali* (Clayton: Monash University, 1990). On Lombok, see Fath Zakaria, *Geger Gerakan 30 September 1965: Rakyat NTB Melawan Bahaya Merah* (Mataram: Sumur Mas, 2001).

[94] Eklund, "Marriage," p. 47.

[95] Three out of the four most influential *tuan guru* backed Golkar in the 1971 Election. They were TGH. Zainuddin Abdul Majid of Pancor and TGH Mutawalli of Jerowaru, East Lombok, TGH. Ibrahim of Kediri, West Lombok. Only TGH. Fadil of Praya, Central Lombok, endorsed Partai Nahdlatul Ulama (PNU). See Ecklund, "Marriage", p. 49.

influential Islamic figure of Lombok, was elected governor in 2009.[96] His election assured that the reform era endowed the Sasak with political power because they were able to determine their own political leadership for the first time since they were defeated by the Balinese in the late seventeenth century.

Lombok has 4,738,70 square kilometers of land area and consists of 23.5 per cent of the 20,153,20 total area of Nusa Tenggara Barat Province.[97] Lombok is the most densely populated island of the province, since two thirds of the total population live on the island, which consists of four regencies (West, North, Central and East Lombok) and one municipality (Mataram).[98] With the exception of the southeastern part, which is arid and filled with bare hills, the island is fertile and wet, especially in the western and northern parts and central plain, whose water is abundantly supplied by rainfall and springs flowing from the northern mountainous areas.[99] These areas are where the majority of the population resides and cultivate their land. For those living in the western coastal villages, fishing is the most important occupation, although some on the southeastern coast use their seashore land to produce salt. The seashore also offers a major business opportunity in pearl farming in the northwestern areas. These products are sold locally and some are exported out of the island and abroad since easy access to transportation is available. As of 2011, two daily direct return flights were scheduled from Mataram the NTB provincial capital to Jakarta. Several other flights go to Surabaya, the second largest city in the country, and to Bali, an international tourist destination. The opening of an international airport in south Central Lombok at the end of 2011 has escalated the mobilization of economic

[96] See the official sites of the NTB Province at www.ntbprov.go.id/tentang_sejarah.php

[97] Badan Pusat Statistik (BPS) Propinsi Nusa Tenggara Barat (NTB), *West Nusa Tenggara in Figures 2011* (Mataram: BPS NTB, 2011), p. 8. This is a bilingual handbook in Indonesian and English. Since the figure represents the Province instead of Lombok alone, all figures about Lombok in this study are manually derived from four regencies and one municipality: Mataram, West, North, Central and East Lombok.

[98] As of 2010, NTB's population was 4,500,212. Of these, 3,168,692 (70.41%) live in Lombok. *Ibid*. p. 67

[99] *Ibid*., p. 12.

activities. Easily accessible transportation has also opened job opportunities and lucrative markets in hotels and tourism. However, such opportunities are limited to those with sufficient educational and training backgrounds. For most other Sasaks, who have a limited education or may not have land and live in bare and arid areas, seeking jobs abroad as migrant workers (*Tenaga Kerja Indonesia*/*Wanita* TKI/TKW) is the most readily available alternative.

Recent official data released by the provincial census bureau shows that 45,668 people from Lombok worked abroad in 2010. The majority of male laborers worked in plantations in Malaysia and the females served as maids in Middle Eastern countries such as Saudi Arabia.[100] According to a World Bank report, in 2001 the amount of total Malaysian remittance inflows to Nusa Tenggara reached Rp. 300 billion, exceeding the province's revenues by Rp. 61 billion.[101] The rapid flow and mobilization of the people working abroad have in some cases become a blessing for eradicating poverty and lessening the unemployment rate; however this migrant labor has shaken family harmony, in part triggering divorce and causing child neglect. *Jamal*, an acronym of *Janda Malaysia* (Malaysian Widows), is a satirical term ascribed to female divorcees due to their husband's abandonment to Malaysia.[102]

Table 1.1: Official numbers of Indonesian migrant workers from Lombok in 2010

Regency	Male	Female	Total
West Lombok	5,412	818	6,230

[100] *Ibid*., p. 89. The actual number could be higher since the data do not cover the unofficial migrant workers. Currently, 1 US$ is roughly equal to Rp. 10.000.

[101] Raul Hernandez-Coss et. al., "The Malaysia-Indonesia Remittance Corridor: Making Formal Transfers the Best Option for Women and Undocumented Migrant," *World Bank Working Paper* (2008), No. 149, p. xiii.

[102] Harriot Beazley, "The 'Malaysian Orphan' of Lombok: Children and Young People's Livelihood Response to Out-Migration in Eastern Indonesia," in Ruth Panelli, Samantha Punch and Elizabeth Robson (eds.), *Global Perspectives on Rural Childhood and Youth: Young Rural Lives* (New York and London: Routledge, 2007), p. 107-120.

Central Lombok	12,823	4,894	17,717
East Lombok	17,630	2,657	20,287
North Lombok	597	477	1,074
Mataram	304	56	360
Total	36,766	8,902	45,668

(Source: BPS NTB 2011).

Lombok is a multi-religious society with a Muslim majority, consisting of 94.83 per cent of the total population, or 2,922,267 followers. Hindus are registered with 122,870 (3.99%) followers and they are higher in numbers than the Buddhists, whose adherents numbered 23,295 (0.76%). Protestant and Catholic adherents are not very different, numbering 7,348 (0.24%) and 5,710 (0.19%) respectively.[103] However, Islam in Lombok is not monolithic, but is typically classified into two variants, namely *wetu telu*, which literally means "three times" or "three stages" and *waktu lima* or "five times."[104] The three include three kinds of ritual (Islamic, agriculture, and life-cycles), honor (God, ancestors and parents) and sacred sets of three.[105] Their existence has become gradually less tangible due to the politics of religious identity in modern Indonesia where the New Order of Indonesian government (1966-1998) required all citizens to embrace one of the five official religions of Indonesia (Islam, Protestant, Catholic, Hindu and Buddhist).[106] The policy put *wetu telu* at odds with the law because it did not fit exactly into any category.[107] Many followers of *wetu telu* "converted" to Islam. While it is fairly easy to identify *wetu telu* followers due to their specific clothes, ritual practices and geographical location and to

[103] This is the data of 2009. See BPS NTB, *Nusa Tenggara Barat Dalam Angka* 2010 (Mataram: BPS NTB, 2010), p. 198. The most recent data of BPS NTB does not include number of religious followers.

[104] See Sven Cederroth, *The Spell of the Ancestors and the Power of Mekkah: A Sasak Community on Lombok* (Göteborg, Sweden: Vasastadens Bokbinderl, 1981) and Erni Budiwanti, *Islam Sasak: Wetu Telu versus Waktu Lima* (Yogyakarta: LKiS, 1999).

[105] Harnish, *Bridges*, p. 30.

[106] After the collapse of the New Order in 1998, Confucianism obtained an official recognition from the state.

[107] This also happened to the Wana religion of Central Sulawesi due to their incompatibility with the state's definition of religion. See Jane Monning Atkinson, "Religions in Dialogue: The Construction of an Indonesian Minority Religion," in Rita Smith Kipp and Susan Rodgers (eds.), *Indonesian Religions in Transition* (Tucson: The University of Arizona Press, 1987), p. 171-186.

distinguish them from the rest of Sasak Muslims, *waktu lima* are less distinguishable in terms of physical appearance.

Waktu lima hold more orthodox and conservative Islamic beliefs and perform complete Islamic rituals such as praying five times a day, fasting during the days of Ramadan, paying *zakat* and performing hajj to Mecca; they are theologically Sunni Muslims who follow the Shāfi'ī Islamic legal school. These are a broad category and comparable to other Muslims as well. As these categories are used less than before, a prevalent conversation about the religiosity of Sasak Muslims is now often concerned with which Islamic organizations one associates or which *pesantren* one graduated from.[108] Between these two poles are ordinary Muslims who do not associate themselves strictly with either group.[109] Nevertheless, Sasak Islam remains markedly distinctive for several reasons.

First, it features excessive prestige for the hajj. This pilgrimage is obligatory for all Muslims who can afford to pay for it and one who has performed it will receive a religious title as a *haji*. What makes the title prestigious in Lombok is due to the religio-political consequences it bears. In rural areas, no one can be assigned a position as an Islamic prayer leader (*imām*) or as a preacher until he has attained the status of *haji*. Being a *haji* is also preferable to being a state official. Moreover, the NTB provincial census data includes the hajj as one out of three important religious categories.[110]

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[108] This is what I often heard in daily conversations. Islamic organizations in Lombok include *Nahdhatul Watan* (NW), *Nahdlatul Ulama* (NU), and *Muhammadiyah*. Of the biggest Islamic schools are *Nahdhatul Watan* in Pancor, East Lombok; Al-Muhajirun in Praya and Qomarul Huda in Bagu, Central Lombok; Islahuddini and Nurul Hakim in Kediri, West Lombok; and Darul Falah in Pagutan, Mataram.

[109] Ecklund termed this group as between *adat*-Islam vortexes. See Ecklund, "Marriage," p. 51-60. One informant from a strong East Lombok orthodox Muslim area described himself, and his other fellow villagers, as non-partisan of any Islamic organization and less enthusiastic to participate in Islamic activism in his village.

[110] Two other categories includes sacred places of religious worship (mosque, temple, church, and *vihara*), and Islamic schools (*madrasa and pesantren*). See BPS, *NTB,* p. 203-205.

Second, everywhere in Lombok the mosque is important. Not only in rich urban areas, but also in poor rural villages, a big and majestic mosque is almost omnipresent. Even more than one mosque can exist within a village. Because of the surplus of mosques, Friday prayer is often held interchangeably from one mosque to another within a village in order to meet the minimum condition of forty adult male congregational members to stage the service.[111] No wonder that Lombok has been labeled as "the island of thousand mosques."[112] The third Sasak Islamic feature concerns the commemoration of the Prophet's birthday (*mauled*). It marks a communal ethno-religious festival in Lombok that often lasts for a full month. Various Islamic public activities, ceremonies and big feasts in villages and government offices are held to celebrate the event. All Sasak Muslims including *wetu telu* communities perform the *mauled* celebration, albeit differently. In the Sixth Nusantara Mauled Festival held in Mataram in 2011, the provincial government displayed various *mauled* celebration pictures across the province, many of which were taken from *wetu telu* communities in North Lombok. Implicit in this was the state's gradual recognition of varied Islamic rituals and expressions that are culturally distinct to Sasak Islam. The practice of *Adat*-Islam, however, not only includes religious-cultural festivities such as *mauled* celebrations, but also includes traditional marriage elopement, known as *merariq*/*selarian.*[113] Generally speaking, the relation between Islam and *adat* in marriage in

[111] This happened at an outskirt village in Central Lombok where I resided during my fieldwork.

[112] I was told by an informant who, quoting a Sasak prominent figure's personal opinion, said that building mosque in a Muslim congregation and community marks not only social piety but also a religious cultural response to the Hindu Balinese religious and cultural domination in Lombok. To him, the mosque partly represents a cultural symbol of religious identity of Sasak Islam.

[113] The term *merarik* is used to describe marital elopement in Lombok in general, but *selarian* is the preferable term in Central Lombok. However, *selarian* carries a different connotation in eastern suburban areas of Mataram, an enclave for Hindu populations. It refers to interreligious and ethnic elopement especially between Balinese and Sasak. This interreligious ethnic elopement often occurs dramatically and causes communal interreligious violence.

Lombok is tight and mutually reinforcing; the former has to do with the validity of marriage while the latter is concerned with its technical and ceremonial consummation.[114]

2) *Merarik*: Customary Marriage Elopement

Merarik literally means "runaway." It refers to a young male taking his female spouse away from her parents as a symbolic statement of their intention to enter into wedlock. The practice is considered to be a quintessentially Sasak custom, although various other marriage customs exist, such as engagement (*lamaran, melakoq* or *ngendeng*) and parental arrangement (*kawin tadong*) of patri-parallel cousin and endogamous marriages.[115] The Sasak in Lombok tend to practice *merarik* regardless of their social status and religious backgrounds. For those whose obedience to Islam outweighs that to *adat*, they would practice elopement to a degree that would not transgress the limits of Islamic law. For example, there should be a third party accompanying the girl while she is away during the elopement because the couple has not yet been united in a valid marital contract. *Merarik* should not be conducted on certain occasions if this may cause inconvenience in the observance of Islamic teachings, such as during the fasting month of Ramadan.[116]

In the communities where *adat* and social class customs are strictly upheld, as in South Central Lombok and among *wetu telu* practitioners in the north, elopement is strictly enforced and all *adat* requirements must be thoroughly fulfilled. A marriage is deemed invalid if the

[114] This is the idea that the Sasak prominent figures, such as H. Lalu Lukman, emphasize. See H. Lalu Lukman, *Tata Budaya Adat Sasak Lombok* (Mataram: 2003).

[115] *Ibid*., p. 14; See also Maria Platt "Patriarchal Institutions and Women's Agency in Indonesian Marriages: Sasak Women Navigating Dynamic Marital Continums," *PhD Dissertation* (Monash, Australia: La Trobe University, 2010), p. 72-88, and Jocelyn Grace, "Sasak Women Negotiating Marriage, Polygamy and Divorce in Rural East Lombok," *Intersection: Gender, History and Culture in Asian Context*, August 2004 (10), p. 5. The *haji* whom I stayed with was doing *kawin tadong*. He acknowledged two other types of marriage.

[116] Linda Rae Bennet, *Women, Islam and Modernity: Single Women, Sexuality and Reproductive Health in Contemporary Indonesia* (London: RoutledgeCurzon, 2005), p. 99.

groom and the bride hold unequal social status. This happens if the groom comes from a lower status (*jajarkarang*) while the bride's family background is high class (*bangsawan*/*perwangsa*). A male aristocrat may marry a female commoner but their offspring's status would drop one level. If a noble woman enters into an unequal marriage (*sala' timpal*), she would be excluded from her natal family and the children from this marriage would not be eligible to use a title of nobility.[117] The bride's family may also endeavor to save the girl and prevent her from such a marriage. At the beginning of 2011, an "honor killing" case was brought to the civil court in Central Lombok. Nine defendants, two of whom were state employees (a teacher and a soldier) were brought to trial and convicted for murdering a local village head who sought to resolve a *sala' timpal* marital conflict between the defendants' female noble relative and a commoner.[118]

The following passages describe the norms and practices of *merarik.* Since there is a great deal of literature and a number of studies that discuss this topic,[119] my main objective here is to use this data along with my own to illustrate the general pattern of this type of marriage and the common issues that arise from it. *Merarik* can be explained as follows. Prior to elopement, a couple has commonly already known each other through evening courtship visits (*midang*) of the

[117] Grace, "Sasak," p. 5. The Sasak aristocracy title is called *raden* and *lalu* for the male and *denda*, *lale* and *baiq* for the female. The titles are usually abbreviated as R (*Raden*), L (*Lalu*), D (*Denda*), L (*Lale*) and Bq (*Baiq*), respectively and attached prior to the name. But variation of the title and ranking system may apply. See Cederroth, *The Spell*, p. 155.

[118] The civil court is located just across from the religious court in Central Lombok. Since I was there during the trials heavily guarded by tens of police in every hearing, I could watch from the second floor of the religious court building and felt a high security alert and tension in every trial because a huge angry mob from the *penghulu* family and his fellow villagers always swarmed the civil court. They attacked the defendants in the first hearing and were involved in brawls with security forces. Some were injured, including police. The case attracted both local and nation-wide media attention. See *Suara NTB*, January 2, 2011.

[119] For sources in English, see Judith Ecklund, "Marriage, Seaworms, and Song," (1977); John Ryan Borthomolev, "Alif Lam Mim: Reconciling Islam, Modernity and Tradition in an Indonesian Kampung," *PhD Dissertation* (Cambridge, MA: Harvard University, 1999); and Maria Plat, "Patriarchal Institutions and Women's Agency in Indonesian Marriage," (2010). For Indonesian sources, see Lalu Lukman, *Tata Budaya Adat Sasak di Lombok* (Mataram, 2003); Tuti Harwati, Mohamad Abdun Nasir, Nikmatullah and Nurul Khaerani, *Tradisi dan Transformasi Pemikiran Hukum Keluarga Islam di Lombok* (Mataram: Pusat Studi Wanita IAIN Mataram, 2007); M. Nur Yasin, *Hukum Perkawinan Islam Sasak* (Malang: UIN Press, 2008); and Atun Wardatun et. al., *Jejak Jender pada Budaya Mbojo, Samawa dan Sasak di Nusa Tenggara Barat* (Mataram: Pusat Studi Wanita IAIN Mataram, 2009).

man to the woman's house. After the couple is certain about their relationship, the elopement occurs most commonly at night and beyond the woman's parents' awareness to avoid being caught and charged with *adat* fines (*dodosan*). *Merarik* marks a change in the life cycle of the couple, in which they enter into a new type of relationship. It is only the beginning of a long process before a marriage can be religiously and culturally validated.[120] During the elopement, the woman stays in a convenient place at the house of the man's relative or his close friend's. The man's relatives have to report the event immediately to the head of the village, who in turn delivers the information to the woman's parents so that they should not be worried about the whereabouts of their daughter.

After this public announcement (*mesejati selabar*), the next step includes a visit to the woman's parents by the man's representative. The main purpose of the visit is to ask for the woman's guardian (*wali*), who will marry her off to the man. Before a *wali* is made available, the representative and the woman's family negotiate certain issues regarding, for instance, the date of the wedding celebration and its expenses, which are the man's responsibility as a voluntary contribution (*pisuka/gantiran*). This payment is a larger sum than, and different from, the Islamically mandated *mahar* (*maskawin*), which is personally given by the man to the woman. This process of negotiation, locally known as *bait janji*, may take several meetings to conclude. Once an agreement is reached, a *wali* will be dispatched to the man's house to officiate the marriage. The woman's father or her male agnates may act as her family guardian (*wali nasab*). If for some reason the family guardian cannot perform the task, the head of the village, a *penghulu*, or a *tuan guru* may act as a substitute for him. Alternatively, if these other options remain unrealizable, the head of the marriage registrar's office (KUA) at the sub-district level (*kecamatan*) takes over the task and becomes an official substitute guardian (*wali hakim*) upon

[120] Lukman, *Tata,* especially chapter three, p. 13-52. See also Platt, "Patriarchal," p. 105-111.

approval from the religious court. The signing of the marriage contract (*ijab kabul*) commonly takes place at the man's house. After the *ijab*, the *wali*'s declaration to marry off the woman to the man, and the *kabul*, a verbal acceptance of the man to the *ijab*, the couple now becomes a valid married couple, at least from the Islamic point of view.[121]

However, *adat* still requires further procedures: *aji krama*/*sorong serah*, *nyongkol* and *bejango*. The first two occur consecutively on one day and mark the peak of the customary wedding celebration held and hosted by the bride's natal family. In a wedding parade (*nyongkol*), joined by the groom's relatives and enlivened with traditional Sasak musical performances, the newly married couple leaves the groom's house for the marriage ceremony gathering. Just before the parade reaches the gate of the wedding place, a group of people, usually senior kinship members representing each couple's family, convene a meeting to formalize the mutual agreement and acceptance of the couple. Following this, the couple and their conveyors enter the wedding gathering. The appearance of the couple is cheerfully greeted by the host, the bride's family and guests. This marks the unification of the two extended families after the disruption caused by the elopement. At the end of this marital process is *bejango,* which is held a few days after the wedding celebration. This is a small feast accompanied by Islamic supplications and prayers (*dzikiran*) at the bride's house. After this she leaves her natal family and lives together with her husband.[122]

The Sasak worldview regards a daughter as so valuable that she would not be simply relinquished upon the request of marriage by a man, but he must struggle to capture her and if possible engage in a deadly competition if more than one male suitor is involved.[123] It is not taboo for a girl in Lombok to receive an evening courtship visit (*midang*) from numerous male

[121] *Ibid*., p. 105.
[122] Platt, "Patriarchal," p. 106-107.
[123] Krulfeld, "Sasak," p. 201.

youths simultaneously.[124] The final decision with whom the girl will elope depends largely on her because an elopement could not ideally take place without her prior consent. Her parents are not supposed to intervene in her decision, except if the man fails to fulfill the prerequisites of *bait janji* (the declaration of commitment), *pisuka* (the wedding expenses) or if the marriage leads into *sala' timpal* (unequal marriage). The norms of ideal elopement thus rest on the woman's independence and male virility as well.[125] *Merarik* symbolizes a woman's prestige, high value and agency in determining her own choice beyond parental intervention.

However, it is not uncommon that in practice a woman is often forced to run away by deception. A deceptive elopement occurs when a man pretends to ask his female lover to accompany him somewhere but does not escort her back home in the evening. If a young unmarried couple leaves together and has not come back home in the evening or the night after the time limit is over, they will be charged with eloping.[126] One of my female informants, HJS, 35, an activist in a women's organization, told me how she was fooled by her male neighbor. One day, he offered her a ride to visit her relative, who was holding a big feast (*begawe*). Her mother allowed her to go with him, but cautioned her not to come back later than just before dark. They conceded and left right away. As dark was approaching, she asked the man to go home. He drove her back but he tricked her by directing their motorcycle toward Mataram, about 15 miles away. She harshly refused to be treated this way and openly resisted throughout the trip. He finally gave up and drove her back home. But it was just a short relief because the time limit had passed when they arrived. They had two options: getting married or paying a fine for violating *adat*. She had no intention whatsoever to marry the man and yet paying the fine was not

[124] Bennet, *Women,* p. 65-68.

[125] Irma Suryani, "Merarik dalam Bingkai Kearifan Masyarakat Sasak Lombok," in Wardatun (ed.), *Jejak*, p. 54-68 and Yasin, *Hukum,* p. 127-130.

[126] Field notes and focus group discussion with the members of Pekka Branch of Central Lombok, March 4, 2011. See also Platt, "Patriarchal," p. 71 and 76-77.

a viable choice either. Pressed by her family, she forcibly consented to marry him. She had one daughter from this marriage, which ended unhappily because of the lack of spousal support and responsibility from her husband.[127]

Due to rampant manipulation, elopement causes various problems such as the marriage of minors, failure to obey the state procedure of marriage registration, costly *pisuka*, and refusal of guardian consignment, just to name few common issues. There is little chance for a girl irrespective of her age to escape from marriage if she has eloped. Under normal circumstances a "stolen" girl cannot be returned unmarried, and because returning her could disgrace her and her family's reputation and disrupt the social order in general, *merarik* has rarely ended without marriage, regardless of the ages of the couple involved. Many deceptive elopements occur during the day, when a girl is forcibly or wickedly stolen after school by her boyfriend.[128] A female principal of an Islamic school in Central Lombok told me that one Islamic private school suffered from losing its female students because of early elopement. Another teacher confirmed this statement and acknowledged high incidences of elopement after school. The school attempted to prevent this by imposing a burdensome fine and expelling the students involved. This strategy did not work well because the parties would insist on paying the fine anyway and did not feel ashamed after being dismissed from school due to the low social stigma associated with the practice.[129] Underage marriage is a complicated phenomenon caused by myriad factors such as low education and poverty. But in Lombok *merarik* partly contributes to it. Syafruddin suggests the average age at marriage is between 15 and 19 years old. Of his 186 examples from each gender, the rate of underage marriage is higher among females, reaching 76.9% of cases

[127] Field notes March 4, 2011. Another similar story of deceptive elopement was presented at APIK Legal Aid Magazine Bulletin "Bini Parigan" No. 27, Juli-September (2009), p. 6-7. The story's title is appalling "*Aku tidak Berdaya karena Adat*," [I was powerless before the *adat*]. For another story, see Platt, "Patriarchal," p. 77.

[128] See again the story in Bulletin "Bini Parigan," p. 6-7.

[129] Interview, April 2, 2011.

compared with males, which is 58.1% of cases. Even the incidence of underage marriage remains higher among the females than that of the males, as the figures below demonstrate.[130]

Table 1.2: Ages at first marriage

Age Ranges	Age at First Marriage			
	Male	Percentage	Female	Percentage
10-14	2	1.1	13	6.9
15-19	108	58.1	143	76.9
20-29	49	26.3	24	12.9
30-39	20	10.7	6	3.2
40-beyond	7	3.7	-	-
Total	186	100	186	100

The official data released by the provincial government shows a relatively higher average marital age. The data indicates 19 years old as the median age at marriage among women in Lombok.[131] This gap probably results from different samples or populations. The official data are most likely based on samples taken from spouses holding official marriage certificates. All registered marriages must follow state regulations, including the minimum age, which is set at 16 years old for women and 19 years old for men.[132] Syafruddin's samples were gathered from the religious courts registry where not all litigants had a marriage certificate. So it is quite possible that his data reveals a lower average age. This means that early marriage does exist and that *merarik* seems to be one of the determining factors for this.

Early marriage can also contribute to another problem, namely, failure of marriage registration. If the bride's and groom's ages are insufficient, they will not meet the state's

[130] Syafruddin, *Perlawanan Perempuan Sasak: Perspektif Feminisme* (Mataram: Universitas Mataram Press, 2006), p. 27.
[131] BPS NTB, *NTB*, p. 74.
[132] The Marriage Law of 1975, Chapter 7 (1&2) and the Compilation of Islamic Law (KHI) Chapter 15 (1).

requirement of a minimum age for marriage. Considering the fact that early marriage is sanctioned by both *adat* and Islam, a marriage will not simply be dissolved on the ground that it is contrary to state law. In Lombok, a marriage will never acquire social legitimacy if it fails to follow both Islamic and customary prescriptions, although it may not comply with state law. An informant told me about a common way that people opted to negotiate or sidestep the registration regulation. He maintained that if the couples are still minors according to state law, the official at the marriage registration office will refuse to marry them unless they hold a license of marriage dispensation from the religious court, where claims for marriage dispensation are very low due to the complicated procedure and high cost for rural people.[133] A more popular way to get around this problem is to falsely raise the candidates' age to match the state's standard. In contrast, for the purpose of becoming migrant workers, people tend to lower their ages so they would appear younger in their documents.[134] My data seems to support this informant's explanation. Claims for a minor's marriage dispensation at the religious courts in Lombok are rare. There were only three cases in the last three years (2008-2010); one was at the court in East Lombok and two others in West Lombok.[135]

A more complicated factor that often negates the state procedure of marriage registration is concerned with the nature of *merarik* itself. One religious court judge told me the reasons why *merarik* often prevents compliance with the state procedure of marriage registration. He explained that certainty is important in elopement. Until the woman's *wali* is assigned, doubt as to whether a marriage can be officiated remains high.[136] The assignment of a *wali* is dependent upon the fulfillment of *bait janji* and payment of *pisuka.* All of these procedures occur

[133] On dispensation for marriage, see the Marriage Law of 1975, Article 7 (1) and Compilation of Islamic Law, Article 15 (2).
[134] Field notes, April 5, 2011.
[135] This is based on the whole cases and claims received by for religious court in Lombok from 2008-2010.
[136] Field notes, November 8, 2010.

consecutively and should be completed within no later than a week after elopement. Marriage deferral may be tolerated but this would result either in raising the sum of the *adat* fine (*dodosan*) or ruining the man's and his family's reputation for not being able to quickly consummate the marriage.

Under normal conditions, marriage registration requires a long, often frustrating, procedure. At one marriage registration office (KUA) in Central Lombok, a complete guide to the registration procedure from the beginning until the issuance of the marriage certificate is put on flyers in the office hall.[137] The procedure includes four steps. The first is to obtain several documents from the village office and complete them with basic information, such as marital status and the genealogy of the candidates. The second step is to get a health verification and a tetanus injection for the female candidate from a local clinic. Next, all of these documents are submitted to KUA for further inspection. Once the documents are verified and the registration fee is paid, the official of KUA publicly announces the upcoming event of the marriage. While waiting for the day of the marriage, the candidates must undertake marriage counseling at the same office. Once these procedures are completed, the marriage can be consummated and registered and becomes valid and legally binding. This is obviously a long administrative process and a time-consuming procedure. It is contrary to the principle of elopement, which is sudden and immediately completed. The Compilation of Islamic Law No. 1/1991, which is used at religious courts, requires engagement (*peminangan*) as a precursor to marriage.[138] This fact alone demonstrates an inherent tension between state law and customary marriage elopement in Lombok.

[137] Field notes, November 25, 2010.
[138] See the Compilation of Islamic Law, Article 3 (subchapter 1, 2 and 3) on Engagements.

Nevertheless, the law is not an automatic reflection of an abstract legal norm. The application of law is not only determined by what is written out in a statute or regulation, but is often concerned with opportunities and constraints that law creates and with the relationships and negotiations between the people concerned. This situation is relevant to marriage registration in Lombok. From the point of view of a *penghulu*, whom I talked with about his experience in assisting villagers registering their marriage, the procedure can in fact be waived and simplified and finished later on after the marriage has been consummated. The *penghulu* understood the gap between the expectations of customary marriage and the state procedure. For him, two conditions must be met to have a marriage registered: completing one document showing the marital status of the candidates and paying the registration fee. However, he explicitly stated that because a *penghulu* like him is not a state employee who receives a regular monthly salary from the state, he asks for voluntary additional contributions from the candidates if they need his assistance. "This is not corruption, because I am paid for what I work for. I have family and must sustain them. This voluntary contribution is legalized in religion. It is like '*ujr* (wage); when you work you deserve a wage."[139] With this contribution, he would work extra time to assure that the registration process does not become burdensome for the candidates. He denied that this fee is a sort of bribe but interpreted it as a wage for what he has done in an out of the ordinary situation.[140]

Another concern of *merarik* pertains to the voluntary contribution (*pisuka*) of the wedding expenses on the part of the groom. This problem emerges when the woman's guardian

[139] Interview with the *penghulu*, November 25, 2010. In Lombok, *penghulu* is a village assistant of the office of marriage registration (KUA). Every KUA is located at a sub-district level (*kecamatan*) and has a number of assistants at every village. Other similar terms include *pengulu* or *pangulu* in Java, *panghulu* among Sundanese in west Java and *pangolo* in Madura. Their role is mainly concerned with administering and supervising Islamic religious matters of marriage, including Islamic judiciary in early periods. See Muhammad Hisyam, *Caught between Three Fires* (2001).

[140] A different strategy was taken by another official by manipulating the date of registration, which was backdated ten days prior to the marriage, as Platt revealed it. See Platt, "Patriarchal," p. 108.

and family set a high price for *pisuka*. There is no requirement to pay *pisuka* in Islamic and state law since it is a customary obligation. Instead, Islam and state law require the groom to pay a *mahar* to the bride.[141] Unlike the *mahar*, whose amount is not always valued in terms of money because it is mainly seen as a symbolic gift, *pisuka* should be given in materially valued contributions such as rice, tea, sugar, meat, eggs or vegetables for the wedding feast, or, as in a recent trend, in cash.

An expensive *pisuka* may be perceived by the husband as a pretext to treat his wife at his whim because he thinks he has "bought" her. Some men demand reimbursement of the *pisuka* when their wives ask for divorce, especially if the *pisuka* was expensive.[142] The rate of *pisuka* is contingent upon many factors, such as the woman's social status, education and family background and the man's wealth. It also varies from one village to another. In a village in the outskirts of Mataram, the average rate is Rp. 1 million.[143] *Pisuka* ranges between Rp. 1-3 million in another village in West Lombok.[144] At one village in Central Lombok, the rate is even higher. This applies when a woman has a higher educational background and if the suitor comes from another village. One male defendant in the religious court told me that the *pisuka* in that village reached a minimum of Rp. 20 million for a girl with an elementary school education. For those who graduated from junior and senior high school, their *pisuka* are worth Rp. 25 to 30 million. For a girl with a higher education such as college or university, her *pisuka* may reach as high as Rp. 50 million. When I confirmed this with one of the students from that village at the State Institute of Islamic Studies (IAIN) Mataram, he just smiled, but did not deny it. However, the

[141] KHI outlines *mahar* at length in Articles 30-38.

[142] I heard several times very clearly in a courtroom hearing male defendants (husbands) demanding reimbursement of their *pisuka* payment after their wife had petitioned divorce at the court. They said they needed the money to remarry. I will discuss this topic on motivations and strategies of divorce in Chapter Two.

[143] Interviews with a female informant, December 27, 2010.

[144] Platt, "Patriarchal," p. 98.

rate is in practice always negotiable,[145] because no parents would let a daughter's marriage be delayed due to her *pisuka* alone.

Here we see how Islam and *adat* work together to play a pivotal role in *merarik.* Although in particular contexts, religious law supersedes custom, both are fundamental for marriage in Lombok. The predominance of both custom and formal religion poses challenges to the modern state and its laws. The introduction of modern law and judicial institutions in the nation-state of Indonesia emerged as an alternative discourse to *adat* and Islam for resolving family-related disputes. Now I turn to discuss the religious courts in Lombok, analyzing how they developed and how local contexts of religion and custom influence the courts in Lombok in various ways.

3) The Religious Courts in Lombok

The earliest source at my disposal about the administration of justice in Lombok is the Treaty of 1894, signed by the Dutch representative M.C. Dannenbargh with the newly defeated Raja of Lombok.[146] The Treaty was accepted as the Constitution for the Dutch colonial government in the region. It was therefore not only about justice per se, but was also concerned with the transfer of power from the old to the new ruler, citizenship, trading, taxation, the military and so forth. Articles 21 and 22 of the treaty declared that all people regardless of their ethnicity living in the territory were subject to the Netherlands Indies Government administration of justice, especially if they committed crimes or insurgency or wished to file suits over trade and disputes over mining industries.[147] Anything beyond these domains fell under the law of the Hindu Raja of Lombok. An exception for this stipulation was made for Muslim subjects, where

[145] *Ibid*., p. 94-99.
[146] Kraan, *Lombok,* p. 214-225.
[147] *Ibid*., p. 220.

Article 27 stated that "the Mohammedan inhabitants of Selaparang shall be subject to the administration of justice of their own priests and heads, insofar as marriage and inheritance law is concerned."[148] The religious court for Sasaks was called *Mohammedaansche Godsdienst Beambte* (*Raad Agama* or *Badan Hukum Syara'*), and exercised competence over repudiation (*talak*), marriage (*nikah*), reconciliation (*rujuk*), *mahar*, judicial marital dissolution (*fasakh*), spousal support (*nafkah*), child custody (*hadlanah*), endowment (*wakaf*) and the public treasury (*baitul mal*).[149] *Raad Agama* was part of the indigenous court called *Raad Sasak*, in which *adat* law was also applied. In October 20th, 1954, the Indonesian Ministry of Justice abolished the Sasak Adat Court (*Raad Sasak*) and replaced it with a civil court (*Pengadilan Negeri*), as part of the national judicial reform.[150]

The Ministry of Religion issued Decree 5/1958 for the formation of a religious court of Mataram, Lombok, whose judicial territory covered the whole island.[151] A decade later, the Ministry issued Decree 159/1968 for the formation of religious courts in Selong, East Lombok and Praya, Central Lombok.[152] However, due to limited resources, the administration of these two courts was still held under *Mahkamah Syar'iyah* in Mataram. The reorganization of the judiciary in East and Central Lombok began in 1976 and 1977 after the religious court of Mataram was unable to handle increasing caseloads from all over the island upon the enactment of Marriage Law 1/1974.[153] As a consequence of the partition of Mataram into two government

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[148] *Ibid*., p. 221.

[149] Proyek Pembinaan Badan Peradilan Agama, *Pengadilan Tinggi Agama Mataram dan Pengadilan Agama dalam Wilayah Hukumnya* (Mataram: Proyek Pembinaan Badan Peradilan Agama, Departemen Agama, 1983/1984), p. 102-103.

[150] Pengadilan Agama Praya, *Profile Pengadilan Agama Praya* (Praya: PA Praya, 2008), p. 1. See also Notosusanto, *Organisasi*, p. 138-141.

[151] At first, the name of the court was *Mahkamah Syar'iyyah* of Mataram and changed to Pengadilan Agama after the unification of the court name upon the enactment of Religious Judicature Act 7/1989. Proyek Pembinaan BPA, *Pengadilan*, p. 103.

[152] *Ibid*.

[153] *Ibid*.

administrations, namely Mataram Municipality and West Lombok Regency, another religious court was established in West Lombok in 1998.

The religious courts in Lombok face two general challenges: technical and ideological. The technical challenge is concerned with limited technical support and inadequate facilities. In their early establishment, courthouses were often small and incapable of accommodating high volumes of cases and other related judicial activities. They also lacked sufficient staff, whose work was hampered by limited office supplies. These problems have been gradually addressed through the court reorganization and modernization. The ideological challenge, however, is much more difficult to resolve because this relates to the ideas, perceptions and attitudes of the people toward religious courts.

In the beginning, the religious courts in Lombok had to struggle very hard to sustain their existence. For instance, the first office of the religious court of Mataram was very small and was attached to the Provincial Office of the House of Representatives.[154] It had only four staff in 1960: one head, two clerks, and one administrative staff.[155] The court in Central Lombok had a similar problem. When operating for the first time in 1977, the court rented a house for Rp. 200,000 for two years to sustain its daily activities because it did not possess an office.[156] Other issues were related to limited transportation and dependence on the civil court to execute its decisions regarding inheritance claims, as reported by the religious court of Mataram.[157] The impact of a dual judiciary on clients, whose claims of inheritance would first be settled in the

[154] *Ibid*., p. 9.
[155] *Ibid*.
[156] *Ibid*., p. 62.
[157] *Ibid*., p. 31.

religious court and then endorsed by the civil court, was shared by the religious court in East Lombok, which also suffered from limited facilities and infrastructure shortcomings.[158]

Although each court faced its problems differently, all suffered the common problem of human resources. Most courts only had one full-time judge, who often simultaneously acted as the court head. Consequently, until 1983-1984, all the courts still had to appoint several part-time judges to help handle their workloads. Most of these provisional judges were religious teachers (*tuan guru*), who either ran or graduated from *pesantren,* or who had an equivalent education in Islamic law. In Mataram, four of the total of eight part-time judges were *tuan guru* from a traditional Islamic school background. Only two of these part-time judges graduated from university and two others were merely senior Islamic high school graduates.[159] Another court in Praya hired five part-time judges and so did the court of Selong.[160] In short, eleven out of eighteen part-time judges on Lombok were *tuan guru* and nearly all of them were trained in *madrasa* or *pesantren*. The Islamic *fiqh* they learned deeply influenced the ways in which the judges framed and examined the legal cases filed before them. For example, the *fiqh* terms *fasakh* (judicial marital annulment), *syiqaq* (judicial divorce on the grounds of irreconcilable conflicts) and *ta'lik talak* (conditional divorce) were used to categorize divorce claims.[161] Another category they used was *pengesahan talak*, where the *talak* occurred out of court and was later brought to the court for validation,[162] despite the fact that this procedure contravened state law. Marriage Law 1/1974 declares that "divorce might be approved by court after the court has failed in its attempts to reconcile the conflicting spouse." However, since the introduction of

[158] *Ibid*., p. 120.
[159] *Ibid*., p. 22.
[160] *Ibid*., p. 57, 68 and 111-112.
[161] There were 193 *fasakh*, 40 *syiqaq* and 83 *taklik* claims filed to the courts in Lombok in 1983. *Ibid.*
[162] The total *pengesahan talak* was 44 claims. *Ibid*.

Religious Judicature Act 7/1989 and the Compilation of Islamic Law 1/1991, these *fiqh* categories have rarely been used.[163]

Another issue faced by the religious courts in Lombok pertains to legal pluralism and its considerable impact on the courts. Although *adat* norms and alternative agencies of dispute resolution provides both constraints and opportunities for people in particular situations and contexts, this negatively impacts the courts.[164] A narrative of a marital dispute from North Lombok best illustrates how *adat* was upheld and how the state law was downplayed.[165] As Sven Cederroth reports, in 1972 a girl eloped with her suitor, a policeman. Because the girl was from a noble family and the man was not, the elopement broke the rules of customary marriage and the man was charged with a fine (*dodosan*). The girl's father refused to dispatch a *wali* unless his daughter's suitor paid the fine, whose amount was beyond his ability to fulfill.[166] Despite this rejection, the marriage was eventually consummated with the help of the sub-district official of religious affairs, who acted as a *wali hakim*. A month later the girl returned to her parent's home for a visit but never went back to her husband because her father impeded her from doing so. Her husband's endeavors to convince her and her father were to no avail since he had not yet paid the fine. The frustrated policeman then switched to the religious court in Mataram, which declared that the marriage was indeed valid (*sah*). However, the girl's father disregarded the court's decision because the marriage was considered invalid according to *adat*. After waiting to resolve this dilemma for three years, the policeman finally gave up. He wished to marry another woman and hoped to divorce his noble wife. But again, the father insisted that since the first marriage

[163] I will discuss this in detail in Chapter 4, Subchapter B and C.

[164] Bowen, for example argues, that women in Aceh tended to resort to Islamic law and the religious court to resolve their inheritance issues more than to custom which does not offer them enough share of the estate. On this issue in Aceh, see John R. Bowen, *Islam, Law and Equality in Indonesia: An Anthropology of Public Reasoning* (Cambridge, UK: Cambridge University Press, 2002).

[165] Cederroth, *The Spell,* p. 140-154.

[166] The fine was amounted 2 million Chinese coins (*kepeng*) and 24 water buffalos. *Ibid*., p. 151.

never existed, there would be no divorce. At this point, the situation became even worse because the policeman was caught between *adat* and state law, for he could not remarry until he had divorced his noble wife whom he never lived with after she went home.

A further consequence of plural norms and laws is that the state's role is diminished, as some studies have revealed. In her recent village-based study of marriage among rural Sasaks, Maria Platt found that only one out of eighteen married female respondents possessed a state marriage certificate because *adat* and Islam were deemed sufficient grounds for marriage.[167] Divorce followed easily with remarriage, and sometimes a polygamous union was not socially stigmatized, as Judith Ecklund and Jocelyn Grace have observed. Ecklund, for example, showed that divorce and remarriage were tolerated and being a second wife of a nobleman was often more prestigious for rural women than being the only wife of a commoner. She noted "that one is married is in some respects more important than the particular individual to whom one is married."[168] Grace observed that divorce frequently occurred within a year after marriage but polygamy was rare because this was less preferable.[169] What was salient in all these cases was the relative absence of documentation and neglect of state procedures. However, these examples should not be construed as a sign of the total failure of the state and its institutions, such as religious courts. Rather, they should be seen as a reminder that the operation and function of state legal institutions might in one way or another not be fully realizable due to socio-cultural challenges and that reliance on *adat* and Islam could and did supersede state law.

To confront these situations and increase the accountability and professionalism of the court, the Appellate Religious Court of Mataram, as the institution responsible for the religious courts of first instance in the NTB Province proposed a strategic plan for the years 2006-2010.

[167] Platt, "Patriarchal," p. 107-111.
[168] Ecklund, "Marriage," p. 21.
[169] Grace, "Sasak," p. 10-12.

The plan's main objectives were to realize the principle of easy, simple and affordable justice, to improve the professionalism of court officials and staff, to modernize and update court facilities, and to promote state law to the people to stimulate their legal awareness.[170] The state allocated a nearly Rp. 10 billion budget for the four religious courts of first instance in Lombok to support these objectives.[171] With this fund, the courts attempted to address these issues.[172]

Easy access to the courthouse is one of the central issues the courts try to resolve. For many people, long-distance and unaffordable transportation to the courthouse has made them reluctant to deal with the court, as one survey on court access has showed.[173] Circuit courts and free legal services (*prodeo*) are two prominent programs to answer this problem. Circuit courts are held at a village or sub-district office so that villagers can easily access the court. Another program aims to offer free legal aid to the poor. *Isbath nikah* (marriage legalization) claims and proceedings are often held at circuit courts and categorized as *prodeo* (U.S. *pro bono*).

Another significant development has been concerned with human resources. The courts now have a sufficient number of judges, clerks and executors. The courts no longer appoint half-time judges. As of 2007, the four religious courts of first instance in Lombok were staffed with 23 judges, 94 clerks, and 69 executors, who were to handle 1,694 total cases in the year.[174] Four years later, the number of judges increased to 35, including the court head and the head deputy.

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[170] Pengadilan Tinggi Agama Mataram, *Laporan Tahunan Pengadilan Tinggi Agama Mataram* (Mataram: PTA, 2007), p. 3.

[171] *Ibid*., p. 19.

[172] On the national comparison of resources and infrastructure between religious courts and general courts, see Tim Lindsey, *Islam, Law and the State in Southeast Asia Vol. I Indonesia* (London and New York: I.B. Tauris, 2013), p. 277-283.

[173] Cate Sumner, *Memberi Keadilan bagi Para Pencari Keadilan: Sebuah Laporan tentang Pengadilan Agama di Indonesia Penelitian tahun 2007 tentang Akses dan Kesetaraan* (Jakarta: Mahkamah Agung dan AUSAIDS, 2007).

[174] Pengadilan Tinggi Agama, *Laporan*, p. 17 and 23.

Some of them had earned master's degrees while others were pursuing their master's degrees in various universities in Mataram. None of the judges was without a university degree.[175]

To support their daily routines, each court has at least one operational car and several motorcycles. Except for the religious court of Selong in East Lombok, which planned to build a new courthouse in 2012, all other courts had a permanent and luxurious two-floor tiled courthouse equipped with air conditioning located downtown or at another strategic location. Almost all of the administrative tasks and registration have been computerized. Most judges use laptops to support their work. Each court has a set of information technology tools, such as a plasma TV monitor displaying the hearing schedule and a touch screen of data bases connected to the Internet, although some were not in use due to limited electric power. Each court runs websites from which information about the court can be acquired.[176] These sites feature basic information regarding, for example, the court's administrative structure, a list of staff, and updated information about their activities and programs. To be publicly accountable, the website also provides information on the procedure and fees of litigation, the annual report, and the use of the budget. In short, religious courts are now very modern and are equipped with information technology tools and internet-based services.

C) CONTESTING AUTHORITY: RELIGIOUS COURT JUDGES AND *TUAN GURU*

One formidable challenge to the religious courts stems from local Muslim religious scholars, *tuan guru,* who oppose the courts and harshly criticize their rulings for contravening

[175] Field notes, July 1, 2011.

[176] See these sites www.pa-mataram.go.id for PA Mataram; www.pa-praya.net for PA Praya, Central Lombok, http://pa-selong.go.id/ for PA Selong, East Lombok and http://pa-girimenang.go.id/ for PA Girimenang, West Lombok. On Mataram Appellate Religious Court's site, see www.pta-mataram.go.id

fiqh, especially the Shāfi'ī doctrine as applied in Lombok. Mastery in *fiqh* is a crucial prerequisite upon which one can acquire Islamic authority in Lombok. In this section, I examine the narrative of a disagreement between a judge and a prominent *tuan guru* that occurred in a village office on the occasion of a circuit court hearing. The man, 60, who wore a white *kopiah* (Muslim cap) indicating that he had performed the pilgrimage to Mecca (*haji*), attended the hearing as a witness for a couple demanding legalization of their past marriage from the court. After being told by the judge to swear before offering his testimony, the *haji* refused, arguing that there was no ground in Islamic law for this matter. He challenged the judge's handling this petition and asked him to cite any source in Islamic scriptural texts that required an oath.

This incident is important because it reflects an ideological conflict occurring in the public sphere. The *haji*'s gesture can be interpreted as a citizen's blatant disobedience of state authority. His confrontation with the court suggests that he did not wish to surrender to the judge's command because he thought he was more knowledgeable than the judge in Islamic law. This served as an entry point to question the judge's authority and the legitimacy of the state to decide what is proper procedure in an Islamic court and what is not. Although the state applies Islamic law in the religious courts, it does not fully realize the law, as the *haji* contended. The judge assumes a powerful authority that is rarely contested by litigants or witnesses in the courtroom. Although debates between litigants and judges may arise, these usually deal with technical and procedural issues. If any debate occurs concerning the substance of the law or its interpretation, the judges can easily control the situation because they hold coercive authoritative power that can be used to compel litigants to follow their commands. Does the circuit court incident suggest that the judge's authority when exercised beyond the courthouse poses a serious challenge to other forms of Islamic authority?

Kramer and Schmidtke's recent edited volume on religious authority in Muslim societies shows that religious authority in Islam is not centralized but fragmented through diverse figures such as the *'ulamā'*, Sufi masters, legal scholars and judges.[177] The above case further illustrates their findings by offering empirical data highlighting contestation over Islamic legal authority in contemporary Indonesia. Another edited volume on authority by Azra, van Dijk and Kaptein does focus on plural Islamic authority figures in Indonesia but none of the chapters deals with judges or religious courts.[178] As many have argued, the increase of modern Islamic schooling and curricula, the use of printed mass media and technologies in studying Islam and the reorganization of the Islamic courts have significantly reduced the traditional authority of the *'ulamā'*.[179] Unlike the interdependent relationship between jurists and magistrates in classical Islam, as Masud, Peters and Powers[180] and Hallaq[181] describe, *'ulamā* and judges in Lombok frequently engage in contestation over who has authority over Islamic law.[182] Here, I am not concerned with defining Islamic authority per se.[183] Rather, I am concerned with the ways in

[177] Gudrun Kramer and Sabine Schmidtke (eds.), *Speaking for Islam: Religious Authorities in Muslim Societies* (Leiden: Brill, 2006).

[178] Azyumardi Azra, Kees van Dijk and Nico Kaptein (eds.), *Varieties of Religious Authority: Changes and Challenges in 20th Century Indonesian Islam* (Leiden and Singapore: IIAS and ISEAS, 2010).

[179] Bryan S. Turner, "The Crisis of Religious Authority: Education, Information and Technology," in Anthony Reid and Michael Gilsenan (eds.), *Islamic Legitimacy in Plural Asia* (London and New York: Routledge, 2007), p. 53-70 and Muhammad Qasim Zaman, *The 'Ulama in Contemporary Islam: Custodian of Change* (Princeton: Princeton University Press, 2002).

[180] See Muhammad Khalid Mas'ud, Rudolph Peters and David S. Powers (eds.), *Dispensing Justice in Islam: Qadis and their Judgments* (Leiden: Brill 2006).

[181] Wael B. Hallaq, *Authority, Continuity and Change in Islamic Law* (Cambridge, UK: Cambridge University Press, 2001).

[182] In general, authority is also contested among different Muslim groups or segments. See Dale F. Eickelman and James P. Piscatory, *Muslim Politics* (Princeton: Princeton University Press, 1996), Frederic Volpi and Bryan S. Turner, "Introduction: Making Islamic Authority Matter," *Theory, Culture & Society*, 24:2 (2007): 1-19 and Peter Mandaville, "Globalization and the Politics of Religious Knowledge: Pluralizing Authority in the Muslim World," *Theory, Culture & Society*, 24:2 (2007): 101-115.

[183] On this topic, see Khaled Abou El Fadl, *Speaking in God's Name: Islamic Law, Authority and Women* (Oxford: Oneworld, 2001) and *And God Knows His Soldiers: The Authoritative and Authoritarian in Islamic Discourse* (Lanham: University Press of America, 2001).

which authority is contested in one locale by different actors and the extent to which the state and its authority is challenged by non-state actors.[184]

1) The Incident at the Circuit Court

I was very fortunate to be allowed to observe a circuit court hearing held at a village office in southwestern Central Lombok.[185] I accepted the invitation because I thought this would enhance my insight about the work of the judges and clerks beyond the courthouse. We left the courthouse at nine thirty in the morning in two cars and forty five minutes later arrived at the location where the village officials had been waiting for us, although most clients were not yet present. While the clerks were busy preparing the court paraphernalia such as the court and national flags, and arranging tables and chairs in the hall of the village office so that it would look like a courtroom, the clients gradually arrived. Some of them brought their children. Others had just returned from the rice fields and entered the hall hastily. The climate was very informal. Some male clients were smoking inside the hall and others wore short pants, which are strictly prohibited in an actual courtroom. Six judges and two clerks were to handle nineteen cases that day. They were divided into two *majelis* (committees), each of which consisted of one leading judge and two assistant judges, and one clerk, as this is a common composition in the courtroom. The duty of the council was to examine cases, hold hearings and produce decrees (*penetapan*). All the petitions (*permohonan*) on this day related to marriage legalization (*isbath nikah*) and were categorized as *prodeo*, which means free of charge and a service for the poor.[186] Although the environment of the circuit court is less formal for litigants, judges always wear official court

[184] This approach, namely examining the state on a diverse range of settings or the social embeddedness of the state, is taken by Klinken and Barker in their edited volume. See Gerry van Klinken and Joshua Barker (eds.), *State of Authority: The State in Society in Indonesia* (Ithaca: Cornell University Press, 2009).

[185] Field notes, November 10, 2010.

[186] The court clients sometimes still need to cover the expenses of the circuit court hearing since the village office do not allocate funds for this program. The cost varies, ranging from Rp. 10,000 up to Rp. 50,000. The fund is used to cover all expenses of the circuit court, such as stationery supplies, banners and food.

dress. Male judges wear a long black robe with green color on the front part and a white tie and a black hat. Female judge wear the same robe but they don *hijab* (or *jilbab*).

At 10.30 a.m., the hearings began after the technical preparation had finished and most litigants had arrived. It was at the first hearing that the conflict between the senior witness, the *haji*, and the judges broke out. The clerk called the first petitioners, a couple, to come before the bench. The judge asked their names, ages, home residence and occupations. The overall dialogue was relatively brief. In most hearings of marriage legalization cases, judges avoid asking detailed questions so that they can settle the petitions quickly. Instead, the petitioners are mostly interrogated about their reasons for wanting a marriage certificate. Below is an excerpt of the dialogue:[187]

> Judge: Why do you ask for the marriage certificate?
>
> Plaintiff: In case we need it (*buat jaga-jaga*), since we often travel and are asked about our marital status.
>
> Judge: Did you meet all the requirements [for marriage legalization]?
>
> Plaintiff: Yes.
>
> Judge: Did you bring two witnesses with you?
>
> Plaintiff: Yes.
>
> Judge: Who are they? What are their names? Call them!
>
> The petitioner mentioned two names and pointed to two senior males sitting behind them.

Before asking detailed questions about the marital status of the petitioners, the judge first asked the two men if they were willing to take an oath before offering testimony.

> Judge: May the witnesses please come forward [Two senior male witnesses came forward and sat down on the chairs before the *majelis*].
>
> Judge: Before asking you questions, I first need your confirmation. Are you willing to be sworn before giving testimony?

[187] Observation and field notes, November 10, 2010.

First Witness: Why? Is it necessary since I myself attended their wedding and supervised their marriage contract?

Judge: This is the procedure, without which we cannot continue to proceed to the petition.

First witness: I know sir, but why must I be sworn? Is this [requirement to take an oath] mentioned in the Qur'ān? Can you show me the verses on it?

Judge: My question is "Are you ready" [for taking an oath] or not? Do not answer something that I did not ask [the judge gets irritated and raises his voice].

First witness: But there is no ground for this in Islamic law.

Judge: If you do not want [to be sworn], please return to your seat. Someone else should replace you!

First Witness: Well, alright! [He now gives up and disappointingly follows the judge's commands].

Judge: Please follow my word "*Wallāhi* [at this point, the judge stops to give a chance for the witness to follow his word. When the witness has finished, the judge continues. This pattern is repeated until the end of the oath]*…demi Allah…saya bersumpah…bahwa saya…akan memberikan keterangan…yang benar…tidak lain…kecuali yang sebenarnya*."[188]

This is a very common formulaic pattern of swearing in the religious courtroom, where the judge breaks the oath formula into words or short phrases and pronounces them very clearly so that the witness can reiterate them precisely.[189] If the witness misses a word or says the oath incorrectly, the judge will ask him to repeat it. In general, the questions for the witnesses center on the witness's knowledge about the marital status of the petitioners and their marriage contract and/or wedding ceremony. Upon asking name, age, residence and occupation, the judge seeks to know about any prior relationship between the witness and the petitioners, be they kin relatives,

[188] The English translation of the oath reads "By God, I swear that I will convey true information, [what I am declaring is] nothing else except the truth."

[189] For non-Muslim witnesses, however, the judge instructed them to pronounce their own oaths.

friends or just neighbors. If the case is *prodeo*, the judge also has the witness testify that the petitioners are poor.

Although the first witness successfully completed answering all the questions, he did not exactly follow the formulation of the oath dictated by the judge. He added two words, namely *billāhi* and *tallāhi,* at the beginning of the oath. Instead of merely saying *wallāhi*, as the judge asked him to do, the witness stated "*wallāhi*, *billāhi, tallāhi"* and only after that resumed following the judge in pronouncing the oath in Indonesian. The witness sought to demonstrate that he knew the formula for oaths in Islam better than the judges. By using all three Islamic oath phrases, he attempted to convince the *majelis* of his knowledge. He also wanted to assure the judge that he recognized the petitioner's marital status because he attended their marriage ceremony. Upon giving testimony, the first witness returned to his chair in the back.

However, the tension continued. After the first testimony was over, the judge called the second witness. Surprisingly, this witness declined to take the oath because he was afraid of making a mistake and giving imprecise, and thus partially untrue, information.[190] His reluctance might also have been influenced by the previous tension between the judge and the first witness. However, the judge convinced him that he should not be concerned. The judge asked him to state "no", "yes" or "do not know" if he was unsure about the answer. Yet, the witness was still unconvinced. The judge then asked if there was anybody else who might be willing to substitute for him. No one responded and this situation embarrassed the village secretary, as the village officer responsible for the event. He then lectured his people for a fairly long time and reminded them about the risk of being ignorant of the law, such as having a marriage unauthorized by the state, which in turn resulted in the difficulty of finding witnesses at a hearing.

[190] The reluctance to give testimony like this is in fact not unusual because witnesses are very heedful to avoid making any mistake in conveying information. I saw some witnesses withdraw from giving testimony at the courtroom. They say to the judges that they did not possess exact knowledge or information that the judges required.

This situation provoked the first witness, who continued to challenge the judge. He then stood up, shouting that an oath was not required for marriage legalization. "What is the function of the oath for the witness? It is not necessary in this regard because we have no basis for this in *kitāb fiqh*. Therefore, people should refuse."[191] Being aware of the uncontrolled situation, the senior judge attempted to calm down the situation, asking the man to keep quiet. The man protested against the senior judge and then went out of the hall. Eventually, the village secretary broke the silence by offering himself as a substitute witness since all claims had to be settled that day. Consequently, he was sworn in more than once. Here pragmatism applied and saved the proceedings.[192]

This incident encouraged me to look into the social norms, cultural logic, and social conventions behind which the incident could be understood more precisely. The first witness, the *haji*, did not obey the court procedure but was able to draw the attention of the audience. During a break, I approached two of the three judges who handled the case and asked their views about the incident. The senior judge, who was a Sasak, offered his distinctive view, a particularly local interpretation of the incident. He said that what happened was an expression of "*pagah*," a type of moral character typically found in the area. He explained that "*pagah*" means "stubborn, resistant," or "recalcitrant." He continued to explain that historically the people of the region were brave fighters against external invaders. In the course of the Praya War at the end of the nineteenth century, Balinese troops failed to conquer the region due to strong resistance from the local fighters.[193] He said that the people of this region were so conscious of this history that up to

[191] Observation and field notes, November 10, 2010. In Malaysia, clients of Islamic courts sometimes refuse to bow to the judges when entering the courtroom, arguing that only God deserves human's bowing. See Michael G. Peletz, *Islamic Modern: Islamic Courts and Cultural Politics in Malaysia* (Princeton: Princeton University Press, 2002), p. 81.

[192] Pragmatism often occurs especially in petitions of marriage legalization where the judges may tolerate one to be a witness in multiple hearings.

[193] Kraan, *Lombok*, especially Chapter 2, p. 16-29.

the present many of them, especially those who held a high religious status or social class, still express this stubborn spirit. Referring to the incident, the judge said that the witness's *pagah* was his insistence to be allowed to voice his opinion, and once he had succeeded, he was appeased. I was told by another informant about a similar conflict that occurred in the surrounding area during a court inspection of disputed land in a joint-property claim. The defendants along with their families and associates stopped the court emissaries at the village border and forcibly evicted them. The inspection failed even before reaching the disputed land.[194] Despite different triggers for these events, both demonstrate that tension, which may lead to violence, can flare up during conflict adjudication by the court.

The senior judge's interpretation of the circuit court incident seemed reasonable, since it took place in an area where people are often described as heroic and because the act was carried out by a man of high social class and prestige, being a prominent religious figure of the village (*tokoh agama desa*). However, the senior judge's explication of the incident missed one salient aspect of the contestation. The *haji* signaled his strong disagreement with the judge because the judge was seen to have transgressed the prescription of Islamic law. The man framed his discourse in Islamic legal terms instead of employing another kind of argument when challenging the judges.

The second judge construed this incident from another perspective. Since he was not from Lombok and less familiar with local history, he underscored the law as a means of disciplining its subjects. To him, the question was not about whether certain people from a particular geographical background tend to be more outspoken and critical than others; rather, it was about how to punish a person, who did not comply with the law. He believed that the

[194] The informant even showed me the video of the physical conflict between the litigants and defendants families that she surreptitiously recorded from her cell phone. Field notes February 17, 2011.

incident was an embarrassment to the *haji* rather than an enhancement of his credibility because he was a prominent figure and was chased out of the hall before the eyes of his people. In his view, the incident was a valuable lesson for the man and other local religious figures like him to not conduct a marriage ceremony that was not sanctioned by the state.

However, it is difficult to gauge the efficacy of punishment for transgression of the law, as this judge argued. The fact that unregistered marriages often go unnoticed and the number of court clients seeking marriage legalization remains relatively high demonstrate that this issue will not be settled easily. In Lombok, marriage legalization petitions constituted 2,536 (33%) out of 7,463 total claims filed in the four religious courts of first instance in the last three years (2008-2010).[195] This suggests that the local violation of marriage registration laws is still prevalent. Furthermore, the failure of the Muslim Marriage Law Bill due to strong resistance from Muslim leaders suggests that the problem will continue to persist in the future.

Although the judges' explanations seemed reasonable in one sense, it is important to note that both judges ignored the likelihood that the incident was a challenge to their authority; at least, they did not construe it in terms of contestation over state law and authority. For me, the incident showed that the *haji* questioned the legitimacy of the state. The contender's use of Islamic symbols, such as Qur'ān and *fiqh* in his argument and framing it in terms of Islamic legal reasoning indicate that he questioned the judge's understanding and application of Islamic law. To the contender, the judge's demand to swear an oath revealed that he had not properly complied with the Shari'a. The ignorance of the judge and his lack of knowledge of the law in the contender's view constituted an opportunity to claim superior authority while denigrating a

[195] The data are derived, and manually calculated, from the four the religious courts of first instance in Lombok.

state official as less authoritative. To the *haji*, authority is not acquired only from the power of the state but also from the religious knowledge that is a prerequisite for one's position.

Here the issue goes beyond the authority of the judges alone and touches upon the legitimacy of the state and state institutions as proper agents in applying Islamic law. The logic that the *haji* used echoed those of pre-modern jurists' views about the Shari'a. Abou El Fadl states that "Muslim jurists' rhetorical and moral power was grounded in the fact that they could plausibly argue that ruler and ruled are normatively bound by God's law. The legitimacy of any political and social institution should and must be evaluated according to its compliance with God's law. God's law must rightly be based on God's literal and immutable speech, the Qur'an and the precedent of God's last prophet, the *sunnah*."[196] Clearly, when the state, here represented by the judges, is not perceived to follow God's law, the state loses its legitimacy and thus provoked the *haji*'s refusal. In other words, simply being a state-appointed judge was not a sufficient argument for the *haji* to accept the judge's command. Authority must be based on legitimacy of Shari'a knowledge, upon which the authority of a traditional religious teacher is built. In the *haji*'s view, legitimacy is only acquired if God's law is followed completely. At the very least, the state should not introduce a new legal prescription that contravenes the law because, as Akbarzadeh and Abdullah Saeed argue, "political power is only just and legitimate if it operates on Divine Law (Shari'a) and serves the cause of Islam. This is because temporal rule is not seen as possessing its own source of authority, independent of the Devine Law. Any attempt to rule independent of the Shari'a, is, therefore, considered illegitimate."[197]

2) The Cultural Logic of Contestation: Tuan Guru, Pesantren and Fiqh

[196] El Fadl, *Speaking in God's Name*, p. 13.

[197] Sharam Akbarzadeh and Abdullah Saeed, "Islam and Politics," in Sharam Akbarzadeh and Abdullah Saeed (eds.), *Islam and Political Legitimacy* (London and New York: RoutledgeCurzon, 2003), p. 2.

To better understand the courtroom incident and the mode of thought of the contender, it is important to look at the broader context of the contestation between the judge and the *haji*. I will illustrate this by detailing a similar argument between a judge and a *tuan guru* regarding Islamic law. If we turn our attention from the religious court with its state laws and procedures in settling disputes to the daily life of the people and the ways in which they resolve their issues relating to family matters, we realize that this incident was a logical consequence of the authority of classical Islamic legal discourses in Lombok. If the judge assumes authority in the courtroom, it is the *tuan guru* with his *fiqh*-minded outlook that is influential in forming Islamic discourses beyond the court. The 2010 provincial census data shows that the number of mosques in the central district of Lombok was 1,227, the highest in the island, and that there were also 304 *pesantren* and *madrasa* or Islamic schools across this central region.[198] Through these Islamic institutions, the authority of *fiqh* is promoted by the *tuan guru*.

As many informed me, most *tuan guru* would refer to *fiqh* literature, commonly taught at Islamic boarding schools, such as *pesantren* and *madrasa,* when supervising matrimonial disputes such as marriage and divorce. The *tuan guru*'s pervasive influence is also sustained by their broad involvement in socio-political activities. Obviously, they are religious and spiritual leaders. But people often come to them not only to study Islam and seek religious and moral advice but also to ask for protection from misfortune or to cure illnesses. Other *tuan guru* participate in political parties, run in local elections and some are elected members of the Regional House of People's Representatives.[199] Due to their diverse roles in society, suffice it to

[198] BPS NTB, *NTB,* p. 203-205. On general discussion about Islamic schooling, *madrasa* and *pesantren*, in Indonesia, see Azyumardi Azra, Dina Afrianti and Robert W. Hefner, "*Pesantren* and *Madrasa*: Muslim Schools and National Ideals in Indonesia," in Robert W. Hefner and Muhammad Qasim Zaman (eds.), *Schooling Islam: The Culture and Politics of Modern Muslim Education* (Princeton: Princeton University Press, 2007), p. 172-198.

[199] Mohamad Abdun Nasir, Ahmad Amir Aziz and Musawar, "Polarisasi Tariqat Qadariya wa Naqsabandiya pada Pemilu 2004 di Lombok," *Istiqaro',* Indonesian Islamic Research Journal, Ministry of Religious Affair, Republic of Indonesia, Vol. 05, No. 01 (2006): 95-114.

say that they are, borrowing Clifford Geertz's term in describing Javanese Islamic religious leaders, *cultural brokers* in Sasak society.

Historically, the emergence of these religious elites coincided with the downfall of the Balinese power in Lombok in 1894 when they were defeated by the Dutch.[200] The shrinking of Balinese power and the arrival of a new colonizer also changed the structure of power relations among the local inhabitants, who sought to take advantage of the interregnum. Using Islamic symbols to mobilize social movements, Muslim leaders drew a large following mainly from peasant commoners. The failure of the Sasak nobility to attract peasant followers was because they retained their privileged social status and served as administrative assistants of foreign rulers to subjugate their fellows. Therefore, the emergence of the new power of the *tuan guru*, who were from the commoner class but used the distinctive discourse of orthodox Islam, constituted a way in which they could distinguish themselves from their former Hindu masters, infidel colonizers, and the syncretistic Sasak elites.[201] The generosity of the *tuan guru* in saving the people of Lombok from starvation due to a long drought and crop failure during colonialization and their efforts to provide non-state services, such as religious education and public security, also made them leaders in Sasak society.[202] This authority remained even after the end of colonialism.

The formation of the new nation-state of Indonesia in 1945 did not initially diminish the socio-political status of *tuan guru*, whose influence even increased since Islam remained the most important source of identity for the Sasak. In the post-Independence era, many *tuan guru*

[200] Kraan, *Lombok,* p. 83-99.
[201] Cederroth, *The Spell,* p. 91.
[202] *Ibid*. For further discussion, see Kingsley, "Tuan Guru, Community and Conflict in Lombok" (2010).

engaged in politics and joined political parties, such as the ruling party Golkar.[203] The subsequent era of reform signaled a change of the political constellation and increased demands for decentralization and autonomy from the central government. This offered a space for *tuan guru* to more widely articulate their political activism. Ending and Muslihun's study on political affiliations in Lombok reveals how widely entrenched the *tuan guru*'s political activism was and how diverse their affiliations with political parties were, implying the political power of these non-state actors.[204] Several *tuan guru* and *pesantren* in Central Lombok joined political parties such as *Partai Kebangkitan Bangsa* (PKB), *Partai Kebangkitan Nahdlatul Ulama* (PKNU), *Partai Keadilan Sejahtera* (PKS), *Partai Sarekat Islam Indonesia* (PSII), *Partai Persatuan Pembangunan* (PPP) and *Partai Bintang Reformasi* (PBR).[205] Some others rallied support for *Golkar* and *Demokrat*, which represented the past and present nationalist-religious ruling parties, but none affiliated with the nationalist *Partai Demokrasi Indonesia-Perjuangan* (PDI-P) and the Muhammadiyah-Muslim modernists of *Partai Amanat Nasional* (PAN).[206] At the provincial level, the incumbent governor is the regional leader of the largest Islamic organization, *Nahdlatul Watan*/NW, which runs thousands of Islamic schools, social institutions, and universities across the island. It is through these Islamic institutions and their broader social and political activities that *tuan guru* establish their authority.

But how exactly do *tuan guru* acquire and exercise authority over Islamic law? What are their basic religious activities and which literature do they use in their study circles? To answer

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[203] The victory of Golkar in gaining majority votes in Lombok in most elections during the New Order (1966-1997), was because of the strong support from *tuan gurus*, including the most influential Tuan Guru Haji Najamuddin of al-Muhajirun Pesantren in Praya. To show his endorsement of the party, he planted a number of Banyan trees (Golkar's symbol) in his *pesantren* yards and built a small hut for his meditation under one of the trees. See Nasir et. al., "Polarisasi," p. 117.

[204] Saleh Ending and Muslihun,"Arah Pergeseran Peran dan Fungsi Tuan Guru di Lombok Tengah," *Jurnal Penelitian Keislaman*, Research Center of IAIN Mataram, Vol. 5 (2), June 2009: p. 289-315. "Weak state and strong society" is the argument proposed by Kingsley. See Kingsley, "Tuan Guru, Conflict and Community" (2010).

[205] Ending and Muslihun, "Arah," p. 300.

[206] *Ibid*., p. 301.

these questions, I went to two Islamic schools, as two informants suggested. The first informant was MZ, 40, a *penghulu*, and the other was an Islamic teacher (*ustadh*), AM, 40. MZ suggested that I visit his former *pesantren*. AM informed me about another school, which a number of local *tuan guru* and Islamic prominent figures attended. Both *pesantren* are suburban, only a couple of miles away from the courthouse of Central Lombok. I visited each school three times, talking directly with the *tuan guru,* who led the studies on Qur'anic exegesis (*tafsīr*), Prophetic tradition (*ḥadīth*), jurisprudence (*fiqh*) and mysticism (*taṣawwuf*).

At one school, a forum of religious study (*pengajian*) is held three times a week on every Tuesday, Saturday and Monday morning, beginning at nine o'clock and ending at around eleven. When MZ was there, he studied a variety of classical works such as *Kitāb al-Ḥikam* by Ibn 'Ata'illāh al-Sakandarī (d. 1309) on the subject of sufism. But he mostly studied Islamic jurisprudence (*fiqh*) and read works such as *Sharḥ Minhāj al-Ṭālibīn* by al-Qalyubī (d. 1660), *Minhāj al-Ṭālibīn fī Sharḥ al-Muḥarrar* by al-Nawawī (d.1277), *al-'Iqnā' fī Sharḥ Ghāyat al-Taqrīb* by al-Shirbīnī (d. 1569), *Fatḥ al-Wahhāb fī Sharḥ Minhāj al-Ṭullāb* by al-Anṣārī (d. 1520) and *Fatḥ al-Mu'īn fī Sharḥ Qurrat al-'Ayn* by al-Malibārī (d. 1567).[207] However, the literature used in this school always changes. When I attended a session on Tuesday morning, the *tuan guru*, about 65 years old, read *Tafsīr al-Munīr Marāḥ Labīd* by al-Nawawī al-Bantanī al-Jāwī (d. 1897) on the subject of Qur'anic exegesis and *Tanwīr al-Qulūb,* authored by Amīn Sulayman al-Kurdī (d. 1914), which covered topics of Islamic theology, law and ethics.[208] This *tuan guru* went to a Saudi Islamic school in Mecca to study Islam for years. He was very charismatic. When he entered the room to begin his study circle, the students hastily stood up to

[207] For classical literature commonly used in *pesantren* in Indonesia, see again Martin van Bruinessen, "*Kitab Kuning*: Books in Arabic Scripts Used in the Pesantren Miliue," *Bijdragen tot de Taal, Land-en Volkenkunde*, No. 146 Vol. 2/3 (1990): 226-269.

[208] Bruinessen notes that this work is authored by a Kurdish scholar and is one of the most popular works in Indonesia. On the Kurdi's influence on Indonesian Islam, see *Ibid*., p. 88-111.

shake and kiss his hand. There were about thirty students; many of whom were older than the master and wore long white sleeves and white hats, indicating that they were *tuan guru* in their own respective communities or villages. Three participants wore the uniforms of state employees. Two other participants were younger and taught at nearby Islamic schools. Another participant worked as security for a store in town.[209]

In the classroom, the *tuan guru* read the texts in Arabic and translated the readings into Indonesian. Since all his students were Sasak, the explanation of the texts was given mostly in the Sasak language. He sat down crossed-legged facing his students, who sat on the floor in the same way. Students were allowed to interrupt at any time to raise questions. In the first half of the session, the forum discussed Kurdi's *Tanwīr al-Qulūb,* and the topic was maintaining one's beard. The text stated that on Friday Muslims are recommended to shave their mustaches but should let their beards grow. According to the text and the explanation of the *tuan guru*, the reason for doing this was to distinguish Muslims from the Jews, who grew their mustaches but shaved their beards. Thus, growing a beard symbolized religious identity. In his explanation, the *tuan guru* said that growing one's beard is obligatory in all Sunni legal schools, except for the Shāfi'ī. He said that because Saudi Arabia adopts the Ḥanbalī School, which obliges maintaining the beard, it was necessary for students to keep their beard unshaved; otherwise their stipends would be cut off. The second session read al-Jāwī's *Tafsīr* for approximately an hour and a half and ended with an Islamic supplication (*du'ā*), led by the *tuan guru*, who then dismissed the class. The students again shook and kissed their master's hand before leaving. I saw one senior student inserting a sealed envelope into the *tuan guru*'s pocket. This voluntary contribution was occasionally made by the students since the study session was free of charge.[210]

[209] Observation and field notes, March 22, 2011.
[210] *Ibid*.

I met the *tuan guru* before attending the study circle. We talked about *fiqh*, especially about divorce. During our conversation, I asked the *tuan guru* about divorces filed in the state religious court. He regretted that women can now easily resort to court to seek divorce after being left by their husbands working abroad. He seemed quite aware about current laws regarding judicial divorce, in which women are the court's major clients. The court, he said, should not automatically approve their claims but should seriously examine the evidence and arguments that they bring. For example, if a husband's absence for being away at work is less than two years and the wife uses it as grounds for claiming divorce, her claim should not be granted. The husband should not be declared as a missing person (*mafqūd*) and the wife must wait for him. Upon returning home, however, the husband must pay all of his unpaid maintenance. He continued to say that on other occasions a wife demands divorce because her husband is involved in a courtship (*pacaran lagi*) with another woman.[211] He argued that this too was not a justifiable reason for divorce as long as the husband fulfills his obligation to his family, provides spousal support and, most importantly, seriously intends to marry his new girlfriend. This is because polygamy is in principle not forbidden, and thus asking for divorce on grounds that are permissible in Islamic law is not allowed.[212] Ending our conversation, he lamented that the people and the judges in the religious courts do not listen to the *'ulamā'*, and that even if they knew Islamic law, they do not enforce it.

Throughout our conversation, I noted several times that the *tuan guru* argued for the predominance of traditional *fiqh*. To him, *fiqh* was paramount as much as the religion itself. He sought to argue that all issues in Islamic law must be referred to the classical sources. This mode

[211] "*Pacaran lagi*" literally meaning falling in love again is a rather sarcastic yet a common term describing a husband who flirts another woman. This often stimulates spousal disharmony and leads to divorce. See also Platt, "Patriarchal," especially chapter 6, p. 113-131.

[212] Interview, March 15, 2011.

of reasoning creates an idealistically normative view of Islamic law and seems unrealistic to a considerable degree. His opinion on spousal negligence illustrates this tendency. This is far from realistic because most women seek judicial divorce only after being neglected for years and neither support nor communication is received by them from their husbands. This is a very difficult condition that often creates an ambiguous social status for them; normatively they are still wives but empirically they are separated from their husbands without affection and without secure economic support.

An equally critical stance was shown by a *tuan guru* from the other Islamic school. He studied in a *pesantren* in Java and yet his reputation was no less popular than the *tuan guru* who studied in Mecca. His expertise in *kitāb fiqh* was widely acknowledged for he was an advisor to the local and regional forums of Islamic legal studies (*baḥth al-kutb*). These forums are regularly held to respond to various issues or questions from an Islamic law perspective. The *tuan guru* also gave sermons at public religious meetings and frequently attending communal feasts (*rowah*) or similar ceremonies, since he was the head of an Islamic organization. Once I saw a mother carrying her crying baby asking a blessing from him so that the baby would stop crying. When I met him at his house for the first time, the *tuan guru* was on call expecting a ride that would take him to a *mauled* celebration in a nearby district.[213]

After a short introduction and talking for a while, I tried to direct our conversation to the religious court. The *tuan guru* had inconvenient experiences in dealing with the religious court. When I asked his opinion about the role of the religious court in adjudicating disputes and settling claims of divorce, he replied that state judges had no authority to separate spouses,

[213] Field notes, February 14, 2011.

except for claims on the basis of sexual repudiation (*ilā'*),[214] because divorce is exclusively the husband's prerogative. He narrated one of his unpleasant experiences at the religious court. A long time ago, his wife decided to go to the court to settle their conflict. He refused to respond to the court summons because he did not intend to repudiate his wife. Instead, he sent two representatives to negotiate with the judges and his wife. The reason for his wife's filing her claim was because they did not get along anymore and had continuous quarrels. In his view, the claim should have been classified as *syiqaq* (divorce on the basis of irreconcilable spousal conflicts), since serial unresolved quarrels broke out between his wife and himself. In cases like this, the judge of the religious court appoints arbitrators (*ḥakam*) for each party to mediate between the spouses. If the arbitrators fail to reach an agreement, the judge should demand the husband's arbitrator to pronounce repudiation on behalf of the husband and then the judge should legalize the divorce.[215] Unlike this procedure, the *tuan guru* stated, the judge in his case decided on the repudiation himself as if he had given his authority to the judge to decide divorce. Alternatively, the judge might decide that the marriage was broken (*fasakh*), but he should not declare repudiation on the husband's behalf because, as he explained, repudiation is the husband's prerogative. The *tuan guru* contended that such a divorce procedure never existed, and no divorce should occur at the court after only two hearings.[216]

The *tuan guru* also denied that the Compilation of Islamic Law, the state law used by the judges at court, was truly Islamic law since its prescriptions do not concur with the majority agreement (*ijmā'*) of Muslim jurists. To the *tuan guru* religion was not about reason, but about

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[214] *Ilā'* is a verbal statement, usually in the form of oath, in which the husband will not initiate sexual intercourse with his wife. This statement automatically invalidates the marriage and the judges are allowed to pronounce the husband's repudiation upon his wife.

[215] This was the procedure of *shiqāq* that was adopted by the Islamic court. See Notosusanto, *Pengadilan*, p. 49.

[216] Interview and field note, February 4, 2011.

tradition and the authoritative texts from which religious practices must be derived, implying that the Compilation employed too much human reasoning in its prescriptions. "If religion is about reason at all, then why did the Prophet wipe the clean part of his shoes instead of the dirty part before performing worship?," he asked rhetorically. This does not mean, however, he implied, that Muslims cannot use reason to solve legal problems, but there is a limit. In his last words to me, he advised me not to work at court, let alone to be a judge because "two out of three judges are going to make incorrect decisions." This is a very popular prophetic tradition satirizing the profession.[217]

Overall, the opinions of this *tuan guru* demonstrate a highly idealized notion of *fiqh*. Although I was unable to attend his religious study circle or his Islamic legal study forums, it is not an exaggeration to argue that what he expressed likely reflected the discourses that take place in these forums. When I spoke to AM and the court clerk, who regularly participated in the *tuan guru*'s religious studies and *pesantren*, about the *tuan* guru's view of *fiqh* and his opposition and criticisms of the court, they confirmed this. Interestingly, AM was of the one of those who refused to take an oath in the courtroom when the judge demanded it. However, he did not express his refusal in a provocative way, like the *haji* in the circuit court incident, but simply refused to be his female neighbor's witness.

The circuit court incident illustrates a broader pattern of discursive conflict between the religious court judges and *tuan guru*. While the judge's domain is associated mainly with state law and the courthouse, *tuan guru* dominates other socio-religious and cultural terrains, including Islamic law in the society at large. Although I was unaware of whether the *haji*, who challenged the judges at the circuit court ever participated in religious studies forums or other similar study circles, it seems obvious to me that his views closely resembled those prevalent at

[217] Interview and field notes, March 16, 2011.

the *pesantren* and religious circle forums. The *tuan guru* and the *haji* both employed classical Islamic legal discourses to support their authority and deny authority to the court for not complying with these discourses when dealing with marital disputes. The adherence to classical law and its genuine application by state judges in the religious courts is the only condition in which the *tuan guru* can accept the state's legitimacy and authority. The encroachment of the court's authority beyond the courthouse by bringing its interpretation of Islamic law to local villages challenges the *tuan guru*'s traditional authority. Once this boundary is passed, tension can easily emerge, as we saw in the circuit court conflict. This tension will continue to remain unresolved in the future since no bridge between the two parties has been established.

The circuit court incident discloses the educational and procedural separation between the *'ulamā'* and the religious court judges. In the past the judge (*qāḍī*) of an Islamic court often consulted with religious scholars (*muftī*) and worked hand in hand with them to resolve legal cases. The judge established the fact petitioned before him and consulted the *muftī* on theoretical issues.[218] In the classical system, as Wael Hallaq explains, the *muftī* found the law and the judge applied it.[219] Both Hallaq and David Powers underline that the judge's position was inferior to the *muftī* since his task was technical rather than substantial in Islamic law. The judge was to examine a claim and apply a legal decision based on the sound opinion of the *muftī*, whose expertise was in the doctrinal and hermeneutical domains. This relationship was still maintained by the Ottoman Empire in the ninetieth century.[220]

Unlike this relationship of interdependence, judges of Islamic courts in contemporary Indonesia are independent of the *'ulamā'* and need no external authority to sustain their rulings.

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[218] David S. Powers, "Four Cases Relating to Women and Divorce in Andalus and Maghrib, 1100-1500," in Mas'ud, Peter and Power (eds.), *Dispensing*, p. 283-210.

[219] Hallaq, *Authority*, p. 76.

[220] Jakob Skovgaard-Petersen, "A Typology of State Muftis," in Yvonne Yazbeck Haddad and Barbara Freyer Stowasser (eds.), *Islamic Law and the Challenges of Modernity* (California: Altamira Press, 2004), p. 83-84.

Judges and *'ulamā'* are independent of one another and seldom collaborate in working out a legal dispute brought to the religious court. Not only do the judges refuse to follow the classical Islamic legal discourses that the local *'ulamā'* embrace, but they seldom consult other religious authorities that produce *fatāwā,* such as the state-sponsored Council of Indonesian Ulama (MUI) or other similar bodies.[221] To the best of my knowledge, these *fatwā* institutions, charged with giving responses and advice on legal issues facing Muslims, rarely engage in court-related activities; they constitute a different and unrelated institution. Although the *tuan guru* do not issue *fatāwā,* their roles are not very much different from that of *fatwā* givers because both engage in the discussion of solutions for the problems of Islamic law that the people encounter. The *tuan guru*'s religious study circles and their involvement in forums of Islamic legal studies demonstrates that they still hold a very important position in society as the custodians of Islamic law.

Formerly, *tuan guru* served as religious court judges in Lombok. However, they lost their position as the state reformed and modernized judicial institutions to support its legal policy of modernization and development, which began during the colonial period. By putting the *'ulamā'* and their courts under the colonial administration, the Dutch authorities exercised considerable control over them, and courts adjusted to the European tribunal model following the Dutch civil law tradition. The same approach has been taken by the Indonesian government by incorporating Islamic courts into the national judicial system. The modernization and bureaucratization of Islamic law have reduced the traditional authority of the *'ulamā'*, such as *tuan guru* in Lombok. For the *'ulamā'*, these developments mean that they "would be only a highly truncated link with

[221] Most Islamic organizations in Indonesia, such as *Nahdlatul Ulama*, *Muhammadiyah* and *Persis*, establish a religious body charged with issuing *fatwās*, but they are rarely involved in religious courts. Nor do the courts consult them prior to meting out their verdicts. M.B. Hooker, *Indonesian Islam: Social Change through Contemporary Fatāwā* (Honolulu: Hawaii University Press, 2003).

the Islamic legal tradition of old. Legal codes were not decidedly the *'ulamā*'s legal tradition but a hybrid of certain legal classic and modern, post-colonial legacy, law."[222]

Although Islamic courts in Indonesia in the past were the domain of *'ulamā'*, who were trained in *pesantren*, they now are the domain of state-appointed judges, who may not be trained in Islamic schools.[223] As a result, religious court judges and *'ulamā'* compete in interpreting the meaning and symbols of Islamic law. The religious court marks a symbolic locus for such contestation of religious authority. Once the court exerts authority beyond its perceived boundary, it may stimulate stiff resistance, as was reflected in the circuit court incident. Turning back to the religious court, the next chapter will take a closer look at judicial practice and divorce in the religious court in Central Lombok, where this study was primarily conducted.

[222] Zaman, *The 'Ulama*, p. 25.

[223] On a general overview of the history of this changing labor division, Knut S. Vikør, *Between God and the Sultan: A History of Islamic Law* (Oxford: Oxford University Press, 2005), especially Chapter 8 trough 12, p. 140-250 and Wael B. Hallaq, "Juristic Authority Vs. State Power: The Legal Crises of Modern Islam," *Journal of Law and Religion*, Vol. 19 (2003-2004), p. 243-258.

CHAPTER TWO
DIVORCE AND OTHER LEGAL CASES AT THE RELIGIOUS COURT OF CENTRAL LOMBOK

Divorce and other legal cases filed in the religious court reveal how Islamic law is constantly reinterpreted by legal actors (judges, clerks and litigants). The present chapter concerns this issue. It analyzes the regularities, patterns and dynamics of Islamic law, as it is empirically experienced by legal actors at religious courts in Lombok when they engage in disputes over divorce and other related issues. This "praxiological approach," a term coined by Baudouin Dupret, examines how people deal with and orient themselves to the law and legal institutions.[1] The procedure of litigation, the litigants' understanding of the nature of their disputes, and the judges' responses to them constitute the discursive judicial practices and legal reasoning of Islamic law.[2]

The first section of this chapter offers a descriptive overview of the setting of judicial practices of the court. It will focus on the court personnel and their tasks, procedure, categories of litigation, and mediation as well as access to the court, which all play significant roles in the application of Islamic family law. It introduces the court personnel, the judges and clerks, and

[1] Baudouin Dupret, "What is Islamic Law? A Praxiological Answer and an Egyptian Case Study," *Theory, Culture and Society*, 24:2 (2007): p. 79-99.

[2] See, for example, Lawrence Rosen, *The Justice of Islam: Comparative Perspectives on Islamic Law and Society* (Oxford: Oxford University Press, 2002), John R. Bowen, *Islam, Law and Equality in Indonesia*: *An Anthropology of Public Reasoning* (Cambridge, UK: Cambridge University Press, 2003), Muhammad Khalid Mas'ud, Rudolph Peters and David S. Power (eds.), *Dispensing Justice in Islam: Qadis and their Judgements* (Leiden: Brill, 2006), Michael G. Peletz, *Islamic Modern: Religious Courts and Cultural Politics in Malaysia* (Princeton: Princeton University Press, 2002), Erin E. Stiles, *An Islamic Court in Context: An Ethnographic Study of Judicial Reasoning* (New York: Palgrave Macmillan, 2009) and Ghislaine Lydon, "Obtaining Freedom at the Muslims' Tribunal: Colonial Kadijustiz and Women's Divorce Litigation," in Shamil Jeppie, Ebrahim Moosa and Richard Roberts (eds.), *Muslim Family Law in Sub-Saharan Africa: Colonial Legacies and Post-Colonial Challenges* (Amsterdam: Amsterdam University Press, 2010), p. 135-164.

discusses their roles, especially the clerks as "cultural brokers,"[3] who reframe the litigants' grievances into a formulaic lawsuit or petition that fit the standards of court procedure and categories of litigation. Furthermore, it analyzes the reasons why the court often fails in persuading the disputants to reconcile. However, the court is quite successful in providing easy access to justice for poor litigants through the circuit court and *prodeo* proceedings.

Part two discusses the competence and domain of the religious court. The litigants bring a range of legal cases from divorce, polygamy, legalization of past unregistered marriages, and inheritance to child custody. Although the court's responses to these legal cases vary, they reveal pronounced patterns, principles and logic of Islamic law. For example, judges might use different reference works and arguments in each case in order to enforce justice. Despite being subject to the same procedure, the same type of case might be approached differently in different contexts. In addition, the judges consider the consequences of the law.[4]

The last section of this chapter analyzes the litigants' experience of divorce. Divorce is a different type of legal case in the sense that gender matters more compared with other legal cases; gender also shapes the litigants' reasons for divorce and influences their strategies to win their claims or counterclaims of divorce. Most importantly, I argue, divorce exemplifies the most dramatic shift of Islamic law from law sanctioned by *fiqh* to law envisioned by state law.[5] It is for this reason that judicial divorce constitutes an excellent entry point from which one can learn to what extent Islamic law is understood, appropriated, and contested by legal actors as well as the degree to which it has been transformed through new judicial practices.

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[3] Richard Antoun, "Litigant Strategies in an Islamic Court in Jordan," in Daisy Hilse Dwyer (ed.), *Law and Islam in the Middle East* (New York: Bergin and Garvey, 1990), p. 35-60, Leon Busken, "Tales According or the Book: Professional Witnesses ('*udul*) as Cultural Brokers in Morocco," in Baudouin Dupret, Barbara Drieskins and Annelies Moors (eds.), *Narratives of Truth in Islamic Law* (London and New York: I.B. Tauris 2008), p. 143-160 and Stiles, *An Islamic Court in Context* (2009).

[4] Lawrence Rosen, *The Justice of Islam: Comparative Perspectives on Islamic Law and Society* (Oxford: Oxford University Press, 2002).

[5] This is the topic of Chapter 4.

A) THE SETTING OF THE RELIGIOUS COURT AND ITS JUDICIAL PRACTICES

1) Court House, Operation and Personnel

The court reform and modernization that began at the end of the 1980s stimulated the development of the religious courts. One of the most visible impacts of modernization pertains to the physical building of the court. The courthouse I studied was strategically positioned, lying at the center of Praya, the largest town in the central district of Lombok where the majority of the district government offices are located. The religious court is near the civil court, the civil administration office and the office of religious affairs, a mile away from shops, the grand mosque and public schools. The jurisdiction of the court covers 1,208 square kilometers of the central district, an area with 856,675 inhabitants, residing in 12 sub-districts and 112 villages.[6] The new courthouse of Praya was built in 2007, transforming its old one-floor building into a two-floor luxurious courthouse.

The first floor is dedicated to court administration; the second floor is designated for the chamber of the judges as well as the main courtroom. The court has three separate entrances. The middle front entrance opens to a hallway separating the south and the north sections of the building with stairs to the second floor. The south front entrance leads to the offices of the head clerk, his deputies and sub-clerks. The north doorway leading to the north hall is the most visible and accessible entrance through which visitors and clients enter the courthouse. The information desk, registration desks and the center of information technology occupy half of the hall while a waiting room occupies the other half. The interior of the hall is replete with modern office furniture such as a triangular wooden desk, along with a couple of high café-style chairs, two

[6] Badan Pusat Statistik Kapubaten Lombok Tengah, *Lombok Tengah dalam Angka 2010* (Praya: BPS Lombok Tengah dan Kurnia Mandiri, 2011), p. 65.

computers connected to the Internet, a printing machine and one standing touch screen. In one corner of the hall stands a cable television with various programs from news, music, sports to western movies, which the court clients sometimes enjoy while awaiting completion of the registration process. It was here where I often sat before and after a hearing to talk to the litigants and the court staff, some of whom would spend their breaks watching television or just hanging out. Next to the hall is a mediation room, which may occasionally serve as a courtroom when the hearing schedule is heavy. A staircase to the second floor stands beside the registration desk.

The office of the court head, his deputy, and the judges' chambers lie in the south section of the second floor, while the courtroom is in the north. They are separated by a spacious hall, where court clients sit waiting their turn for the courtroom hearings. This is another spot in which I talked to the litigants. The courtroom, roughly about 7x8 square meters, has two doors. The judges and clerks enter from the side door while the litigants and witnesses enter from the front door, which is always guarded by security. A low portable wooden fence is installed in the middle of the courtroom, marking the separation between the front section for the judges, clerk and litigants, and the back section for the litigants' relatives or friends.[7] Researchers or law students conducting research on courtroom hearings may sit in this back section, as I did. Behind the new building is the old courthouse, which houses the offices of clerks and executors, a repository for the court documents, and a sports center for badminton. A wide parking lot, a prayer house (*mushalla*) and a modest cafeteria, another area where I often met informally with the judges and clerks during lunch, are behind the courthouse.

[7] According to the court procedure, all hearings are open to public attendance except for divorce hearings, which are closed, even to family members; they may enter the courtroom only for a while at the beginning, before proofs and evidence are examined by the judges, and at the end, when the judges read the decision. However, for the purpose of research or internship, the court commonly allows students or researchers to attend divorce hearings.

The court hours are from 7.30 in the morning to 4.30 in the afternoon, Monday to Friday. The court sessions and hearings are only held from Monday to Thursday; however, the registration desk remains open through Friday. Judges and clerks are often off-site on Friday to inspect disputed objects of inheritance or other property-related disputes and to attend the mosque for Friday prayer. Daily hearings begin at 9.00 at the earliest and end around noon or early afternoon, depending on the hearing schedule of the day.[8] Following the break, the court sessions resume until 4:30. During this time, some clerks may relax in the afternoon, playing computer games or ping pong at the sports center after they are done with their work; however, the judges are always busy. When not off duty or outside of the courtroom, they spend most their daily activities in their chambers, reviewing cases and preparing the issuance of decisions. Rarely do they talk to the disputants nor do they freely engage in social interactions beyond the court. This is in order to remain unbiased towards the people they serve as the code of judicial ethical conduct stipulates.[9] However, the judges who used to attend the religious courts in eastern Indonesia acknowledged that they had more flexibility in terms of sociability when they were there.[10] In the areas where Muslims are a minority such as in Papua and East Nusa Tenggara, the case load of the religious courts is commonly very small, which allows the judges time for socializing and participating in social and religious activities. These domains belong to *tuan guru* in Lombok. Therefore, the idea of the rotation of assignments is not necessarily empowering to

[8] In the religious court of West Lombok, hearings often started late at around10 a.m. because judges commonly had fewer cases and was willing to wait for the clients, who came from far distances. In the Mataram religious court, however, the sessions were held earlier at 8.30 in the morning although they had few hearings. In these two courts, afternoon hearings were common because the judges were willing to wait for the litigants and carry out the hearings much later as long as the office was not closed, something that I rarely saw in Central Lombok. In East Lombok, the court's caseload was the highest and consequently the hearings often lasted until just a few minutes before the court closed.

[9] A 12 page booklet, containing 10 basic principles, can be accessed online from downloaded from the *Badilag* site http://badilag.net/data/Keputusan_MA/Kode%20Etik%20&%20Pedoman%20Perilaku%20Hakim.pdf

[10] Interviews, March 5, 2011.

the court personnel, especially if they are rotated to a court where the number of legal cases is insignificant.

A court often becomes a temporary station as judges rotate throughout the country through appointment and reappointment.[11] The longest period a judge might serve in one court is commonly five years, but many judges are promoted into another court before finishing their term. This mobility aims to empower the legal apparatus with extensive experience from working in various places and prevents the development of close relationships with the court's clients.[12] For example, the religious court of Praya is staffed by nine judges, excluding one junior judge temporarily employed at the registration desk, and a number of clerks: one secretary/clerk head, two deputies, six assistant deputies, twenty one clerks (*panitera pengganti*), twenty five executors (*jursita/jurusita pengganti*), and five administrative staff. Three judges were female and six others were male; all were university graduates, four held a master's diploma and one female judge was pursuing her master's degree at a university in Mataram. Two new judges had previously served in a court in Sumbawa before being stationed in Praya. Another judge just moved to Central Lombok after working two years at a court in Sulawesi. Several months after I concluded my fieldwork, one senior judge was rotated to East Lombok while two other judges, who were Javanese, moved to East Java. After serving for a year and a half as a court registrar, the junior judge was re-appointed to a court in East Nusa Tenggara, from which he began to build his career as a full judge. This is a very common pattern of judicial re-appointment where junior judges are employed provisionally in the court administration office for a year or so before

[11] See John R. Bowen, "Fairness and Law in an Indonesian Court," in R. Michael Feener and Mark E. Cammack (eds.), *Islamic Law in Contemporary Indonesia: Ideas and Institutions* (Cambridge, MA: Harvard University Press, 2007), p. 172 and Euis Nurlaelawati, *Modernization, Tradition and Identity: The Kompilasi Hukum Islam and Legal Practices in the Indonesian Religious Courts* (Amsterdam: Amsterdam University Press, 2010), p. 183-184.

[12] Mark E. Cammack, "The Indonesian Islamic Judiciary," in Feener and Cammack (eds.), *Islamic Law,* p. 162.

being nominated as a full judge at a distant court. Senior judges are often appointed as a court head or deputy in a remote religious court before being nominated as judge of a high or appellate religious court at the capital of a province.

Despite providing valuable experience, mobility of judges raises some issues concerning local tradition and language. This in turn influences the ways in which the judges might consider or disregard local norms and traditions when examining and deciding cases, a topic that I will discuss in the following chapters. Many religious court judges in Lombok are not Sasak, but are from other ethnic backgrounds, such as Javanese or Sundanese. In Central Lombok, six out of nine judges were Javanese and the remaining judges were Sasak.[13] None of the judges at Mataram Appellate Religious Court was Sasak, despite the fact that they examined and decided appeals from four first instance religious courts in Lombok.[14] One's ethnic background brings about importance consequences; for example, in the courtroom hearings I recognized only one Javanese judge in Praya speaking Sasak fluently. This problem emerges when disputes involve senior litigants who either cannot speak Indonesian or speak it very poorly; however, in my experience this language barrier rarely disrupted divorce hearings since most litigants were young and had a good command of Indonesian. When the litigants did not speak Indonesian the judges asked the clerk, who was usually local, to clarify issues, or they might ask the clerk to lead the session and translate it into Indonesian. The role of the clerks as intermediaries for the court and its clients is therefore crucial; they bridge the language and communication gaps between the litigants and the judges. The clerk is thus a "cultural broker," translating the

[13] Hirsch also found a similar pattern in Kenya where the judges were employed in different court districts but the clerks were appointed from the local people. See Susan F. Hirsch, *Pronouncing and Persevering: Gender and the Discourses of Disputing in an African Islamic Court* (Chicago: Chicago University Press, 1999), p. 122-123.

[14] The other religious courts in East Lombok and Mataram had only one Sasak judge respectively.

grievances brought by the litigants and reframing them in a formulaic way into the narrative of a claim suitable for the judges' terms of reference.[15]

2) Procedure and Categories of Litigation

Each type of claim or petition submitted to the court must follow a specific formula established by the court. The registration desk, the first stop for the litigants, reveals how a claim or petition is composed. The court must remain neutral in the business of disputants. Since the litigants mostly do not know how to compose a claim or petition, they are assisted by the clerk.[16] Only a few litigants can afford to pay lawyers to do this task. Therefore, the clerk at the registration desk may assist them in preparing their claim or petition and even guide them to obtain the best outcome.

Bringing a personal identity card or proof of residence and other supporting documents, the plaintiffs inform the clerk about their objective in appearing before the court. By means of storytelling, they share narratives of grievance to the clerk, who in turn composes their narratives into a legal claim or petition. They are not sworn when giving their information but are required to prove what they claim in the courtroom by producing supporting documents and two witnesses. After a claim or petition is completed by clerks and agreed upon by plaintiffs, it is signed by the plaintiffs and brought to the head clerk and the court head, who review, sign and determine the day of the first hearing and determine the *majelis*, or committee, consisting of one leading judge and two member judges, who will examine and decide the claim. A week or so later, depending on the defendant's place of residence, a summons letter will be directly

[15] See Antoun, "Litigant Strategies," (1990), Stiles, *An Islamic Court*, p. 64 and Busken, "Tales According to the Book," p. 143-160.

[16] Field notes, December 16, 2010. The Supreme Court steadily limits the court's involvement in assisting clients by allocating a significant budget to establish a center of legal aid (*Pusat Bantuan Hukum*) at the religious courts to offer a free legal service to the poor. In Lombok, only the religious court of Mataram has provided this service. The court pays about Rp. 70,000 for each claim that the legal aid office produces. The office is staffed with academicians and independent legal experts.

delivered by the court executor to the defendant or his/her legal representatives. The first hearing generally begins two weeks after the date of the registration, except in cases where the defendant's current location is unknown (*ghaib*). The court then broadcasts the summons through a local radio station and waits for a maximum of four months, after which the hearing will be opened anyway, whether or not the defendant's response is ever received.[17]

Every claim or petition submitted to the court for adjudication and settlement is classified as either contentious or non-contentious. A contentious case refers to a claim or lawsuit (*gugatan*) involving disputes between the plaintiff and the defendant, where mediation between them is necessary before the trial can be resumed. A non-contentious case refers to a petition (*permohonon*) that seeks the court's permission or approval of a particular issue such as child upbringing. No defendant is necessary. However, a non-contentious case might become contentious if it involves a third party whose consent is required for the approval of the petition. Although repudiation (*talak*) is classified as *permohonan*, it is always contentious because it is assumed to have generated or followed disputes between the couple that led to the marriage breakdown. It is never categorized as a claim or lawsuit (*gugatan*), since the husband does not sue his wife for repudiation; instead, he needs the court's permission to pronounce repudiation and must propose a petition (*permohonan*) for this to the court.

The female plaintiff's main concern in *gugat* is to have the judge separate her from her husband (*menceraikan penggugat dari tergugat*). She may include other additional claims, such as fulfillment of unpaid *mahar*, post-divorce maintenance, or division of joint property. In a *talak* petition, a male plaintiff seeks permission from the court to repudiate his wife (*meminta izin untuk mengikrarkan talak*). Once his petition is approved, he will be asked to pronounce *talak* in

[17] If the claim is approved, the court decree is then called *verstek*, meaning it is granted without the defendant's presence. This also applies to other cases where non-*ghaib* defendants never attend the court sessions but receive a copy of the court decree. A *verstek* decision remains subject to judicial review.

two weeks but has to pay *mut'a* if the judges require it. *Mut'a* refers to a one-time consolation payment by a male plaintiff to his repudiated wife after his *talak* is granted. In most cases of *talak* where the wife does not make a counterclaim, the judges usually demand that the husband pay *mut'a*.

3) Mediation and Access to the Court

Every contentious claim and petition must undergo mediation at the first hearing before a court decree can be issued. Under the current law, divorce is classified as a contentious case reflecting household conflicts that need adjudication and mediation. The main purpose of mediation is to bring the disputants back to harmony. It also helps to reduce the tension at the court because for most people going to court is embarrassing or frightening. Although a few couples might still display harmonious behavior at the court despite their marital breakdown, most appear tense and uneasy.

The judges of the religious courts, like their counterparts in Kenya,[18] Morocco,[19] Iran,[20] Syria,[21] and Malaysia,[22] always encourage the litigants to revoke their claims and reconcile. In 2008, the Supreme Court issued a circular stating that any contentious claim or petition submitted to the court is subject to mediation, without which the court decree is invalid.[23] Procedurally, the disputants will be mediated in the first hearing. If the defendant is absent, the judge orders the executor to recall him/her again and to reschedule the mediation the following

[18] Hirsch, *Pronouncing*, p. 128.
[19] Lawrence Rosen, *The Anthropology of Justice: Law as Culture in Islamic Society* (Cambridge: Cambridge University Press, 1989), p. 79.
[20] Mir-Hosseini, *Marriage*, p. 71.
[21] Esther van Eijk, "Divorce Practices in Muslim and Christian Courts in Syria," in Maaike Voorhoeve (ed.), *Family Law in Islam: Divorce, Marriage and Women in the Muslim World* (London and New York: I.B. Tauris, 2012), p. 147-170.
[22] Peletz, *Islamic Modern*, p. 85.
[23] Article 2 (3) Peraturan Mahkamah Agung/PERMA [The Supreme Court Decree] No. 1/2008.

week.[24] If the defendant ignores the second summons, the hearing resumes with an examination of evidence and testimony of witnesses, followed by the issuance of the court decision. If the defendant never attends, the trial concludes rather quickly. However, if a plaintiff misses a session twice, the trial is cancelled with the assumption that the plaintiff has withdrawn his/her claim or petition. However, if all disputants are present and the mediation by a mediator judge fails,[25] the next session after the first hearing is "reply and response" where the judges read the claim or petition and have the litigants respond to it. If they defend their respective stances, they are required to support their arguments with written documents and testimony before any decision is issued. Throughout these proceedings, the judge will continue to encourage the disputants to reconcile and withdraw the claim.

For example, I noted one judge repeatedly lecturing the disputants at length, citing the Prophetic tradition condemning divorce as "God's most hated lawful act." The judges make every effort to persuade the litigants to rethink their decision to divorce because of the impact of separation on children, if they have any, or on the two extended families. "Please reconsider your decision [to separate] and think not of yourselves but of your children as well. There may be a former spouse, but there is certainly no former child because the child belongs to the parents. The impact of marital dissolution not only impinges upon the spouse and the children but also on the family of each spouse at large," advised one judge to the litigants.[26] Marriage is often understood not as a private and personal relationship between spouses but as a web of alliances tying the spouse together with children, extended family and society at large, and even with God.

[24] The plaintiff is rarely absent because she/he is the party most concerned with the claim. If the plaintiff does not appear twice in the hearing, his/her claim will be dropped.

[25] In the future, judges will no longer serve as mediators. Litigants have to find mediator by themselves.

[26] Field notes, December 14, 2010. The judge is often very concerned with the fate of the children after divorce because many parents neglect them or at least become less attentive to them.

Before the court decree is given, the chance of compromise is still open,[27] because in principle "divorce can only occur before the court after the court fails to reconcile the conflicting couple."[28]

Although efforts for rapprochement are pursued by judges in every stage of the proceeding, statistical data suggest that court mediation often fails and most litigants wish to continue the trial. Only 41 cases (6.8%) were withdrawn in 2009 and 63 cases (9.7%) in 2010.[29] A claim or petition is withdrawn (*dicabut*) when the disputants reconcile and the judge stops the trial. The rate of reconciliation in Indonesian religious courts, as can be seen from Central Lombok, is lower compared to other Muslim countries. Antoun noted that about 40% of the claims petitioned by men and 63% by women were dropped in a sub-district court in Jordan.[30] Mir-Hosseini reveals in her study that 25% of the cases were withdrawn by petitioners in the religious court of Casablanca.[31] According to Rosen, in Morocco the litigants may still continue to renegotiate their marital terms and settle disputes out of court despite ongoing court proceedings, resulting in an increase in withdrawn cases.[32] What Rosen shows is not typical to Morocco alone because this also occurs in Lombok; negotiation and compromise are always encouraged by the judges despite on-going trials.[33] The judges in Lombok will push the litigants to peacefully bring conflicts to an end, even at the last hearing before a decision is given.[34] In fact, judges will often require witnesses not only to offer testimony but also to help mediate the disputes. If they agree to accept the role of mediator, the hearing will be postponed to give the

[27] Religious Judicature Act 7/1989, Article 82 (4).
[28] Marriage Law 1/1974 Article 39 and Religious Judicature Act 7/1989 Article 65.
[29] Annual Report of Praya Religious Court 2009 and 2010.
[30] Antoun, "Litigant Strategies," p. 23.
[31] Mir-Hosseini, *Marriage*, p. 48.
[32] Rosen, *The Justice of Islam*, p. 108-109.
[33] This is also common in the US. See Sally Engle Merry, *Getting Justice and Getting Even: Legal Consciousness among Working-Class American* (Chicago: Chicago University Press, 1990).
[34] Many times I saw the plaintiff and the litigant shake hands or hug because the judges asked them to do so after the divorce claim is granted. This effort is seen to reduce the tension between the litigants.

witnesses time to conclude their task, and a following hearing will be scheduled to hear the report from the mediator. Nonetheless, referring again to available data, this endeavor has not been very successful.

The failure of reconciliation at religious courts in Lombok merits a brief discussion. *First*, the court appears to be the last option of conflict resolution after the failure of initial familial-based and other schemes of non-litigation settlements. For example, one informant, a *penghulu*, told me how disputes are resolved in his village. If a household or any family dispute emerges, the parties will be invited to a meeting in the village forum to settle it under the guidance of *penghulu*, *kadus* and *tuan guru*, in the spirit of family harmony (*secara kekeluargaan*).[35] This principle maintains that all village inhabitants are members of one community, which is responsible for preventing any disruptive factor that may cause insecurity and disharmony in the neighborhood. If the dispute remains unresolved or the resolution dissatisfies either party, it will be brought to an official resolution, such as the court. As a result, opportunities to withdraw a claim are therefore very small because other available means of resolution have been exhausted. Some judges concur with this explanation, stating that it is difficult to bring people back to terms when they have already decided to go to court. Although I have no exact figures, most litigants that I am aware of already consulted the issue with their family and relatives before going to court, but to no avail. Thus, going to court is the last resort.

Second, in some parts of rural Lombok, conflicts, including domestic violence, are first settled according to the village consensus (*awiq-awiq*) but, as Tamtiari notes, this has often been ineffective due to its informal status.[36] This unofficial mediation initially results in an agreement; however, it is less binding than a court decision since it is unofficial. By turning to the court, the

[35] Interviews, January 10, 2011.

[36] Wini Tamtiari, *Awiq-awiq: Melindungi Perempuan dari Kekerasan dalam Rumah Tangga* (Jakarta: Ford Foundation dan PSKK Universitas Gadjah Mada, 2005).

plaintiffs hope to get a more binding and officially enforceable decision.[37] *Third*, when facing marital disputes, people rarely visit and consult with the bureau of marriage consultation, guidance and preservation (BP4) at the marriage registration office (KUA), located in every sub-district area. The bureau is an official state institution charged with the management of household conflicts. When I went to one BP4 office in town, I found that on average it received less than 10 petitions per year. The head of the bureau explained that people were either unaware of the office or unenthusiastic about it. Even though the office only receives a small number of visitors, it still provides a useful service. For example, the office head showed me a copy of a reconciliation letter between a woman and her parents-in-law, who agreed on her maternal delivery fees after her husband had left to work abroad without providing her enough support.

Overall, however, the office is not very popular. The prospect of reconciliation thus remains unlikely. Recently, some courts have tried to be neutral by not arranging mediation; the litigants have to find and pay for independent professional mediators.[38] Although this policy may preserve the neutrality of the court, it will make it more difficult for people to access justice since they will have to pay more than the regular court fees, which are minimal.

Court fees have become a crucial issue in accessing the court, especially for the poor. In 2007, the Indonesia-Australia Legal Development Facility (IALDF) conducted a national survey about access to religious courts. The survey included 1,040 respondents taken randomly from 35 urban and rural regions throughout the country.[39] Although the majority of the respondents (70%) were satisfied with the court's services, the court fee was a significant burden. The

[37] One reason for successful mediation institutions in Malaysia is precisely because they are officially endorsed by the state. See Sharifah Zaleha Syed Hassan and Sven Cederroth, *Managing Marital Disputes in Malaysia: Islamic Mediators and Conflicts Resolution in the Syariah Courts* (Curzon: 1997), p. 228-229.

[38] The religious court of West Lombok has adopted this policy.

[39] Cate Sumner, "Memberi Keadilan bagi Para Pencari Keadilan," Sebuah Laporan tentang Pengadilan Agama di Indonesia: Penelitian tahun 2007 tentang Akses dan Kesetaraan [Dispensing Justice for the Justice Seekers: A Report about Access to the Indonesian Religious Courts] (Jakarta: 2007).

average monthly income of the respondents was Rp. 956,500, slightly higher than the expenses they incurred when using the court, which was Rp. 789,666. This amount was to cover the court fee and other related expenses such as reimbursing witnesses' transportation and lawyers' fees.[40] This was adequate for the majority of the respondents since they lived within ten kilometers (7 miles) of the courthouse, for which they incurred about Rp. 15,000 in transportation costs for each visit to the court and had to attend a hearing at least three times over three months for their claim to be completed.[41] Therefore, in spite of the expense and inconvenience, the research concluded that the court was accessible and satisfactory for the clients.

However, the research also surveyed 163 respondents from female-headed households (*perempuan kepala keluarga*),[42] which revealed the problem of accessing the court by the poor. The survey showed that the women's monthly income averaged Rp. 207,000. They mostly lived in remote rural areas, about 20 kilometers away (15 miles) from the courthouse, and consequently paid more for transportation.[43] Because of the standard court fee that the majority of the respondents had to pay (Rp. 789,666), the court became inaccessible to these women because the total cost was nearly 4 times higher than their monthly income. Due to this high cost, they rarely used the court; they divorced and remarried without complying with state law.[44] This research thus recommended that the state increase the budget for *prodeo* (free) legal services for

[40] *Ibid*., p. 14.
[41] *Ibid*., p. 14-15.
[42] Members of *Pekka* are those women who become the head of family or are responsible for family support. These include widow either because of spousal death or divorce and women as breadwinners for their family. *Ibid*., p. 10.
[43] *Ibid*. 14-15.
[44] Local interpretation of classical Islamic law (*fiqh*) in Lombok definitely contributes to this rate as well, as the informants told me during the focus group discussion. Interviews and focus group discussion with the members of *Pekka* of Central Lombok, April 28, 2011.

the poor and to hold more circuit courts in rural areas to reduce the cost for those living far from the courthouse.[45]

Court clients in Lombok encounter a similar problem concerning access to the court. The court fee is chiefly contingent upon distance: the farther one lives from the court, the higher one pays for the fees because the transportation fare for the court executor delivering the summons letter to the defendant is included. This payment is set at Rp. 391,000 for disputants living roughly 1-10 kilometers away from the court. For those who live in the second range (11-20 kilometers) an advance payment of Rp. 466,000 must be made. Those who are in the third range (21-30 kilometers) have to pay Rp. 591,000. This amount does not cover other expenses, such as transportation for the plaintiffs and their witnesses. The majority of court users in Central Lombok are, therefore, those who come from nearby areas.[46] In contrast, one woman, who lived about 25 km away from the court, told me she had to pay Rp. 50,000 for an *ojek* (motorcycle transportation) return trip for each court visit and reimburse her witnesses' transportation fare as well.[47]

Because of their low income, the majority of litigants rarely uses lawyers except if they have just returned from working abroad or if the claim involves inheritance or other related property disputes. A lawyer costs approximately Rp. 2.5 million for divorce claims and Rp. 5 million for divorce along with joint-property disputes.[48] In sum, even without the cost of lawyers, the average fee that the disputants incur is expensive, rendering the court inaccessible

[45] *Ibid*., p. 27-28.
[46] People from Praya have been the dominant clients of the court, which is located near to their homes.
[47] Interview, February 14, 2011.
[48] Interview with a lawyer, January 10, 2011. He acknowledged that the price may be reduced, depending on the income of the plaintiffs. In a religious court in one district in East Java, one litigant had to pay lawyers Rp. 500,000 more than their counterparts in Lombok, as one informant told me. Apparently, a fee for legal service is higher in urban than in rural-based courts. Therefore, the report of the national survey stating that the standard court fee included the fee for lawyers seems exaggerating.

for nearly 21 per cent of Lombok's population who are considered poor.[49] According to the Indonesian government, "poor" refers to those living in rural areas with a monthly income of Rp. 146,837 and those living in urban areas with Rp. 187,942 income.[50]

Access to the religious courts by the poor is therefore a crucial issue. This concern has become a main objective of court reform. The state has multiplied the budget for *prodeo* and circuit courts, as the survey recommended. Furthermore, the Director of *Badilag* launched a program called "justice for all," where the poor get priority for free services from the court. According to Judicial Authority Law 4/2004, the judiciary should in principle run more efficiently, more quickly and more inexpensively.[51] In compliance with this law, the religious courts in Lombok keep the *prodeo* and circuit courts functioning by allocating a significant amount of their funds to these programs so as to ease the access to justice for the poor.[52]

B) THE COURT'S COMPETENCE AND DOMAINS

This section presents a range of legal cases (Table One) received by the religious court of Central Lombok in the last few years to highlight its competence and domains. The plaintiffs bring various disputes to the court, ranging from divorce, inheritance, polygamy, certification of past unofficial marriage, substitute marriage guardianship to child custody. The court's responses to these petitions reveal the pattern and regularity of judicial practices and the principles and logic of Islamic law. In addition to procedure, the judges are concerned with basic principles of

[49] Badan Pusat Statistik Lombok Tengah, *Lombok tengah dalam Angka 2010* (Praya: BPS Praya 2011), p. 245.

[50] Sumner, "Memberi Keadilan," p. 13.

[51] Judicial Authority Law 4/2004, chapter 4 (2) states: "Peradilan dilakukan dengan sederhana, cepat dan biaya murah (The court trials should be carried through a simple, less costly and fast way)."

[52] Tim Lindsey, *Islam, Law and the State in Southeast Asia Vol. I Indonesia* (London and New York: I.B. Tauris, 2013), p. 284-290.

law in deciding the cases brought before them such as public interest, child protection and avoidance of hardship.

As I have explained in Chapter One, prior to colonial times in Indonesia, the domain of the Islamic court covered not only matrimonial laws and property laws but also criminal laws. The Dutch colonial administration limited these jurisdictions to matrimonial laws. Disputes over inheritance and land endowments had to be heard in civil courts and were adjudicated by *adat* law. After independence changes occurred, such as when Marriage Law 1/1974 was endorsed. This law revived some lost domains of the religious courts despite the fact that the jurisdiction of the religious courts was not unified and their authority was not complete but partially dependent upon civil courts with respect to the execution of inheritance and property disputes. The Religious Judicature Act 7/1989 cleared up this ambiguity by establishing uniformity and standardization over the competence of the religious courts. While the Compilation of Islamic Law of 1991 details the domain of the religious courts, the First Amendment of Religious Judicature Act 3/2006 extends their jurisdiction into the economic field (*ekonomi syariah*).

The Directorate of Religious Courts Body of the Supreme Court (*Badilag*) indicates that divorce (*gugat* and *talak*) has constituted the predominant number of cases in the last few years (2008-2010), reaching an average of 88 percent of total cases.[53] This is followed by legalization, dispensation, abrogation and prohibition of marriage. Determination of heirs, the division of inheritance, consent to polygamy, substitute marriage guardianship, joint property, guardianship, child genealogy, endowment, bequest and economic Shari'a economics constitute a lower

[53] All cases/claims are classified into three types; *gugat*, *talak* and others. In 2008, total claim/cases of first instance religious courts were 245,023: 143,747 (58.67%) *gugat*, 77,773 (31.74%) *talak* and 23,503 (9.59%) for other cases. In 2009, total cases reached 284,749: 171,477 (60.23%) *gugat*, 86,592 (30.40%) *talak* and 26,680 (9.37%) for other cases. The year 2010 recorded 320,788 total cases: 190,280 (59.32%) *gugat*, 94,099 (29.33%) *talak* and 36,409 (11.35%) for other cases. In 2011, the total cases were 333,844: 190,940 (57.19%) *gugat*, 85,700 (25.69%) *talak* and 57,154 (17.12%) for other cases. See badilag.net/statistik-perkara.html

number of cases.[54] These national data of legal cases are also reflected to a considerable extent in the local court, such as in Central Lombok.

Table 2.1: All claims/petitions filed before the religious court in Central Lombok. The data for 2006 is unavailable and for 2008 is only available for three months, from January through March.

No.	**Types of Claim**	**Year, Number and Percentage**								
		2001	**2002**	**2003**	**2004**	**2005**	**2007**	**2008**	**2009**	**2010**
1.	Divorce (*Gugat*)	290 (75.1)	277 (78.5)	217 (76.1)	288 (80)	293 (80)	388 (73.5)	79 (74.5)	313 (83.2)	319 (75.5)
2.	Repudiation (*Talak*)	37 (9.7)	32 (9.1)	34 (12)	32 (9)	25 (7)	47 (8.9)	10 (9.5)	32 (8.5)	30 (7.2)
3.	Marriage Legalization (*Isbath Nikah*)	20 (5.2)	10 (2.8)	11 (3.9)	7 (2.0)	12 (3.4)	29 (5.5)	-	9 (2.4)	43 (10.2)
4.	Inheritance (*Kewarisan*)	14 (3.6)	10 (2.8)	8 (2.8)	13 (3.7)	16 (4.6)	18 (3.4)	8 (7.6)	11 (2.9)	9 (2.1)
5.	Joint Property (*Harta Bersama*)	3 (0.8)	6 (1.7)	4 (1.3)	8 (2.4)	7 (1.9)	37 (7)	3 (2.8)	6 (1.6)	12 (2.8)
6.	Polygamy (*Poligami*)	20 (5.2)	7 (2.0)	7 (2.3)	6 (1.9)	3 (0.8)	4 (0.7)	3 (2.8)	1 (0.3)	1 (0.2)
7.	Substitute Marriage Guardian (*Wali Adhal*)	1 (0.2)	5 (1.4)	-	2 (0.5)	3 (0.8)	1 (0.2)	-	4 (1.1)	6 (1.4)
8.	Marriage Permission, Cancellation, Prevention and Dispensation (*Izin, Pembatalan, Pencegahan dan Dispensasi Nikah*)	1 (0.2)	5 (1.4)	1 (0.3)	2 (0.5)	3 (0.8)	-	-	-	-
9.	Raising Children (*Pengangkatan Anak*)	-	-	-	-	-	1 (0.2)	3 (2.8)	-	2 (0.4)
11.	Children Custody (*Penguasaan Anak*)	-	-	-	-		1 (0.2)	-	-	1 (0.2)
11.	Endowments (*Wakaf*), Gifts (*Hadiah*)	-	1 (0.3)	3 (1.3)	-	2 (0.7)	2 (0.4)	-	-	-
Total Number/Year Per cent		**386/ 100**	**353/ 100**	**285/ 100**	**358/ 100**	**364/ 100**	**528/ 100**	**106/ 100**	**376/ 100**	**423/ 100**

The table represents the entire range of cases received by the court in Central Lombok in the first decade of the 21st century with the exception of 2006, and with three months of available data from 2008. The figures show that divorce constitutes the majority of cases, with an annual average of 68.49% being *gugat* and 8.99% being *talak*. Together, these constitute 77.48% of the total number of cases. The number of petitions for marriage legalization (*isbat nikah*) varies significantly from one year to the next. Interestingly, polygamy and inheritance cases have declined. Substitute marriage guardianship and other issues regarding permission, cancellation,

[54] *Badilag* 2009.

prevention and dispensation of marriage have never been higher than those of polygamy and inheritance. Petitions to raise children and custodianship (*hadana*) are among the lesser number of cases.

Although the number of each type of case fluctuates from one year to another, the pattern remains largely the same, where divorce ranks at the top. Instead of specifically raising questions about the factors that have influenced the patterns and ranges of those legal cases, I will discuss the ways in which the litigants deal with their disputes at the court and the judges' responses to them because this helps us understand the extent to which Islamic law is practiced. I will discuss one example for each category of legal cases that occurred during the course of my fieldwork and will start with marriage legalization. I will discuss divorce cases separately in the last section of this chapter.

1) Isbat Nikah: Marriage Legalization between Public Good and 'Legal Smuggling'

A large number of petitions submitted to the court concern *isbat nikah*, where the petitioners seek authentication for their past unregistered marriage in order to obtain marriage certificates. We have already seen that unregistered marriage remains prevalent in Lombok. Most *isbat* petitions are granted on the grounds of avoidance of hardship, despite the fact that the petitions are not based on the reasons sanctioned by the law. Theoretically, only marriages conducted before the enactment of Marriage Law 1/1974 are qualified for approval,[55] but post 1974 unofficial marriages remain eligible in practice. If one wants to resolve a troubled unofficial marriage in court, one needs first to obtain official recognition of such a marriage and only after that one proposes a claim for divorce; however, both can be combined in one divorce

[55] See The Compilation of Islamic Law No. 1/1991, Article 7 (3).

claim. This is called legalization of marriage for divorce (*isbat dalam rangka perceraian*).[56] No divorce can be granted if the marriage is not authorized by the state. Marriages prior to 1974 and legalization for the sake of divorce constitute the only two conditions upon which *isbat* petitions can be theoretically granted.

Practically, however, judges still consider *isbat* petitions even though they may be proposed beyond these conditions. For example, from the courtroom hearings that I recorded, the petitioners' objectives varied, ranging from acquiring birth certificates, obtaining visas for performing the hajj, obtaining pensions for the spouses of deceased state employees, or obtaining a family card. These all require a marriage certificate. According to the judges, there is no other way to resolve such documentation issues except by first making an unregistered marriage official. This pragmatic approach aims to realize the principle of public good or public interest (*maslaḥa*).[57] The numbers of unregistered marriages are so high that disregarding them is tantamount to creating severe hardship for those involved. Procedurally, a petition for *isbat* should be proposed by a couple who have never divorced and/or remarried but seek legalization for their first unrecorded marriage. If the petition is proposed by divorcees or remarried couples, it becomes a contentious claim. Consequently, all parties to the previous marriage such as a former wife/husband and grown-up children, have to be included as defendants (*termohon*) to assure that no problems are left unresolved or dues are left unpaid before this current marriage can be legalized.

Both the 2009 national data released by *Badilag* and the local data from the religious court of Central Lombok show that the number of petitions for marriage legalization is very high, coming third after *gugat* and *talak* cases. In Lombok, *isbat* constitutes 33% (2,536 cases) out of

[56] *Ibid*.

[57] This is the argument that the judges in Lombok frequently make to accept and grant petitions of *isbat nikah*. A similar response is given by the judges elsewhere. See Nurlaelawati, *Modernization,* p. 146.

7,463 total claims received by the religious courts of first instance in the last three years (2008-2010).[58] This suggests that the requirement of registration has been unable to alter customary marriage practices and that *fiqh* along with *adat* are still sufficient grounds for marriage, as I have demonstrated in the previous chapter. People may also skip the required state procedure due to economic reasons. According to one survey, only 38% of 163 respondents of *Pekka* (female-headed households) can afford to acquire birth certificates for their first born children, while 62% fail to do so because they did not register their marriage due to economic considerations.[59] The court has been flexible in dealing with requests of marriage legalization except if it involves divorced or remarried couples. The Supreme Court considers marriage legalization tricky and susceptible to legal manipulation (*penyelundupan hukum*).[60] For example, petitioners might have conducted an unofficial marriage (*kawin sirri*) for their polygamous marriage before turning to court to have it legalized.

I found one incident where the judge commanded a couple to revise their petition because it was mistakenly composed as 'non-contentious'. In fact, it was 'contentious' because one of the petitioners (the husband) had just divorced but did not count his former wife as the defendant. Not until the clerk revealed this prior to the hearing was the judge aware of it. The clerk was surprised to see the man with a woman at the court asking for his marriage to be legalized. The clerk told me that the man had previously remarried twice, once with a female relative, both ending in separation. In the courtroom, the judge was straightforward in questioning the man

[58] The data are derived, and manually calculated, from the four first instances of the religious courts in Lombok.

[59] Sumner, "Memberi Keadilan," p. 14.

[60] Direktorat Jenderal Badan Peradilan Agama Mahkamah Agung, *Pedoman Pelaksanaan Tugas dan Administrasi Peradilan Agama Buku II Edisi Revisi* (Jakarta: 2010). The guide is available for a fee and can be downloaded from www.badilag.net

about this issue, which is unusual; normally the judge opens with questions about the basic identity of the petitioners followed by their marital status. [61]

On most other occasions, the basic objective of *isbat* is to obtain a birth certificate for children. For example, in a case of the circuit court, a male peasant petitioner told to me he had been married for twenty years and had three children. Although all three of his children did not possess birth certificates, the two oldest had been admitted to school. However, his youngest son was not permitted to enroll in the state kindergarten school because he did not have a birth certificate.[62] The school maintained that the certificate was mandatory, as the district government required.[63] This policy forced the male informant, like many others, to resort to the religious court to petition for *isbat*. On other occasions, senior couples submitted *isbat* petitions after having been asked to show their marriage certificate to apply for a visa to perform the hajj in Mecca.

In general, *isbat* takes only one hearing and the procedure is often lenient. For example, two witnesses often remain seated in the courtroom giving testimony interchangeably; one witness might even offer testimony in another hearing on the same day, especially in circuit courts. This lose procedure is used because judges lean towards speeding up the approval of *isbat* for the sake of public interest provided that no legal manipulation is detected. This, however, will not occur in the other types of cases, such as divorce and inheritance.

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[61] Field notes on the courtroom hearing, May 26, 2011.

[62] Field notes on the circuit court in the hall of the village office in southwest Central Lombok, November 10, 2010.

[63] According to the 2009 census, there were 292.000 (31,56%) people of out 927.344 total population of Central Lombok who had no birth certificate. Badan Pusat Statistik Lombok Tengah, *Lombok Tengah dalam Angka 2010* (Praya: BPS Lombok Tengah, 2010), p. 128.

2) Waris: Inheritance and the Question of Adat

The general impression of the court's response to claims on inheritance is that it is likely to adopt *fiqh* at the expense of *adat*. Three modes of bequest management and allotment prevail in Lombok.[64] The first model is that in the traditional *adat*-based patriarchal society, Sasak male agnates are awarded the most valuable and immovable property such as the land and house, while females are awarded movable property such as house appliances and furniture. The second model is that Sasaks who adhere to Islam more strictly than their *adat* fellows adopt the Islamic law of inheritance (*farā'iḍ*) to manage their division of estate. The spirit of *farā'iḍ* is expressed in the Sasak proverb *sepelembah sepersonan* (two baskets on a man's shoulder is equal to one basket on a woman's shoulder), meaning that a son receive shares two times higher than the daughters due to the different burdens and responsibilities that they normatively bear.[65] The religious courts constitute an alternative site where Sasaks seek settlement of their inheritance disputes because the courts maintain the *farā'iḍ* without major changes.[66] The third model is that other Sasaks, regardless of their religious-cultural outlook settle their disputes over estate allotment at the civil courts, which administer and divide bequests equally for the descendants regardless of their gender.[67] The first two patterns have prevailed, while the third has been revoked because the First Amendment of Religious Judicature Act 3/2006 requires that disputes

[64] Erman Rajagukguk, "Pluralisme Hukum Waris: Studi Kasus Hak Wanita di Pulau Lombok Nusa Tenggara Barat," *unpublished paper*, 2010. This also happens elsewhere in Indonesia, such as among Muslims in Aceh and among Christians of Batak, North Sumatra. See Bowen, *Islam*, especially chapter one, and Sulistyowati Irianto, "Competition between State Law and Customary Law in the Courtroom: A Study of Inheritance Cases in Indonesia," *Journal of Legal Pluralism and Unofficial Law*, 91 (2004), p. 91-112.

[65] *Ibid*. *Sepelembah* means two baskets a man carries on his shoulder. *Sepersonan* refers to one basket that a woman lifts on her head. These are actual portraits of how gender is represented in the working division of daily activities, symbolizing the distinct workload and responsibility that men and women bear respectively. The Javanese have a similar proverb, namely *sepikul segendong*, expressing exactly the same symbol and meaning as that of the Sasak.

[66] The Compilation of Islamic Law introduces two new concepts of Islamic inheritance, namely *washia wajiba* (obligatory bequest) and *ahli waris pengganti* (substitute heirs). See Ratno Lukito, *Islamic Law and Adat Encounter: The Experience of Indonesia* (Jakarta: Logos, 2002).

[67] *Ibid*., p. 26-27.

over property rights of inheritance among Muslims belong only to the competence of the religious courts.[68]

Because of such plurality of estate division, a claim of inheritance often reflects conflicts between Islamic law and custom or local convention. On the one hand, the defendants, usually the oldest sons or other male agnates, often invoke *adat* or customary norms (or their particular understanding of them) to acquire all or a larger portion of the estate upon the ascendant's death. On the other hand, the plaintiffs, commonly female descendants or heirs, contest such conventions or unilateral acquisition on the grounds of Islamic law. They may ask judges to resolve the dispute according to their discretion so long as it yields justice. The following case illustrates this pattern where the validity of *adat*-based inheritance division is questioned.

In November 2010, a woman and her nieces appeared before the court to file a claim of inheritance division over a plot of farmland (*sawah*) and gardens (*pekarangan*), which were arbitrarily taken over and used as a mortgage by the woman's youngest brother. The plaintiffs explained that their male ascendant died in 2007, followed by his wife two years later. The late ascendant left three descendants: the first plaintiff, the second plaintiff's deceased mother and the defendant. The second plaintiff's mother died in 2008, leaving two heirs: the second plaintiff and her father (the deceased's husband). The deceased couple left 13,847 square meters of farmland and another 706 square meters of garden. The plaintiffs requested the judge to stipulate that the assets be an undivided bequest, to determine that the three descendants be the late ascendants' legal heirs, and to distribute the assets to these heirs in accordance with the *farā'iḍ* or any other prevailing laws. As with other legal cases, mediation in disputes over inheritance remains obligatory.

[68] First Amendment of Religious Judicature Act 3/2006, Articles 49 and 50 (2).

Often judges encourage the litigants to reimburse their opponents from the assets so that the case can be resolved without formal adjudication and settlement. "If you ask me to decide your case, there must be a winner and a loser. But if you can go back to your own compromise among you, you might resolve this through compromise, and nobody gets hurt. Remember, you are one family and live side by side. So you should be embarrassed [to come here]. You should not fight over the bequest that might rage the soul of your forebears, who should rest peacefully. Go back, compromise and pray for your deceased ancestors so that you may reconcile".[69] Often judges invoke kinship and ancestors as a primordial bond tying the litigants to one another so that they might agree to reconcile.

Following the failed reconciliation, in the second hearing the defendant responded to the claim saying that the farmland was in fact 8,000 square meters, and was used as a security deposit for a loan, which was still unpaid, to fund the late ascendants' hospital bills when they were ill prior to their deaths. The defendant did not mind dividing the land provided that the division was based on his own arrangement. He further said that the garden should only be awarded to the first plaintiff. The plaintiffs responded by saying that they admitted being mistaken in calculating the assets but insisted on dividing them in accordance with the *farā'iḍ*. Since neither the defendant nor the plaintiffs in principle denied the existence of the assets, they were not required to present witnesses because acknowledgment was sufficient proof, but they had to accompany the judge to inspect the assets.

The judge (a woman) found that the farmland had not been returned to the heirs (the litigants) because the loan was not paid. She reminded the litigants to repay the loan in accordance with their own agreement, which was beyond her capacity to decide. She approved the claim, saying that because the *farā'iḍ* was *ijbari*, meaning that the law of Islamic inheritance

[69] Field notes and observation on the courtroom hearing, November 17, 2011.

automatically applies upon the ascendant's death, there was no reason to dismiss or postpone the allotment of the estate. The judge contended that since the ascendant left three heirs (one son and two daughters), the formula for the estate allotment should follow Qur'an (3:11), which states that a son's share is equal to that of two daughters. The judge also quoted the Compilation of Islamic Law, Article 176 endorsing this Qur'anic injunction and Article 179 concerning the estate allotment for a widower if he has children. The judge stipulated the three descendants as the late ascendants' rightful heirs and the assets as the ascendants' valid undivided estate. She stipulated a one fourth (1/4) allotment for the first two female heirs (the first plaintiff and the second plaintiff's mother) and a two fourths (2/4) allotment for the defendant. Because the second female heir had died, her allotment was shared by her two heirs, her husband and her daughter (the second plaintiff), where each received half a share.

This case reflects a prevalent pattern of inheritance disputes on Lombok where sons or male descendants attempt to acquire the whole estate. This unilateral claim is influenced by local convention, in which male descendants deserve a greater share of a bequest such as land. Although such convention varies from one region or village to another in Lombok, it is clearly manifest in this defendant's stubbornness in disbursing the estate in accordance with his own whim. The decree demonstrates that the judge ruled against the defendant because his suggested disbursement of the estate contravened the *farā'iḍ*.[70]

[70] The judges are always strict in applying the court procedure in inheritance claims. As a result, many claims are dismissed, resulting in dissatisfied litigants proposing an appeal to the high or appellate court. The annual report of the appeal cases released by the High Religious Court of Mataram shows that inheritance cases are the most numerous. The Appellate Religious Court of Mataram received 63 and 44 appeals on inheritance cases in 2010 and 2009 respectively. These were the most numerous of all types of appeals, followed by *gugat* (39 and 33 cases) and *talak* (33 and 22 cases respectively).

3) Polygamy: Only if It is Just

The religious court's responses to petitions on polygamy are parallel to those on inheritance in two ways. First, the court still upholds the stipulations of *fiqh* and, second, the recognition of polygamy is subject to a strict court procedure. In principle, polygamy is not prohibited, as *fiqh* maintains, but its approval is contingent on consecutive prerequisites that a petitioner must fulfill. As a result, petitions on polygamy are rare. When brought to the religious court, the presence of polygamy discloses two features. First, it may concern a man petitioning the court for permission to remarry. Second, it may deal with a female plaintiff's reason for divorce from her polygamous husband. The figure of polygamy in Table 1 concerns the first feature, whose incidence is lower than that of the second feature. This means that more clients use the court to escape polygamy rather than to acquire the court's permission for it. Statistically, the data demonstrate that (official and registered) polygamy has decreased significantly over the years. In 1983/1984, the religious court in Praya recorded 55 petitions,[71] but it only received four (4) petitions in 2008 and one (1) petition in the two subsequent years. Although the causes for such a sharp decline are beyond my investigation,[72] the strict procedure to obtain approval has apparently become a major reason.

Marriage Law 1/1974 is based on the principle of monogamy although polygamy is not categorically forbidden.[73] The religious courts can accept a petition for polygamy on the condition that the first wife suffers from physical illness or from a disability that renders her unable to conceive (*mandul*) or serve her husband properly; in addition, the male petitioner must obtain consent from his wife. The male petitioner/husband must prove his financial capability

[71] During the same period, the religious courts of Mataram and Selong, East Lombok, received 31 and 141 petitions on polygamy respectively. These data of course show the numbers of registered polygamy.

[72] For a specific study of polygamy in Indonesia, see Nina Nurmila, *Women, Islam and Everyday Life: Negotiating Polygamy in Indonesia* (London and New York: Routledge, 2009).

[73] Marriage Law 1/1974, Articles 3-5.

and the ability to treat his co-wives and their children equally.[74] The issue of consent is crucial. The Compilation of Islamic Law details that the wife may give her consent in a written statement; however, her direct presence confirming her agreement before the court is still required, unless she is unable to do so or she deserts her husband and her whereabouts have been unknown (*ghaib*) for two years.[75]

I obtained a copy of a court decision (*salinan putusan*) on polygamy. Apparently, this was the only petition made in 2010, as Table 1 shows, and it was completed prior to my fieldwork. The *putusan* reports that a 33 year-old male peasant appeared before the court to acquire permission to remarry after his 28 year-old peasant wife failed to serve him properly. The couple married in 2007 and had one child. The petitioner maintained that after giving birth, his wife suffered from a sexual illness that caused her to be unable to have intercourse. He thus intended to marry another woman, a 33 year-old peasant. The petitioner declared that he had no genealogical relationship with his prospective co-wife that prevented their marriage. The woman had not been in any previous relationship with another man and her guardian agreed to conclude her marriage with the petitioner. The petitioner was committed to keeping his co-wives economically secure by producing evidence of a savings account totaling Rp. 40 million and promised to treat the two wives justly. The court agreed to open a hearing for him. In the mediation, however, the judge encouraged the petitioner to rescind his decision, advising him to keep only one wife but he refused.

The petitioner produced a copy of a legalized marriage certificate, a signed consent letter from his wife and his signed promise to be just. He presented two witnesses, who informed the judge about the petitioner's intention to remarry because his wife was ill. They added that the

[74] *Ibid.*
[75] *Ibid*.

petitioner was rich, for he earned a daily income of Rp. 100,000 in addition to his multi-million rupiah savings account. The first wife (defendant) confirmed her physical problem and gave her consent to her husband's proposal. But she also wanted all properties earned during the course of their marriage to be counted as joint property, which included the Rp. 40 million rupiah savings account and 2 *are* of land with a house built upon it. The petitioner approved his wife's demands and recompensed her Rp. 10 million, plus the land and the house. At the hearing the prospective co-wife asserted her consent to this. She said that she was an unmarried woman who had not established any legal relationship with any other man. Nor had she maintained a genealogical relationship with the petitioner that would prevent their marriage.

Quoting Marriage Law 1/1974, the Compilation of Islamic Law 1/1991, the Qur'an (4:3) as well as a legal maxim from *fiqh*, the judge approved the petition because the petitioner, in the judge's view, met the prerequisites of polygamy. He was wary of dismissing the petition; the situation might cause jeopardy and moral degradation (*kemudharatan dan kemaksiatan*) for the parties concerned, as he stated clearly in his consideration. Although he did not detail what he meant by 'jeopardy and degradation', he seemed to be very concerned with what would happen should the petition be overturned. The petitioners would likely conduct *kawin sirri* (unofficial marriage),[76] which is not only an insecure union, especially for the wife and the children born from the union should it dissolve, but it is also unrecognized by the state and is thus legally unbinding. By approving the petition, the judge did not intend to support polygamy, as he asserted when counseling the petitioner in the mediation. Rather, he considered the consequences

[76] This is marriage that is only sanctioned by Islamic and *adat* law, but not state law.

if the petition were declined. The judge based his view on the consequence of the law, which is a common feature of Islamic legal reasoning.[77]

4) Wali Adhal: the Runaway Girl and the Limit of Family Guardianship

A similar type of reasoning was found in the case of a substitute family guardian in which the judge perceived the consequences of a law as more important than the application of its normative prescription. The judge approved a petition of a substitute marriage guardian filed by a girl after her father refused to consent to her marriage. According to *fiqh*, the father is the first and foremost family guardian (*wali nasab*) for a daughter's marriage. Next is the grandfather, or the upper ascendants from the male line, followed by male siblings (brothers), or brothers from the same father and/or the same mother. Uncles from the line of the father and/or the mother occupy the next level. If the first guardian is not available, a second level guardian fills the gap, and the rule follows accordingly.[78] The family guardians can also delegate their authority (*berwali*) to somebody else to conclude the marriage. However, the judge may appoint a substitute guardian for a girl whose family guardians are reluctant (*enggan*) to marry her off with the man of her choice.

Disagreement over the amount of wedding expenses (*pisuka*) often provokes a family guardian's refusal. An unequal social status between the groom and the bride can also trigger a rejection, especially in *adat*-based communities because such a marriage is considered unequal (*salak timpal*).[79] If a woman insists on marrying despite her guardian's opposition, however, she may run away for the sake of her marriage and disregard customary deliberations. This was what

[77] Rosen argues that Islamic law "is based on logic of consequence rather than a logic of antecedent." This judge's reasoning best illustrates this proposition. See Rosen, *The Justice*, p. 22.

[78] This is what I noticed from the flayer installed at the KUA office's hall in town that details the structure of the family guardian according to *fiqh.*

[79] See Chapter One, especially Part B.

a 27 year-old girl from Kalimantan experienced after her father rejected her marriage to her suitor from Lombok because the man failed to make a full payment of the wedding expenses that the girl's parents requested.[80]

Accompanied by her suitor, the girl filed a petition for a substitute marriage guardian to the religious court of Central Lombok. She had been in courtship with him for one year. The man left for Kalimantan to work and coincidentally lived near the girl's house. As time passed, they came to know each other and established an intense relationship as a young couple and insisted on marrying despite opposition from her guardian. She presented a copy of her identity card and two witnesses to endorse her petition. The witnesses, the man's neighbor, and the *kadus* (the hamlet head), informed the judge about the problem that the young couple faced. The *kadus* told the judge that he had phoned the petitioner's father twice asking him to give his consent for her daughter's marriage, but was refused. The girl's suitor pledged before the judge that he would take care of her and treat her benevolently.

Upon examining the evidence and listening to the testimonies as well as the male suitor's commitment, the judge approved the petition. His perception of the couple having run away as elopement (*merarik/selarian*), and the witness's effort to call the girl's father as notification (*sejati selabar*) of the elopement as a preliminary act of marriage, demonstrated that the judge was willing to integrate local Sasak idioms and practices of customary marriage to support his decree. The judge emphasized that declining the petition would create injustice and pose an even greater hardship (*kemudharatan yang lebih besar*) because there would be no other way to resolve the problem, except if the petitioners switched to a law school other than the Shāfi'i, which allows an adult woman to conclude her marriage without a guardian. By approving the

[80] According to a man who accompanied the young couple at the court, the girl's parents asked 15 million rupiah for the male suitor to marry their daughter. The man was only able to offer Rp. 5 million; he was therefore dismissed. Field notes and interviews, November 25, 2010.

petition, the judge terminated the deadlock that the young couple encountered. Again, the judge's reasoning reflected his concern about the consequence should the petition be overturned, similar to that of the petition on polygamy.

5) **Pengasuhan Anak: Child Upbringing, Custodianship and Admission of Legal Status**

The religious court is also concerned with child protection and maintenance. The judges' approach to petitions about children is based on the consideration of whether the children would receive the best advantage from the decision. There are various issues concerning children that litigants or petitioners bring to the court. These include a child's upbringing, custodianship and admission of child legal status, just to mention some. For example, petitions for 'bringing up' children (*pengangkatan anak*) are filed by a third party on the grounds that the parents are no longer able to properly look after their children due to economic hardship or other reasons. If the petition is granted, it will not alter the child-parent legal relationship; it only shifts the responsibility for providing nurturing, education and other needs from the biological parents to the foster parents. The following example illustrates this court competence and domain.

A senior couple sought the court's approval to raise their grand-daughter, whose parents had recently divorced. The petitioners, a 59 year-old state employee and his 46 year-old wife, married in 1972 and had four children. All the children married, including the youngest son, who had one 6 year-old daughter and was recently divorced. The petitioners were concerned about the future of their granddaughter after her parents' separation left her unattended. They produced four official documents: marriage certificate, family card, the granddaughter's birth certificate and her parent's divorce certificate. In addition, they presented two witnesses. Under oath, the witnesses, the petitioners' neighbors, testified that the petitioners intended to raise their granddaughter and that they earned sufficient income to nurture the child. Because the petition

involved a third party, the judge summoned the granddaughter's parents to hear their confirmation. Both the child's father and mother were present at the court session and affirmed their consent. The judge approved the petition.[81]

Referring to the contemporary *fiqh* book *al-Fiqh al-Islām wa Adillatuh* by Wahba al-Zuhaylī, the judge cited the author's view that one is allowed to raise an unattended or abandoned child but not to elevate the child's legal status to that of one's own biological child. The Compilation of Islamic Law, also cited by the judge, states, "the adopted child is a child whose daily life maintenance, nurture, education and other needs are transferred from the child's biological parents to the foster parents upon the religious court's approval."[82] The judge contended that petitions for raising children are not the same as those for adoption because they will not change the child's legal status; consequently, they do not sever the blood relationship between the child and his/her biological parents; the biological father would remain the guardian of his daughter when she marries. Here we see how *fiqh* and state law (the Compilation) can be mutually supportive of the court's decision. In other words, the judge simply adopts *fiqh* and the Compilation and applies them as analytical tools to decide this petition.

Two other related issues are child custody (*penguasaan anak/hadana*) and admission of a child's legal status (*pengesahan anak*). Either the husband or the wife can submit a claim for child custody after divorce if they dispute the right to nurture their child (*hak asuh anak*). The claim can be made separately or as part of a divorce. If the wife proposes the claim, which is often the case, she might also demand financial support for the child from her husband because he remains responsible until the child matures and is economically independent.[83] According to

[81] Field notes and observation on the courtroom hearings November 24, 2010.
[82] The Compilation of Islamic Law 1/1991, Article 171 (h).
[83] The amount of support is contingent upon the father's income. However, if he is poor, his wife is also responsible to support the child. Marriage Law 1/1974, Article 41 (b).

Compilation of Islamic Law, an infant will be automatically raised by the mother but a child 12 years old or older can determine whom s/he will stay with.[84] However, the religious and moral qualifications of the parents are often determinant factors in the judges' consideration to grant claims of child custody.

A petition for the admission of a child's legal status is made for those born out of an official marital union since the children only bear a legal relationship with the mother. Therefore, to raise the child's legal status and ascribe it to the father requires the court's approval. This can be done through *isbat nikah*, which elevates past unofficial relationships between the spouses and their children. If for some reason, the child is born prior to—or if his/her birthday is mistakenly written before—the issuance of the parental marriage certificate, s/he has no legal relationship with the father, who in turn needs to propose a petition to the court for legalization of their child (*pengesahan anak*). Recent mass media coverage of the controversy over the legal status of a female actress's son perfectly illustrates this issue.

A former 1990s female actress was reckoned to have secretly married a late former State Secretary in 1993 and had a son, although the minister never explicitly acknowledged it.[85] Over the years, she did not propose *isbat*, most likely for political reasons since her husband was a top political figure. When her husband retired, the situation changed and enabled her to propose *isbat* at the religious court of Tigaraksa, Banten, in April 2008. However, her petition was rejected because the minister was still married to another woman.[86] In other words, the court refused to legalize the former minister's second marriage with the actress because it would have been polygamous. The problem became even more complicated as the actress married another man beyond the court's approval; as a result, her son's legal status could neither be ascribed to her

[84] The Compilation of Islamic Law 1/1991, Article 105 (1).
[85] See *Kompas*, July 19, 2008.
[86] *Kompas*, July 21, 2008.

former nor to her current husband.[87] Two years later she resorted to the Constitutional Court to propose a judicial review to challenge the law that did not admit the legal status of her son. This petition was approved. One judge of the Court argued that the law was unfair if it discharged a man from being responsible for a child that he has produced—regardless of the nature of the relationship from which the child was born—as long as a genetic relationship between them could be scientifically proved. Another judge maintained that the law was disadvantageous to the son, who should not be liable to bear illegal status for what he had not done.

Following the approval, the actress reappeared before the same religious court (Tigaraksa) as before to request *isbat* in order to obtain a birth certificate for her son.[88] The approval sparked a wide controversy. The Minister of Religious Affairs was very careful in responding to the case and vowed to "take lessons from it," because it had become, in his view, possible to resubmit the same petition for a child born from an illicit sexual relationship,[89] which is not allowed according to the Council of Indonesian Ulama.[90] Controversy was unavoidable even among the religious court judges.[91] One view considered the Constitutional Court's approval as justified according to Islamic law because the legal relationship between the parents and child was based on a blood relationship, despite no official proof of the parents' marriage (*nikah sirri*). Other judges criticized the decree because the decree contravened Marriage Law 1/1974; it might create legal uncertainty and encourage the spread of "wild marriages" that are not sanctioned by the law. The debates surrounding this issue reflect different (re)interpretations

[87] Marriage Law 1/1974, Article 43 (1) and the Compilation of Islamic Law 1/1991, Article 100.
[88] See *Media Indonesia* and *Merdeka*, February 12, 2012.
[89] *Republika*, April 11, 2012.
[90] *Tempo*, March 27, 2012.
[91] The *Badilag* website present's two different essays by two judges who support and criticize the Constitutional Court's decision.

of both Shari'a and state law among judges, the state, the *'ulamā'*, and Indonesian Muslims in general.

All of these legal cases (*isbat*, polygamy, inheritance, substitute guardianship and child custody) demonstrate several important features. First, people come to the religious court for various reasons. A large number of clients seek acceptance of their past unregistered marriages despite the fact that their reasons are not necessarily valid according to the existing law. Other clients use the court to challenge conventional estate divisions and settlements that are not fair to female descendants and heirs. Others seek the court's permission to remarry, raise children, and legalize their children's legal status as well as search for assistance in marriage guardianship. A second important feature these cases demonstrate is that such issues disclose the most important issues of family law over the past few years and reveal the ways in which the religious court addresses them. The majority of clients find the court helpful in resolving their problems except for those who do not comply with court procedures. The judges do not mind hastening a trial if this would be in line with the public good. Some judges contend that the consequence of the law, and its moral and social implications are substantially paramount.

The reactions of judges to the claims and petitions brought before them demonstrate that they work from more than one set of principles, which is another important feature of Islamic courts in Indonesia. Depending on the situation and the nature of the problem, the judges' reactions may vary. On the one hand, they may decide *isbat* or other categories of non-contentious petitions such as raising children and marriage guardianship relatively quickly for the sake of the public good. On the other hand, judges may adopt a more careful approach to inheritance disputes because these commonly involve complex questions of norms and laws among senior litigants that call for meticulous examination. This approach applies to other cases

as well, such as petitions for consent to polygamy. The different views of judges on various cases suggest that different cases require different approaches for settlement.

C) PATTERNS OF DIVORCE AND LITIGANTS' EXPERIENCES

Most people appearing before the religious court in Praya attempt to resolve their marital disputes by claiming divorce, as is the case elsewhere in the country. Who are these people? Why do they seek divorce? What are the roots of their marital conflicts? How do they engage in disputes over their marriage at court and how do the judges respond to them? The demographic data provide the answers for the first question. The answers to the rest of the questions require detailed analyses of judicial divorce. Five *gugat* and two *talak* cases are presented and examined here to illustrate the ways in which litigants negotiate their marital disputes and the judges' responses to them. These cases represent different categories in terms of the causes of marital disputes and the reasons for divorce as well as the strategies the litigants devise to win claims or petitions of divorce. They demonstrate that gender constitutes an important factor in determining both the reasons and the strategies for divorce. For example, male and female litigants frequently use the discourse of rights and responsibilities with respect to gender to either support or reject arguments advanced by their opponents. Although state law lays out certain acceptable reasons for divorce, the ways in which they are appropriated and manipulated depend on the gender of the disputants.

Both culture and law prescribe men as the head of the household and providers of family subsistence while women are defined as housewives charged with domestic tasks.[92] Husbands and wives most often invoke negligence of these gendered roles as their reason for divorce. As in

[92] See Juliette Konig et. al., *Women and Households in Indonesia: Cultural Notions and Social Practices* (Richmond: Curzon, 2000). Marriage Law 1/1974 Article 31 [2] declares that "a husband is the head of the household while a wife is the mother of the household."

the other cases previously discussed, judges examine and decide marital disputes on the basis of procedure and on their understanding of the nature of such disputes. Before discussing these points in detail, I will outline demographic data to describe the statistical aspects of judicial divorce in Praya.

During my 12 months of fieldwork in the Praya Religious Court of Central Lombok from November 2010 through October 2012, I studied 137 divorce cases, consisting of 125 cases of *gugat* and 12 cases of *talak*. Each number represents roughly one third of the annual average rate of divorce for each category in this court. Although I followed many more divorce cases during my fieldwork, these 137 are complete cases, from which I collected information regarding the litigants' backgrounds, the causes of marital disputes, and the court decisions. I obtained this information from court records, the registrar's books, and clerks' notes of hearing schedules, interviews (with the litigants, judges, and clerks), courtroom hearings and copies of court decisions on divorce. Although not everyone shared their story with me, many were amenable to talking about their experiences in negotiating their marital conflicts. This interrelated method of data collection enabled me to capture the entire dispute process from the beginning when they are filed and processed, until the end, when the decision of the court is issued.

1) The Litigants' Demographic Backgrounds

The demographic data provides information about plaintiffs (but not defendants): their age, education and employment. Reasons for divorce disclose the origin and causes of the disputes. Court decisions offer critical information regarding the judges' views of the disputes, legal sources and references that are used and the court's gradually changing approach to divorce, especially if we include past court archives (to be discussed in Chapter Four). Both interviews and courtroom hearings offer further information regarding the details of the disputes,

which are not completely recorded in the claims or petitions nor are they included in the court decisions. They also provide the best entry point to comprehend how a dispute is contested by legal actors and how they construe the meaning of judicial divorce and the understanding of Islamic law as a locus of contestation, domination, and resistance (I will come back to this issue in Chapter Three).[93]

I gathered only the plaintiffs' demographic information, because the plaintiffs are the initiators of litigation. From the 137 cases, the majority involved plaintiffs between 21 and 30 years old (62%), followed by those who were between 31 and 40 years old (24.55%). Of the youngest age group, 13 plaintiffs were female between 17 and 20 years old and none were male. The majority of the male plaintiffs were between 21 and 30 years old. This was also the case for females. Two female plaintiffs were over 50 but no male plaintiffs were found in this age group (See table 2.2).

Table 2.2 Plaintiffs' Ages

Age Ranges	**Female**	**Male**	**Total/Percent**
17-20	13	-	13 (9.50%)
21-30	78	7	85 (62.00)
31-40	23	1	24 (17.55)
41-50	9	4	13 (9.50)
51-up	2	-	2 (1.45)
Total	**125**	**12**	**137/100**

The plaintiffs' educational backgrounds varied. The majority, 36.50%, only completed elementary school. The percentage of plaintiffs with junior and senior high school degrees was almost identical, between 24% and 25.55%. Those with higher educational backgrounds, academy and college/university degrees reached only about 12%. Nearly 3% of respondents did

[93] As I said, the transformation of divorce from *fiqh* to state law not only alters the procedure of divorce but also changes the substance of divorce, establishing new meanings and stimulating contestation over what constitutes divorce. Chapter Three will discuss these topics.

not provide any information about their education in their claims/petitions, possibly because they never attended school at all or never completed elementary school (see table 2.3).

Table 2.3: Plaintiff's Educational Backgrounds

Education Backgrounds	**Female**	**Male**	**Total/ Percentage**
Elementary School	49	1	50 (36.50%)
Junior High School	31	2	33 (24.00%)
Senior High School	32	3	35 (25.55%)
Academy	6	1	7 (5.10%)
College/University	4	4	8 (5.90%)
Not Available	3	1	4 (2.95%)
Total	**125**	**12**	**137 (100%)**

Most plaintiffs identified themselves as housewives (37.22%); others were private entrepreneurs (25.55%), peasants (20.43%), state employees (5.10%), and students (3.20%), but others (9.50%) did not mention their employment or social role. "Housewives" (*ibu rumah tangga*) refer to the social status of married women whose tasks are closely related to domestic household work. "Private entrepreneur" (*wiraswasta*) is a broad category that includes a variety of professional jobs such as driver, mechanic, private business owner, carpenter and the like. This term is commonly used to distinguish them from those who are employed by the state (*pegawai negeri sipil*), which also includes a wide range of employment.

Table 2.4: Plaintiffs' Employment and/or Social Roles

Employment/Status	**Female**	**Male**	**Total/Percent**
Housewife	51	-	51 (37.22%)
Peasant	26	1	28 (20.43%)
Private Entrepreneur	28	7	35 (25.55%)
State Employee	4	3	7 (5.10%)
Student	3	-	3 (2.20%)
Not Available	13	-	13 (9.50%)
Total	**125**	**12**	**137 (100%)**

I have no intention to offer statistical and quantitative analyses in this dissertation; however, the demographic data merit a brief discussion. The data show that most plaintiffs are young housewives with low educational backgrounds, whose husbands also have little education. This suggests that marital breakdown occurs mostly among less educated young couples. Some studies of divorce confirm this finding. Although based on Java, the study by Hildred Geertz of Javanese family life and socialization is illuminative in this regard. When discussing divorce, she shows that early arranged marriage is prevalent among her subjects with the understanding that if young couples are not compatible (*tjotjok* or *cocok*) they can return to their parents and plan another marriage.[94] This pattern of marriage and divorce still prevails to a considerable extent in rural Lombok, which involves cousin marriages and village endogamy, as these are found among litigants. For some couples, although they do elope (*merarik*), their marriages might in fact be pre-arranged by the parents. Dommaraju and Jones argue that early parental arranged marriage, lower income and low education contribute greatly to the increasing divorce rate.[95]

In a similar vein, Heaton *et. al*., contend that freedom to choose a marriage partner, increasing age at marriage and education are important parameters for marital stability.[96] Their arguments fit the judicial divorce rate at the religious court of Central Lombok since this court serves mostly clients with these qualifications. In general, however, the divorce rate in Southeast Asian Muslim societies is among the highest in the world,[97] partly because, as many argue,

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[94] Hildred Geertz, *The Javanese Family: A Study of Kinship and Socialization* (New York: Free Press, 1961).

[95] Premchand Dommaraju and Gavin Jones, "Divorce Trends in Asia," *Asian Journal of Social Science*, 39 (2011), p. 725-750.

[96] Tim B. Heaton, Mark E. Cammack and Larry Young, "Why is the Divorce Rate Declining in Indonesia?", *Journal of Marriage and the Family*, 63 (2001), p. 480-490.

[97] Gavin W. Jones, *Marriage and Divorce in Islamic Southeast Asia* (Kuala Lumpur: Oxford University Press, 1994).

women hold a relatively high social status.[98] Such a position might in some way make them more assertive in deciding family matters, including divorce, as the religious court judges presume.[99] Cammack and Heaton further demonstrate that the 1998 reform in Indonesia has provided a further basis for social and political changes that affect the family. Wide popular media exposure where women can access a variety of information and entertainment, the state policy regarding 'gender mainstreaming' through Presidential Decree 9/2000 and the enactment of Human Rights and Domestic Violence Laws, constitute structural developments that facilitate the upturn in divorce since litigants make use of these laws to legitimize their claims.[100] These demographic aspects will be evident in the cases that will be analyzed in the following passages.

Although the studies mentioned above provide statistical analyses and socio-political contexts for marital disputes, I am more concerned with the litigants' firsthand experience with marital disputes and judicial processes for their settlement. This approach will enable me to depict how Islamic law is used by the Muslims involved in marital disputes. The national data of divorce released by *Badilag* and the local annual report of the religious court include the stated reasons for divorce, but they do not distinguish between *gugat* and *talak*, thus blurring these two gender-based categories of divorce under the single category of divorce. Unlike other family cases, which are primarily characterized by disputes in a consanguine relationship, divorce involves mainly conjugal conflicts where gender matters in determining relevant reasons and strategies for the settlement strategies adopted by the litigants.

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[98] Charles Hirschman and Bussarawan Teerawichitchainan, "Cultural and Socioeconomic Influences on Divorce during Modernization: Southeast Asia, 1040s to 1960s," *Population and Development Review*, 29 (2003), p. 215–254.

[99] This is the religious court judges' general impression when I asked about the increasing *gugat* divorce rate. Cammack and Heaton found a similar response from other judges. See Marck E. Cammack and Tim Heaton, "Explaining the Recent Upturn in Divorce in Indonesia: Developmental Idealism and the Effects of Political Changes," *Asian Journal of Social Science*, 39 (2011), p. 776-796.

[100] *Ibid*.

2) Reasons and Strategies of Divorce

As others have demonstrated, litigants give various reasons and devise various strategies to ensure the most advantageous outcome of court cases. In Rural Zanzibar, for instance, desertion and lack of support constitute the major grounds for women filing a claim for divorce.[101] In Malaysia, men as plaintiffs resort to the *kadi* court to recall their deserted wives or repudiate one of their co-wives; nowadays they also have court permission for *talak* and polygamy.[102] When coping with household disputes and intending to bring them to court, female villagers in Jordan resort to either conjugal or consanguine relations to effectuate their claims or counterclaims.[103] Judicial divorces at the religious court of Central Lombok display similar features; however, the litigants give more nuanced reasons for divorce in accordance with their respective genders and adopt a particular strategy accordingly. From the judge's point of view, those who initiate divorce may receive harsher terms if they fail to present compelling arguments and produce strong evidence, as the law requires. In addition, the existing law provides constraints and powers that shape the patterns of reasoning and strategies for divorce.

According to the law, divorce may be considered under the following reasons: fornication, drunkenness, gambling, two years desertion, five years imprisonment, violence, physical disability or other acute illness, irreconcilable conflicts, and conversion.[104] These are general causes; however in practice, as will be clear from the cases discussed below, gender plays a role in determining which reasons are the most relevant to the litigants. The first case to be discussed involves a *gugat* lawsuit on the grounds of spousal neglect and desertion. The male

[101] Stiles, *An Islamic Court,* p. 23.
[102] Peletz, *Islamic Modern,* p. 129-130.
[103] Antoun, "Litigants Strategies," p. 54-55.
[104] The Compilation of Islamic Law 1/1991, Article 116 and Article 19 Government Regulation 9/1975.

defendant never attended the hearing because he was declared as whereabouts unknown (*ghaib*); thus, the court decision was given without the defendant's presence (*verstek*).

Case One: A 27 year-old housewife approached the court to petition a divorce lawsuit against her husband, a 31 year-old migrant worker, who had neglected her since he left to work in Malaysia. The couple married in 2004 and had a baby girl a year later although they still lived together in the husband's parent's house.[105] With her consent, the husband went to Malaysia in 2006 to earn more income to improve their standard of living. A few months later he sent money home, but the amount was sufficient only to reimburse the loan for his travel to Malaysia. The money was his only remittance since he never sent another amount, rendering his wife uncomfortable because she was still dependent on her parents-in-law's support. She then decided to return to her natal parents. Since that time, she received neither support nor even any information from her husband. She turned to the court asking the judge to divorce (*menceraikan*) her husband on the grounds of desertion and negligence. She had to wait four months before her claim could be heard due to her husband's status as an absent person (*ghaib*). The court opened a hearing for her in the middle of November 2010, where the judge proceeded directly to examine her claim and evidence without mediation because her husband was not present. She presented a copy of her ID and legalized marriage certificate as written evidence and one witness to substantiate her claim. The witness, her uncle, told the judge that the claim was true to the best of his knowledge. It was the same with the other witness's testimony in the second hearing a week later, in which the second witness, like the uncle, was also unwilling to counsel the disputants. The judge approved the claim on the day of the second hearing.

[105] Normatively, the wife follows her husband upon marriage. They may remain in the husband's parents' home until they can build up their own house.

I attended the hearing and talked both with the plaintiff and her witnesses outside the courtroom. They said that the decision to divorce was not spontaneous but deliberate after a long series of considerations and unsatisfactory compromises. Initially, the plaintiff was patient and migrated to Kalimantan to open a small food shop for a year in order to divert her attention from the household problem and generate income. However, the prospect of the business was daunting, which forced her to return to the village. There she received unpleasant information. Rumor had it that while she was away her husband secretly arrived from Malaysia but stayed with his parents for some days. He neither contacted his wife nor visited her parents. Her uncle even heard gossip that her husband had remarried in Malaysia. What made her most desperate was the fact that the children in the neighborhood bullied her daughter by calling her an orphan (*anak yatim*) for she "had no father." According to her uncle, who accompanied her to court, it was necessary to take legal action to terminate her ambiguous status, saying, "to wait uncertainly [about the husband] is very unpleasant. Her situation is stuck; she is neglected but not legally separated. She is not yet divorced but cannot remarry. I hope the court approves her claim so she can start her life all over again."[106] Her natal family endorsed her decision.

This is one example of a very common divorce case involving families of migrant workers. A large portion of divorce claims submitted to the court in Praya reflects this pattern. Absent husbands rarely return home, or return secretly beyond their wife's awareness, rarely sending sufficient money and, more seriously, rarely updating their latest information for their family at home. Although these features do not represent the behavior of all migrant laborers, they are prevalent factors in destabilizing migrant labor families. This female plaintiff was aware of the difficulties encountered by her husband, especially if he was an illegal laborer. The plaintiff was willing to struggle with economic hardship at home by opening a small business,

[106] Field notes and interview, November 24, 2010.

albeit unsuccessfully. Whatever problems may exist abroad, this does not justify lack of communication because the means of communication are inexpensive.[107] The main legal issue is therefore about the willingness of the parties to maintain the union. For this reason, many women file a divorce claim to the court a year or so after not hearing from their husbands. They are stuck in the status quo: they are neither in a stable union nor a legal separation.

This case reveals one reason why a female plaintiff may use the court. This plaintiff attempted to clear up her marital ambiguity by seeking divorce from the court because this was the best available option. For her, the issue upon which she framed her claim rested on her spouse's desertion, which made the marriage unstable. As Judith Ecklund explains, poverty is only a secondary reason for divorce for rural Sasak women because their parents or close relatives often sustain them.[108] Thus, asking only for a divorce and not compensation reveals the plaintiff's strategy to win at the trial and obtain a quick approval. From the court's perspective, the judges realize the enduring dilemma that female plaintiffs bear; thus, granting their claims quickly is a fair and viable way to get them out of their predicament. In many cases, a claim under this category can be approved within two or three hearings. The judges are willing to hasten a trial provided that all requirements such as presenting proof and two witnesses are met. In the second case, a female plaintiff sought divorce for different reasons. Again, gender played a role in shaping the plaintiff's complaint. She also received a quick trial due to her husband's absence from the hearings.

[107] Means of communication include mail and mobile phones. It is impossible that a male migrant laborer forgets his spouse's address. Therefore, an expectant wife at home will easily conclude that her husband is no longer interested in maintaining their union when he stops calling or sending her mail or text messages.

[108] Judith F. Ecklund, "Marriage, Seaworms, and Song: Ritualized Responses to Cultural Change in Sasak Life," *PhD Dissertation* (Cornell: Cornell University, 1977).

Case Two: A 44 year-old housewife with a diploma in engineering sued for divorce against her husband, 59 years-old, an engineer and the head of the village, after he beat her and secretly took a second wife. The couple married in 1991 and had one daughter. They had stayed with the husband's parents for years after marriage before moving out to Sulawesi and living there for six years. They returned to Lombok and built a house in the village, which became their permanent residence. In 2009, her husband covertly remarried and had one child, which provoked constant conflicts leading to domestic violence. The dispute was so intense that it was handled by the police before being brought to court. The court accepted the wife's claim and initiated a hearing.

The first hearing was very quick because the defendant did not attend. The judge rescheduled the hearing for the following week and asked the clerk to recall the defendant. Before ending the session, the judge advised the plaintiff to reconsider her decision to divorce but she kindly disagreed. The defendant remained absent for the second hearing, while the plaintiff presented her written documents and two witnesses, who under oath testified that the disputant's household was in trouble. Although unaware of the details of the dispute, the first witness, a neighbor, acknowledged that the defendant had remarried. The second, a female witness, the plaintiff's colleague, informed the judge about the violence against the plaintiff as she saw the remnants of the wound. She added that the defendant was unwilling to repudiate the plaintiff but the plaintiff refused to return home because she thought the conflict was unbridgeable. When the judge advised her to reconcile since the couple had been married for nineteen years and had one daughter, the plaintiff did not change her mind. The judge approved her petition despite the defendant's absence (*verstek*).

The plaintiff told me that she was unaware of her husband's remarriage until a neighbor informed her. One day when she was on duty in Java, a woman and a child, along with their

relatives, visited her husband at home. The neighbors suspected that they were not casual acquaintances. Speculation spread widely in the neighborhood that this woman was a co-wife. After the rumor was confirmed, a neighbor phoned the plaintiff explaining what was going on. When she came back, she asked her husband for clarification and responsibility, which he was unable to make. Under the auspices of a legal aid NGO (*Lembaga Bantuan Hukum*/LBH APIK), this couple signed an agreement stating that the husband would repudiate his co-wife with a triple (irrevocable) divorce so they could not marry each other again. He agreed, but a week later he broke the agreement by visiting his co-wife. The plaintiff could not accept this violation and continued to argue with her husband, who in turn beat her. She brought the dispute to the police, asking them to prosecute him for domestic violence. The husband implored her to revoke the report to the police, promising that if she accepted the proposal she would be recompensed with 20 *are* of land.[109] She concurred, withdrawing her report to the police and seeing the notary to register the land in her name. Once the process of land registration was done, she did not return home to her husband but instead resorted to the religious court to file a claim of divorce. Since the value of the compensation was high enough, she did not request other compensation from her husband in order to avoid a prolonged trial.[110]

Similar to Case One, divorce was the only claim pursued by this female plaintiff. Her claim was approved without the presence of the defendant (*verstek*), who did not respond to the court summons even though he had been officially and properly recalled (*telah dipanggil secara resmi dan patut*). The plaintiff proposed two reasons for divorce, namely polygamy and violence. Here the purpose to use the court was not to clear up an ambiguous marital status in the sense

[109] One *are* is equal to 10x10 square meters. Currently, in rural areas, the price of one *are* of land can be at a minimum Rp. 10 million or more depending on the location. Whether urban or suburban, the plot values at least Rp. 50 million. The price of land is always increasing from time to time.

[110] I talked to her three times when she appeared in the hearings in November 2010.

that the spouse deserts or is unknown, as in Case One. Rather, it was about the preservation of a monogamous marriage and the establishment of a peaceful relationship within the union. The husband's unilateral decision to remarry without his spouse's prior consent broke the law and his violence against the plaintiff strengthened her position as an innocent victim that the law had to protect. The wife was also aware of the most auspicious moment to file the claim and the best way to win the trial. The exclusion of demands other than divorce such as spousal maintenance after divorce or division of joint property revealed her strategy to win the trial. She lodged her claim only after receiving compensation from her husband so she would not have to fight for it at court, which would be complicated. The two following cases reveal how female plaintiffs faced complicated trials because they not only asked for divorce but also for a division of joint property and payment of unpaid *mahar*. Their cases became prolonged since the male defendants attended the hearing, resisting the claims filed by their wives. Lack of evidence on the part of the plaintiffs can also weaken their claim.

Case Three: A 36 year-old female teacher appeared before the court to submit a divorce and *mahar* payment claim against her husband, a 40 year-old part time worker at a local private business office. The wife often quarreled with her husband because he rarely supported her. Her husband often wandered off and came back home late without just reasons. These resulted in conflicts leading to an out-of-court repudiation (*talak*) in 2008. However, the couple remarried and renewed their marriage contract, in which the husband awarded his wife a house as her *mahar*. However, this remarriage was not registered. After the husband married someone else in 2010, the couple no longer got along and lived apart (*tidak lagi cocok dan tidak lagi tinggal satu rumah*). On this basis, the plaintiff went to court to seek divorce and after-the-fact certification of

her second marriage. She also demanded payment of her *mahar*, the house, which was occupied by her husband and his new wife.

The defendant was absent in the first two hearings but was present in the third session. He told the judge that he had come to the second session but was late.[111] Because the defendant appeared in the third session, the judge instructed the couple to attempt mediation, which failed to reunite them. The plaintiff produced her old marriage certificate and proposed two witnesses. The witnesses, her father and a neighbor, informed the judge that the defendant stated in the second marriage contract that he awarded the plaintiff a house for her new *mahar*. The witnesses added that the defendant had another unpaid *mahar*, namely 5 grams of gold, as the defendant stated in the first marriage contract. When the judge checked the written evidence, he did not find any information about these two *mahar*s. Instead, he found a set of prayer appliances (*seperangkat alat shalat*)[112] as the wife's *mahar*. The defendant admitted the gold *mahar* and was willing to repay it, but not the house.

Here lies the reason why the plaintiff's claim was only partially granted. The problem arose because the disputant's divorce and remarriage were not recorded. Thus, she lacked written official proof. The plaintiff acknowledged that the marriage certificate she had was the first one, which only recorded prayer materials as her *mahar*. Neither the gold nor the house was recorded in it. Consequently, the defendant was by law not required to fulfill these promises. Nevertheless, he pledged to repay 5 grams of gold.[113] Here a conflict of evidence emerges between written proof and testimony. When I asked the judge about this, he replied that the marriage certificate

[111] I saw him on the day of the second hearing but he went out and left his bag in the court and returned during the break when the session was over. Field notes, December 22, 2010.

[112] This is one of the most popular *mahar*, which symbolizes a spiritual-moral meaning. It commonly consists of *sajadah* (prayer mattress) and *mukena* (female prayer long outer garment) and the Qur'an. Other additional *mahar* can include cash, gold, a house and other valuable items.

[113] Although fluctuating, the price of gold ranges around Rp. 350,000 to Rp. 500,000 per gram.

was an official document and if marriage, divorce and reconciliation were not recorded, there was no evidence to prove them. According to the clerk, official documents were stronger evidence than testimonies. As a result, the judge only approved the demands of marriage legalization and divorce, but turned down the *mahar* claim, although he commanded that the defendant assign the plaintiff 5 grams of gold.

Again, the female plaintiff perceived the failure of her husband in fulfilling his marital obligations as justification for asking for divorce. This case revolved around the issue of spousal support, polygamous marriage, and unpaid *mahar*, for which the husband is liable. The case also suggested that the plaintiff gained less than what she asked for since no substantial evidence was produced. Although the defendant's presence may not be as significant a factor as the lack of documents in shaping the court decision, he nevertheless utilized the law to escape the obligation of delivering the house *mahar* because this was not mentioned in an official marriage document. His willingness to pay 5 grams of gold was considered to be an act of sincerity because this *mahar* was not mentioned in the first marriage certificate either. The defendant's strategy succeeded since the judge did not approve the consignment of the house as *mahar*. Insufficient documents and the defendant's resistance were the determining factors regarding whether the plaintiff could win all or only part of her claim. Even complete evidence and court approval may be not an automatic way of getting what plaintiffs claim if the defendants refuse the court decision. This is what happened to another female plaintiff, who had to struggle harder to obtain her rights because her husband resisted.

Case Four: A 30 year-old returned female migrant worker appeared before the court to submit a claim of divorce in September 2010. The plaintiff married her husband, a 40 year-old peasant, in

1997 although the marriage was without registration. For the purpose of generating more income, she went to Saudi Arabia as a migrant laborer after her husband had consented. A few months later, her husband remarried and sent her text messages informing her that he had repudiated her. A few years later when the plaintiff returned to Lombok in 2010, she was threatened by the defendant not to inquire about the house in which they used to live together. The house was controlled by the defendant and occupied by his brother's family. As a result, the wife returned to her parents. The plaintiff considered her marriage as broken and brought the dispute to the court. She sought legalization of her past unofficial marriage, divorce, and a half share of the joint property, consisting of 11.4 *are* land and a 9,5x7,5 meter house built upon it.

The disputants attended the first hearing for mediation but failed to reconcile. In the session of reply and response (*replik* and *duplik*) the judge read the claim to the defendant. He replied that he had no intention whatsoever to repudiate his wife because his household was just fine. The defendant further said he still loved the plaintiff, who responded by hand clapping and loud laughing, to which the judge reminded her not to be noisy. The defendant admitted having married the plaintiff, and acknowledged the house and land as the couple's common property but was unwilling to separate. The plaintiff insisted on continuing the trial and produced proof of residence, a copy of the certificate of land and home ownership, and presented four witnesses. The first two witnesses, her brother and a neighbor, testified that the couple was in trouble after the defendant threatened the plaintiff upon her return from Saudi Arabia and refused to share their joint property. Two other witnesses, her neighbors, offered their testimonies about the land that the disputants bought and the house they built on it after their marriage. The defendant neither rejected these testimonies nor presented his own witnesses. In the following week the judges and clerk inspected the assets (*pemeriksaan setempat*) and found them as they were

described by the witnesses. A week later in the last hearing the judge approved all the points sought in the claim in December 2010. The court decision instructed anyone who controlled or occupied the land and the house to submit them to the disputants. Leaving the courtroom, the defendant grumbled and swore to appeal; he never acted on his words, however.

Negotiations between the disputants to reach compromise about the property began before the trial and continued even after the decision was issued. According to the plaintiff's brother, who always accompanied her in court, the plaintiff initially asked for Rp. 20 million from the joint property, although the land and the house was valued nearly at Rp. 80 million. Had the defendant accepted the proposal, the plaintiff would not have turned to the court. Because the trial was in progress, the plaintiff was willing to withdraw the lawsuit if the defendant increased the compensation to 50 million rupiah. Until the decree was issued, the defendant kept trying to renegotiate the amount, and was willing to add another Rp. 10 million to the initial amount so it would be Rp. 30 million. The plaintiff was no longer interested in responding to the defendant's offer until the case was decided by the court, as she told me when she reappeared before the court in the middle of March in the following year (2011). She asked the court to enforce a court execution because the defendant did not comply with the court decree to release a half share of the property to her. She paid nearly Rp. 5 million for the security execution fee.[114]

[114] I joined the execution of the court decree in April 2011. We were six: three court executors, two notaries and me. Before we approached the location, another team from the sub-district police joined us. Two police brandished an automatic gun to assure security during the execution of the court decree. I saw the plaintiff and her brothers walking down from her parent's house, about a half mile away from the disputed house, but the defendant did not show up. The executor read the court order loudly before the crowd asserting that he was instructed to divide the assets justly so as not to create trouble for either party or the public such as access to and from the walkway and the road. About one and a half hours later, the notaries successfully finished measuring the assets. They put line markers dividing the assets into two equal portions. Field notes and observation, April 13, 2011.

The case took several months and a number of hearings to conclude because the defendant resisted.[115] The plaintiff sought divorce because she was betrayed by the defendant, who unilaterally repudiated her and remarried. But the defendant insisted on maintaining the marriage. By doing so, he hoped to prolong the hearings in order to continue negotiating beyond the court about the compensation for the property. Unfortunately, he failed to convince the judge, let alone the plaintiff, but continued to control the house even after the decision was issued. Sometimes judges discourage plaintiffs from including joint property in their claims and allow the property to be completely taken away (*diikhlaskan*) by the defendant, especially if its value is lower than the fee for execution. "Please do not buy a chicken with a goat," a judge cautioned one plaintiff about the execution fee, which was much higher than the value of the disputed assets.[116] My point here is to show that the resistance of defendants will often render a trial more complicated. They persuade the judge by making statements about their good relationship with their spouse but are often unable to prove it. Moreover, male defendants might ask for a ransom in exchange for the release of their wife from a marriage. The case below illustrates this strategy.

Case Five: This case involves an endogamous parental arranged cousin marriage. A 17 year-old housewife resorted to the court to submit a divorce lawsuit in November 2010. Her husband, a 25 year-old coolie, failed to support her, which undermined their less-than-one year marriage. The husband had no steady job so he had not enough income to support his wife. The husband's

[115] I missed half a session of their hearings since I began my fieldwork in November. Fortunately, I have a copy of the court record of the case so I can combine it with my courtroom notes and interviews with the plaintiff to reconstruct and present the case here.

[116] Depending on the security alerts, the disputants may pay the security fee for the sub-district police (*polisi sektor*), which costs around Rp. 4-5 million, or the district police (*polisi resort*) which cost around Rp. 15 to 20 million. The disputants on inheritance usually invite the district police to safeguard the execution of the court decision. I once attended this kind of dispute where the district police employed two police groups each consisting of 15 personnel armed with all necessary means to prevent unexpected things, such as angry mobs, which is not uncommon during court execution. The execution often incites violence.

parents often interfered in the couple's business, and they disliked their daughter-in-law. The husband was a bad tempered man who sometimes beat his wife. The conflict escalated as the husband repudiated his wife out of court in July 2010 and sent her back home (*mengantar pulang*) to her parents. Four months later, the wife lodged a lawsuit in the court asking for divorce.

During the courtroom session, the husband denied the claim, saying that he did not beat his wife or repudiate her when he sent her back home. Instead, what he meant was to place her temporarily (*menitipkan*) with her parents. However, he acknowledged that his parents disliked his wife because she did not listen to them. He never supported his wife since she lived with her parents and refused to go back to him. The plaintiff denied the defendant's reply and presented a copy of a legalized marriage certificate and two witnesses to defend her claim. The first witness, her father, testified that the conflict arose because the defendant did not support the plaintiff. He said the defendant repudiated the plaintiff, bringing her back home to her natal family. The second witness, the disputants' neighbor and head of *Rukun Tetangga* (the smallest unit of the village structure that includes a number of family households) offered different testimony. He said that the main cause of the conflict was because the defendant's parents disliked the plaintiff. Along with the defendant, the witness tried to persuade the plaintiff three times to return to the defendant but she refused because she said that she had been repudiated. The defendant denied part of the testimonies and expressed his objection to the first witness because the witness was the plaintiff's father. The defendant presented his own father as a witness to balance the testimonies.

The defendant's father testified that the real cause of the conflict was not because of a lack of support, but because the plaintiff established a new relationship with a man. The

disputants, the witness added, were never involved in physical violence, but only argued with one another (*bertengkar mulut*). The plaintiff partly disputed this testimony while the defendant accepted it wholly, adding that the plaintiff was living with her prospective husband. The defendant also asked Rp. 5 million ransom if the plaintiff wished to divorce him. The judge was upset to hear that the plaintiff lived with her prospective husband and ordered her to leave the man because the plaintiff was still a valid spouse until a decision was issued. The plaintiff was skeptical of the judge's statement—because she thought she was repudiated out-of-court a few months previously—but gave no response to the judge.[117] The judge, however, did not comment on the ransom claim at all but questioned the strength of one witness that the defendant produced. The judge rejected the testimony of one witness because it was insufficient and thus approved the divorce.

Litigants frequently complain about witnesses if they are close family members of their opponents. Unlike inheritance cases where witnesses must be non-family members to avoid any interest in internal family estate disputes, testimonies in divorce cases may be offered by family members on the assumption that they know about the dispute better than others. This logic comes from the idea that marriage is not merely a personal relationship between spouses but is also between families and that household grievances should be kept secret. The way the judge reviewed the evidence and testimonies in this case suggests that he strictly followed the official procedure of litigation (*hukum formil/acara*). The judge rejected the testimony offered by the defendant's father not because the information was wrong, or because it was given by a close family member, but because it was insufficient according to the procedure of litigation. The judge also dismissed the defendant's counterclaim for compensation because it was a sort of

[117] From my conversation with the plaintiff's prospective husband, it seemed to me that he had married the plaintiff because the plaintiff's waiting period (*'idda*) had passed since she was repudiated by the defendant more than four months earlier.

extortion to reject the wife's claim. I noted that several male defendants requested ransom from their wives when seeking divorce but such claims were rarely approved.

The disputes in this case revolved around the problem of support as the main reasons why the plaintiff wanted a divorce. However, only one of the two witnesses that the plaintiff produced confirmed this. The defendant's witness also disputed her. This meant that she did not possess very strong evidence to endorse her claim. Nonetheless, the judge still approved her claim mainly because the disputants could no longer preserve a harmonious life, which is the fundamental objective of marriage. This case also indicates that lack of spousal support (*nafkah*) may not be the plaintiff's most effective reason for divorce; in this case the plaintiff had hidden motives. The plaintiff's new suitor told me that by turning to the court she aimed to avoid the payment of ransom that the defendant asked for. The man said that the people in her village now almost unanimously agree that any party that unilaterally initiates a divorce has to compensate his/her spouse with at least Rp. 5 million.[118] This was based on an incident where a man remarried although his current wife strongly opposed it. She took most of the household furniture and appliances away with her and requested Rp. 5 million more for compensation, which the husband agreed to. This incident had thus become a new *adat* model for the settlement of extrajudicial repudiation, which the defendant referred to as grounds for compensation from the plaintiff. Instead of paying the defendant, the new suitor suggested that the plaintiff contest it in court. The man further stated that he and the plaintiff needed an official divorce certificate, without which their current relationship could not be officially recognized. Divorcees have to

[118] Field notes and interviews, January 5, 2011.

produce a divorce receipt from the court if they wish to remarry officially. This serves as another motive for which the plaintiff and her suitor turned to the court.[119]

When recalled to appear before the court as defendants in cases of *talak* repudiation, women also devise strategies to overturn *talak* and propose a counterclaim. Unlike the ransom asked by male defendants in *gugat*, which is rarely approved by judges, the female defendants' counterclaim in *talak* is usually granted (although partially), as the example below demonstrates.

Case Six: A 28 year-old male part time (*honorer*) teacher with an undergraduate diploma (*sarjana*), appeared before the court to submit a petition of *talak* in January 2011. He explained that since 2008, about one year after marriage, his household had been in trouble for several reasons. First, the defendant, his wife, a 28 year-old kindergarten teacher, was not good at managing money. Second, the defendant often provoked him to effectuate *talak* upon her. This led to conflicts and repudiation beyond the court in 2008. As a result, they lived apart. Two years later, the plaintiff proposed a *talak* petition to the court.

The defendant did not appear at the first hearing, but sent a notification informing the judge that she was unwilling to divorce and raise their sole child without the plaintiff. She appeared at the second hearing in order to undergo mediation. In the sessions following the failed mediation, the plaintiff could not convince his witnesses to give testimony because they knew little about the causes of the dispute and refused to be sworn. However, in the courtroom the plaintiff told the judge that his witnesses were ill. The defendant denied the plaintiff's statement about his witnesses, telling the judge that there was no one who knew the cause of the dispute

[119] Of course divorce and remarriage without being compliant with state law continue beyond the courts, as the court clerks and the litigants repeatedly told me. For other women who have been repudiated beyond the court, not quickly turning to the court after such an extrajudicial divorce may be because there is no immediate plan to remarry soon or to remarry officially.

except family members, who were reluctant to offer testimony. Although the plaintiff eventually presented two other witnesses, the head of the hamlet (*kadus*) and a neighbor, they admitted being unaware of the couple's dispute in detail. They only informed the judge that the disputants had not lived together for about a year or so. The defendant did not deny this testimony but asked for compensation for her and the child should the petition be approved. She proposed Rp. 5 million for her *iddah* and Rp. 1,5 million per month as support for the child. She also wanted custody rights (*hak asuh*) over the child.

The plaintiff responded to his wife's request, saying that his salary was low because he was only a *honorer* teacher. Therefore, he was only able to pay Rp. 100,000 per month for child support and Rp. 900,000 for *iddah* maintenance, even though the judge had ordered him to increase the amount. The judge granted his *talak* but also partially approved the defendant's counterclaim. The judge obliged the plaintiff to pay Rp. 1 million as a consolation gift (*mut'ah*), Rp. 1,25 million for *iddah*, and Rp. 300,000 per month for the child support. While the plaintiff accepted the decree, the defendant questioned the terms which she thought were too lenient for the defendant, claiming, "Rp. 300,000 per month is not enough for monthly child support." The judge reasoned that the total amount incurred on the plaintiff was a fair medium between the defendant's demand and the plaintiff's income. However, the judge strongly encouraged the plaintiff to add more support for the child on his own initiative because the child was his daughter. By this the judge underscored that his decision about child support was meant to be a minimum. The judge did not specifically appoint either party as the child's custodian but instructed the litigants to be jointly responsible for their child. Two weeks later, the plaintiff came back to the court to pronounce (*mengikrarkan*) *talak*. The defendant did not appeal.

This case reveals one of the most common reasons male plaintiffs turn to the court to petition repudiation, namely a spouse's inability to manage income, or other related issues regarding women's domestic duties. Unfortunately, the plaintiff failed to prove his allegation satisfactorily before the judge since he was unable to present witnesses who could specifically confirm his reasons for *talak* in detail. This failure affirmed the defendant's statement that no one knew about the dispute in detail, except for close family members, of whom none were willing to testify.

The case also discloses the strategy adopted by the plaintiff to win the trial, namely the inclusion of a narrative of past extrajudicial repudiation. By doing so, he hoped that the judge would acknowledge and legalize the *talak* immediately so he could obtain a receipt of divorce quickly in order to remarry, which was apparently his real motivation.[120] But his strategy was a failure. The judge ignored the past extrajudicial repudiation and had the plaintiff comply with all of the procedures of proper repudiation. Because the plaintiff lacked cogent reasons and did not present strong evidence, the repudiation appeared unjust, a point that the judge referred to as the basis upon which to fine the plaintiff by partially approving the defendant's counterclaim. Although the plaintiff failed to give a very strong reason for *talak* or produce convincing evidence (testimonies), like the female plaintiff in Case Five, his petition was granted because, from the judge's point of view, any party strongly wishing separation constitutes valid grounds for divorce.

[120] The plaintiff said to me that he had repudiated the defendant almost two years before he filed the petition. He said his decision to turn to the court for divorce was because he was an educated person who was supposed to obey the law. But his new relationship with a new woman, whom he would marry soon, seems to have served as his real motivation to petition *talak* to obtain an official divorce certificate as a receipt for remarrying because if he knew the law and obeyed it properly he would have petitioned *talak* two years before. Interviews, March 21, 2011.

Judges rarely disapprove *gugat* or *talak* petitions if they find that a dispute between litigants is unbridgeable, regardless of who creates the problem. Those who initiate the dispute may receive a harsher verdict, but their claim is not rejected as long as they produce sufficient evidence (written documents and two witnesses).[121] The failure of court sponsored mediation and continuous quarrels among litigants in the courtroom reveal *the legal fact* (*fakta hukum*) of the state of the disputants' marriages. According to Dupret and Drieskens, "legal narrative of 'what happened' may constitute either a version that is accepted by conflicting parties or a version that satisfies the legal requirements despite factual gaps."[122] For the judge's consideration in granting divorce, the issue is mainly about whether there is a chance to reconcile the couple or not.[123] There is no point in defending a union if either party strongly wishes to end it. The plaintiff's reiteration throughout the proceedings about his/her intention to divorce proves that s/he no longer wants to stay in the union. It is on this basis that the approval of this *talak* case was given. Below is an account of another *talak* case that reveals similar reasons for divorce bearing on a gender-based division of labor. The female defendant obtained a higher post-repudiation payment than any other female defendants that I observed due to her ability to use the law to serve her ends.

Case Seven: A 42 year-old male court clerk went to the court to petition *talak* from his wife, a 40 year-old housewife. Beginning from 2008, the couple, who had no child, had often been contentious with each other and rarely slept in the same bed (*pisah ranjang*). The defendant was

[121] A claim on *gugat* or a petition of *talak* will be rejected (*ditolak*) if the plaintiff has no evidence at all. The judge may withdraw (*menggugurkan*) the claim if the plaintiff does not attend the trial or will delete (*mencoret*) it from the register if the plaintiff refuses to add court fees due to prolonged trials. Other than this, rarely do the judges disapprove a claim.

[122] Baudouin Dupret and Barbara Driesken, "Introduction," in Baudoiun Dupret, Barbara Drieskens and Annelies Moors (eds.), *Narratives of Truth in Islamic Law* (London and New York: I.B. Tauris, 2008), p. 10.

[123] This is also what happens in Malaysia. See Peletz, *Islamic Modern*, p. 90.

said to frequently take out loans without the plaintiff's prior consent. Two years later they separated and returned to their respective parents. The situation made the plaintiff uncomfortable since he could no longer live a proper and harmonious life with the defendant. He intended to repudiate her and lodged a *talak* petition at the court in November 2010. The court accepted the petition and opened a hearing.[124]

The disputants attended the mediation at the first hearing but disagreed to reunite. When the judge read the petition, the defendant did not give a prompt response, as most others do, but promised to write a response and present it a week later. In her reply in the following session, the defendant implied that she still wanted the marriage repaired. She partially agreed to what the plaintiff stated about her and their relationship but denied other points. She admitted taking out loans although not very often because she received insufficient monthly support. The reason why they did not have a child was because the plaintiff was impotent. The seed of disharmony grew as the plaintiff decided to continue his studies for a bachelor's degree, which forced him to stay apart from her but close to campus. But this was resolved when their permanent house was completed and they moved into it at the beginning of 2010. Unfortunately, the plaintiff's brother, who lived just next door, disliked the defendant and provoked the plaintiff to repudiate her. The provocation worked and the couple lived apart. The plaintiff unilaterally sold the house to his brother for Rp. 50 million and shared the money equally with the defendant. At this time, the disputants stated that they agreed to divorce at court and that no one should make any complaint about it. However, the defendant argued that the agreement did not prevent her from filing a counterclaim for maintenance. Therefore, in her counterclaim, she asked for a total of Rp. 95

[124] The hearing began in December 2011 and ended with the issuance of the court decree in March 2011.

million for complete maintenance,[125] an unpaid 10 gram gold *mahar*, and one third of the plaintiff's monthly salary. This was because he was a state employee, who, according to the law, has to share one third of his salary with his former wife as long as she remains unmarried. The plaintiff preferred to supply a written response to this counterclaim rather than a direct response. Leaving the room, the plaintiff accused the defendant of demanding too high a compensation.

In the following session, the plaintiff only responded to the points he disagreed with. He said that he was not impotent but had lost his sexual libido for a time. He rejected the accusation of external intervention from his brother as the cause of the conflict. He further said that his salary was used to repay the loan for building the house and he only brought home a wage of Rp. 300,000 to Rp. 500,000 per month, which was too low to support the defendant. The plaintiff also cited the agreement in which the litigants were committed to separate amicably (*bercerai secara baik-baik*), to share the joint property equitably, and not to file any lawsuit, as grounds to turn down the defendant's counterclaim. However, he did not mind giving her Rp. 2 million for her maintenance. In the week following this, the defendant presented a reply where in general she defended her counterclaim. At this time, the plaintiff gave a prompt verbal response. To prove his case, the plaintiff produced copies of his ID, the marriage certificate, a permit for divorce from his office because he was a state employee, and presented four witnesses.

Two of his witnesses, the plaintiff's brother and neighbor, confirmed his statement about the house, which was sold to the plaintiff's brother (not the witness) for Rp. 50 million and each disputant received a half share. Another witness, the plaintiff's nephew, testified that without telling the plaintiff the defendant borrowed Rp. 1,5 million from his father. The other witness, the plaintiff's colleague, said the defendant borrowed Rp. 1 million from him without the

[125] This comprises Rp. 30 million for consolation (*mut'ah*), Rp. 15 million for maintenance (*iddah*), Rp. 30 million for housing (*maskan*), and Rp. 20 million for clothing (*kiswah*).

plaintiff's prior agreement. This witness also happened to see the plaintiff give the defendant Rp. 300,000 for monthly living expenses. One witness gave uncertain information as to when exactly the disputants stopped getting along. The judge warned him to tell the truth, saying, "A witness cannot say 'maybe' or 'perhaps', when testifying but must be certain. If you are in doubt, [it is] better to say 'no' or 'do not know'. A witness also cannot give an opinion. We need your information or confirmation [about the information given in a claim/petition], but not your opinion."[126] The defendant denied that she never informed the plaintiff when she borrowed money from others.

The defendant presented three witnesses. One witness, her sister, told the judge about her younger sister's household problems. She confirmed that a third party incited the dispute between the litigants. One other female witness, the defendant's friend, told the judge she never knew that the defendant had loans but acknowledged that the defendant once invited her to borrow money from a third party. The other witness offered his testimony in his capacity as a businessman, from whom the disputants used to order household appliances for a total of Rp. 5 million. Since no further evidence or witnesses were presented by the litigants, the judge decided the case.

The judge accepted all testimonies and approved the *talak* but considered the litigants' claims against each other exaggerated. The defendant's counterclaim was too high to be met by the plaintiff. Likewise, the Rp. 2 million maintenance that the plaintiff was willing to pay was too low since he was a civil servant who not only received a monthly salary but also received other benefits, such as *renumerasi* and a thirteenth month salary.[127] Therefore, the judge used his

[126] Field notes on the courtroom hearing, February 8, 2011.

[127] Indonesian state employees working at the state courts receive the benefit of *renumerasi* (two times higher salary than a regular wage). This monthly-based salary is paid every three months as part of the government's

own consideration to determine the proper amount of maintenance. He awarded Rp. 2,5 million as a consolation payment (*mut'ah*), Rp. 3 million for post repudiation maintenance (*iddah*), and Rp. 2 million for clothing (*kiswah*) but rejected the defendant's demand for housing support (*maskan*) because she had already received a half share from the sale of the house. The demands for *mahar* and one third of the plaintiff's salary were not granted. No specific reasons were given by the judge except for the denial of the one third salary; this was beyond the competence of the religious court to decide but belonged to the state administrative court (*Pengadilan Tata Usaha Negara*). All parties accepted the decision.

The litigants reappeared before the court two weeks later to attend the session of the *talak* pronouncement (*sidang ikrar talak*). Although the petition was approved, the judge again reminded the litigants about reconciliation. But neither was interested. When ordered to assign maintenance, the plaintiff only brought Rp. 5 million in cash and promised to repay Rp. 2,5 million out of court. The defendant did not accept this partial payment. The judge instructed the plaintiff to repay all that he owed right away; otherwise, the *talak* session would be cancelled until it was fully paid. The plaintiff left the courtroom for a while and came back bringing the remaining money. After being assured that the defendant was not menstruating, the judge commanded the plaintiff to pronounce *talak*.[128]

Again, the spouse's failure to manage household matters was used as the main reason for *talak*. The husband blamed his wife for being unable to manage money. She did not deny taking out loans but insisted that she received insufficient support. The judge's concern focused mainly on the defendant's counterclaim, which was exaggerated, and the plaintiff's response, which was

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effort to improve the performance of the state legal apparatus. In addition to this, they, like other state employees, receive "thirteenth salary," one full-month additional bonus over their twelve months salary.

[128] I saw another session of *talak* pronouncement was postponement because the female defendant was menstruating.

inappropriate for a state employee with sufficient salary. The judge's decision reflected a similar pattern of reasoning as in the previous *talak* petition, in the sense that he approved some of the demands of the defendant and fined the plaintiff by imposing a higher sum of maintenance than what he initially intended to pay.

3) Gender and Patterns of Divorce

The seven cases discussed in this chapter reveal how economics and the social effects of gender shape reasons for and strategies of divorce. Some female plaintiffs used the court to terminate their ambiguous marital relationships due to their husband's desertion by working abroad and rarely returning home to support their family. The absence of a husband for a long period without regular contact destabilizes the marital union, leaving the wife in a dilemma: she is neither divorced nor united in a secure union. By bringing the problem to court, women hope to resolve this marital ambiguity. The judges are sympathetic to this problem and easily grant their claims provided that all requirements are met. The absence of the husband at the courtroom hearing accelerates the trial. Case One best exemplifies divorce in this category.

Most women also prefer divorce to polygamous marriage, as other cases reveal. As I have argued, more clients use the court to divorce due to polygamy than to ask for permission for polygamy. Case Two involves violence in addition to polygamy as grounds for divorce. In Cases Two and Three, the plaintiffs sought divorce from their polygamous husbands and demanded payment of *mahar* and a share of joint property. In other divorce cases, morality issues, such as drunkenness, gambling, or shirking religious duties such as daily prayer and fasting, are more often ascribed to men than women. For this reason, more female than male plaintiffs use these as grounds for divorce.

Men never use issues of support to petition repudiation (*talak*) because they are legally and culturally defined as breadwinners, who are in charge of providing support for their family. Disobedience or inability to carry out domestic tasks is a very common reason that men give for *talak*, as Cases Six and Seven show. These reasons are related to the gender ideology regarding the division of labor, where women are defined as the managers of the household. Failure in realizing this task is often used by men as grounds for *talak*. Men may also petition the court for repudiation because of irreconcilable conflict, which refers to situations where the spouse engages in constant quarrels and for which separation is a better choice than maintaining the union. Irreconcilable conflict is a very broad and general category that can cover any specific detail. Litigants, both male and female, use and manipulate this category and include in it many relevant causes of divorce. Violence is another reason men rarely give for divorce; in contrast, women flee from violent husbands and often turn to the court to ask the judge to dissolve their unhappy marriage.

Female litigants who seek divorce include other demands such as maintenance, unpaid *mahar*, and joint property. The exclusion of these demands serves a strategic purpose in that it helps them obtain quick approval from the court, as Case Two demonstrates. The more demands plaintiffs insert in their claim, the longer the trial will be. Case Three shows how difficult it is for a female plaintiff to win her claim when a resistant male defendant is present. This plaintiff had to wait five months to conclude her case. Women rarely ask for maintenance or payment of *mahar* without demanding divorce because such problems would never be resolved at court without asking for divorce first. In other words, household conflicts caused by lack of support, economic hardship or unpaid *mahar* are hardly ever brought to court if the couple does not wish to dissolve their union (However, claims on joint property may be made separately after a

divorce lawsuit is approved). This feature significantly differs from what is found in other Muslim countries, where women may turn to the court to seek maintenance or payment of *mahar*, without necessarily requesting divorce, as in Iran, Zanzibar and Malaysia.[129] However, if summoned to attend the court as a defendant, women generally propose a counterclaim, as in Cases Six and Seven. Men do the same. The chances to win such a counterclaim are better for female than male defendants.

When attending a court session as a defendant, men usually attempt to block the trial by telling the judge that their relationship is just fine or that the problem is not critical such that a divorce is necessary, as Case Four discloses. Other male defendants pose a counterclaim, asking for compensation in exchange for the release of their wives. They perceive such compensation as appropriate because they paid a high *pisuka* or because the practice of asking for compensation prevails in their village, as Case Five demonstrates. Furthermore, many male defendants are absent from court hearings either because their whereabouts are unknown (*ghaib*) or simply because they want to avoid having business with the court, which may be embarrassing. Case Two suggests that not all disputants are happy to appear before the court and consequently they might ignore a court summons, even though they are not *ghaib.* In this regard, the defendant is not unknown, but simply neglects the summons letter and refuses to attend the hearing without giving any justification.

As plaintiffs, men's main purpose is to ask the court's permission to pronounce *talak* (Cases Six and Seven). However, in my experience no male plaintiff used the court to recall a deserted wife. In general, no household problems are brought to the court by couples if they do not intend to dissolve their union. They might include particular narratives in their petition,

[129] Mir-Hosseini, *Marriage on Trial*, p. 46-49; Stiles, *An Islamic Court*, p. 28 and Peletz, *Islamic Modern*, p. 156-157.

which they think can accelerate the trial, such as incidences of extrajudicial repudiation. However, for the judges, no *talak* is valid except before the court. Moreover, because men initiate repudiation, they are liable for any relevant post-divorce maintenance that is due to their repudiated wife. At the very least, judges will ask them to give a consolation payment, and pay it at once, without which *talak* will not be approved (Case Seven).

Women can and do resist *talak* at court, not only because they attempt to save their marriage, but also because they feel they are being treated unfairly by their spouses, especially if the reasons for *talak* are not very convincing. Case Six demonstrates the motivation for which a male plaintiff often petitions *talak*, namely to obtain a court receipt to marry a new wife. In this respect, the law portrays female defendants (and thus divorcees) as victims who deserve assistance. The law enforces obligations on men upon the approval of *talak*. These include a one-time consolation payment, spousal post-divorce maintenance (*nafkah*, *maskan* and *kiswah*), payment of *mahar*, and maintenance for children.[130] Not surprisingly, women often make a counterclaim when responding to *talak* (Cases Six and Seven). This constitutes the most common strategy that women adopt when appearing in court as defendants. However, the ways in which female defendants propose a counterclaim differ considerably, from simply giving a prompt and verbal response, as in Case Six, to a written response that covers a complete maintenance counterclaim, like the female defendant in Case Seven. This is influenced by the extent to which they are familiar with the law or whether there is a third party, such as colleagues or lawyers who help them compose a good counterclaim. Judges are inclined to grant such counterclaims, although only partially. As for male plaintiffs, they seem to have little recourse but to obey when the judge asks for their consent to fulfill their post repudiation obligation. Judges often make use of this consent as a prior requirement for *talak* approval (Case Seven).

[130] The Compilation of Islamic Law, Article 149.

What is also salient about judicial divorce is that some cases involve extrajudicial *talak*. Male litigants tend to use such incidences to request the acceleration of the approval of their claims, as in Case Six. However, judges disqualify extrajudicial divorces and ask the male petitioner to pronounce 'a new *talak*', whether or not he has done so. The male plaintiff's late submission of *talak*, which he in fact enunciated outside of court two years earlier, sparked speculation about his real motive. Not until I found Case Six, where the plaintiff was motivated to acquire an official divorce receipt in order to remarry, did I realize what one clerk meant when he said, "If one turns to court for divorce, one may have encountered problems of administration regarding one's marital status." A further consequence of such a motive is that divorce and repudiation have different meanings. Not only does judicial divorce signify a sign of official marriage dissolution, but it may also become the first step toward legalizing (another) marriage, as the next chapter will discuss. In the following pages, I will examine some other cases of *gugat* and *talak* to highlight other important features of judicial divorce regarding the meaning of divorce, the problems of validity and legality of marriage and extrajudicial divorce as well as the issue of domination and resistance of law.

CHAPTER THREE

JUDICIAL DIVORCE: MEANING, CONTESTATION AND RESISTANCE

Judicial divorce reflects the dynamic practices of Islamic family law as impacted by the state's introduction of the statutory regulations of marriage and divorce. These regulations create new meanings of divorce and stimulate contestation over what constitutes divorce. Judicial divorce may also be a site of women's resistance against patriarchy and gender biases in local discourses and practices of Islamic law, such as male arbitrary divorce (*talak*) and polygamy. In this chapter, I will investigate how the reinterpretation and incorporation of Shari'a law into state law and the modern judicial system in Indonesia has transformed the interpretation of Muslim family law as these are manifested in judicial divorce and how judges and litigants at courts as well as Muslims beyond the court respond to this transformation.

The application of the statutory regulation of marriage and divorce in Indonesian religious courts has implications for both the practice and meaning of divorce. The law requires divorce to take place before the court for an official and legal separation of spouses whereas *fiqh* does not. However, since *fiqh* remains an important normative source of Islamic family law in Lombok, many litigants prefer to embrace *fiqh* at the expense of state law. My data shows that 21 divorce cases (15%) contain narratives of extrajudicial divorce, where the husbands divorced their wives unilaterally beyond the court, a practice which is justified by the local interpretation of Islamic law. How do litigants deal with the court to cope with their marital disputes of past extrajudicial divorce? What does it mean for litigants when they appear at court to file, or respond to, a claim of divorce if divorce has already taken place out of court? The first part of

this chapter will examine these questions. It will demonstrate that judicial divorce serves different needs for different disputants.

The second section of this chapter will address the issues of validity and legality in Islamic law as viewed through the lens of divorce. What constitutes a valid and legally binding divorce? An ideal divorce, which is valid and legally binding, is one which both complies with *fiqh* and occurs before the court. However, not all divorces abide by this ideal of divorce due to disagreements and contestations over what counts as divorce. On one hand, the local interpretation of Islamic law affirms the validity of an extrajudicial divorce that is concluded arbitrarily by the husband, or other types of divorce that conform to the stipulations of *fiqh*. On the other hand, state law requires divorce to be approved at court in order to acquire legal status. The controversies surrounding triple divorce (Indonesian *talak tiga* or Arabic *ṭalāq ba'in kubra*), a divorce which is pronounced three times at once by a husband to his wife, constitutes a vantage point to investigate how Muslims at court and the beyond court in Lombok contest the boundaries of validity and legality in Islamic law.

The last part of this chapter focuses on judicial divorce as an entry point to examine the relations between law, gender and power. Drawing on the perspective of the law as a locus of domination and resistance, I argue that Islamic law constrains but at the same time liberates women in Lombok. Islamic legal practices embody paradoxes. On the one hand, the law preserves gender hierarchy and patriarchy in marriage, which results in asymmetrical power relations between spouses. On the other hand, it allows women to be present at court, to petition divorce, and to challenge men's prerogative to the right of unilateral divorce. In this way, the interplay between hegemony and resistance in the contemporary practice of Islamic family law in Indonesia are revealed through judicial divorce.

A. The Meaning of Judicial Divorce

Divorce marks the end of a marital union, dissolving the conjugal relation between husband and wife. Spouses use the court to achieve this end. By lodging a divorce lawsuit or a *talak* petition, plaintiffs intend to bring their union to an end. This is one of the normative uses of the religious court and the meaning of judicial divorce. However, divorce at court might also convey specific meanings and serve particular ends for different litigants. Although most plaintiffs in divorce appear before the court to file a divorce lawsuit or seek court permission to pronounce *talak*, many of them carry other hidden motives. Divorce may not be the ultimate motivation for litigants to use the court. Rather, it might serve as a medium to achieve other more ultimate goals, which cannot be fulfilled except by producing an official proof of divorce from the court. In other words, judicial divorce often is the first step toward gaining other objectives, such as to legalize a current marriage, but it is not an end in itself. This holds true especially for couples who are involved in extrajudicial divorces in accordance with local conventions and interpretations of Islamic law and who turn to the court to seek official proof of this. I will present two cases, one *gugat* and one *talak*, to illustrate how judicial divorces create different meanings and experiences for the litigants and how they respond to these cases differently in accordance with their own specific objectives.

Case One: A 28 year-old woman, who just came back from Malaysia, appeared before the religious court in Praya to submit her claim of divorce against her husband, a 30 year-old peasant. She married him in 1999 and passed the first year of her marriage harmoniously. But she experienced trouble in the second year of her union because her husband did not provide her with enough allowance and he cheated on her with another woman. This triggered conflicts between them that led to extrajudicial divorce; her husband divorced her and sent her back home

(*mengantar pulang*) to her natal family. The couple lived apart for years. In 2010, the plaintiff brought the dispute to the court. The court accepted her claim and opened a hearing.

In the first hearing, the judge mediated between the litigants in order to reconcile them but failed because the plaintiff refused to return to her husband, who still hoped for reconciliation. In the following week, during the session of reply and response in the second hearing upon the failure of mediation, the defendant responded to his wife's claim, stating that he was willing to fix the problem. But the plaintiff was uninterested in his proposal because she no longer trusted him as a responsible man. She further accused him of having divorced and remarried other women (*suka kawin cerai*) several times since 2001. The defendant acknowledged his past bad behavior but desired to cement a renewed intimate relationship with the plaintiff, who remained unaffected by her husband's persuasion. The judge postponed the hearing to offer opportunities for the disputants to renegotiate their disputes and instructed them to come back again to the court in a week. When they reappeared at the court hearing, the defendant reiterated his willingness to repair the broken union while the plaintiff wanted divorce. To move forward with her claim, the plaintiff produced her marriage certificate and two witnesses.

The first witness, the plaintiff's mother, testified that her daughter was repudiated by the defendant when he sent her home. She stated that her daughter was not adequately supported by the defendant, who irresponsibly neglected her and remarried other women. The plaintiff confirmed this testimony while the defendant only partially concurred. He admitted that he had remarried but said that he did not intend to divorce the plaintiff. The second testimony by the plaintiff's father strengthened the information offered by the first witness. The litigants responded to this second witness as they did to the first one. Because the defendant did not

accept the witness, he was commanded by the judge to produce his own evidence and witnesses in the next court session but he never reappeared. The plaintiff's claim was approved by the judge without the defendant's presence.[1]

What is most interesting in this case is not the approval of the claim, but rather the disputants' hidden motives that shaped the meaning and experiences of their divorce. This case was unusual despite its outward typicality. The dispute began in 2001 but was only brought to the court for settlement in 2010, nearly a decade later. Why was the plaintiff so late in filing her claim in the court and what was her motivation? Court clients may use, or manipulate, the law and the court for their own interests and thus appear before the court for different purposes. This plaintiff's ostensible use of the court was to seek divorce, and the defendant's presence at the hearings was aimed at defending the marriage. This was what the case displayed on the surface. But looking more closely beyond the formality of litigation helps to explain what the underlying motivation really was. My conversation with the plaintiff's male neighbor, who always accompanied the plaintiff to court, revealed the litigants' hidden motives.

The plaintiff's neighbor, AM, a 40 year-old Qur'an teacher in his village, told me that the dispute between the plaintiff and her husband in fact began and ended in 2001, about two years after they had entered into wedlock.[2] The couple had separated and never saw each other after that. This was possible since they had no children. While the husband engaged in a series of remarriages and divorces, the plaintiff went to Malaysia to work as a female migrant worker (*Tenaga Kerja Wanita/TKW*). New communication between them was restored after the plaintiff returned home to Central Lombok and turned to the court to file her divorce claim, after which the defendant received the court summons. Judicial divorce reconnected them after a long

[1] Field notes and courtroom observation, December 16, 2010.

[2] I talked to AM several times at court when he was there accompanied by the plaintiff and once at his house. Field notes and interview, December, 16, 2010.

separation. The plaintiff was said to have married a man abroad but could not acquire an official marriage certificate from the marriage office in Malaysia until she produced an official proof of her previous marital status as a divorcee. It was for this reason that she flew back to Lombok to acquire proof of divorce from the religious court. But the court would not issue her a proof of divorce without a trial. To acquire a divorce receipt, she therefore had no choice but to file a lawsuit of divorce. Judicial divorce for this female plaintiff thus was more for moving one step closer toward legalizing her (current) marriage than simply separating from her (former) husband since she had been away from him for many years.

For the defendant, the divorce served as a means of gaining economic advantages. AM informed me that the defendant asked the plaintiff for Rp. 10 million in compensation if she wanted a divorce from him.[3] The defendant argued that he had reconciled with the plaintiff immediately after he dispatched her home long ago. In his view, which was relevant to the common perception of local practices and interpretation of *fiqh*, such reconciliation was valid even without the consent of the wife so long as the reconciliation occurred within his wife's *idda* or the waiting period, approximately 3 months upon the first, or the second, repudiation (*talak raj'i*).[4] He made use of this argument to proclaim the plaintiff as his reconciled wife, although this claim was unverifiable. I often heard other male defendants use this argument during courtroom hearings, although this defendant did not explicitly state this during the court sessions. Instead, he appeared at the court to refuse his wife's divorce lawsuit and complicate the trial so as to have more time to pressure the plaintiff to pay the desired compensation outside the court.

[3] Interviews, December 22, 2010.

[4] This view that divorce and reconciliation can occur without the wife's consent represents the classical doctrine of Islamic law of marriage and divorce. See Kecia Ali, *Marriage and Slavery in Early Islam* (Cambridge, MA: Harvard University Press, 2010), especially Chapter 4, p. 133-163.

AM told me that upon the first court session, which involved a failed mediation, the defendant, accompanied by the head of the village, confronted the plaintiff at her home, intimidating her and her parents to pay the ransom the defendant asked for; otherwise he might call the police. After the intruder left, the plaintiff hastened to see AM, who lived next door. AM advised her not to give anything to the defendant until the court decision was issued. Upon the second court hearing, the defendant along with two male companions again visited the plaintiff at her home, pressuring her to pay the compensation. Although she refused the request, she became desperate. The defendant, however, did not give up. He worked with a corrupt policeman to further compel the plaintiff.

In the evening of the day of the third court hearing, the policeman appeared at the plaintiff's house, wearing a uniform and driving a police vehicle to show that he was on duty. He came on behalf of the defendant to coerce the plaintiff to consign the money. The plaintiff called AM to come in and speak to the policeman. AM arrived and argued with him. He was aware that this official was abusing his power. AM requested him to show his letter of duty (*surat tugas*) because it was unusual for a police officer to do such a thing. Although the policeman was unable to present the letter, he still insisted on demanding the money. By the time the debate between the two men had heated up, several neighbors arrived and figured out what was going on. Knowing what was wrong, they all supported the plaintiff and AM, arguing against the intruding policeman and forcing him to leave; he finally left without getting a single penny. This was the defendant's last effort to pressure the plaintiff. He never contacted her again nor reappeared before the court since the judicial divorce had lost its economical meaning and significance, which was his main priority.

This case illustrates how judicial divorce can be a pretext that might mean different things for different litigants. To this defendant, the divorce was seen as a chance to gain economically. Men asking for money or another sort of compensation from wives seeking divorce is not uncommon. This is often the case especially if female plaintiffs have just returned from working abroad. Assuming that they have large savings, male defendants often manipulate the law and the legal institutions for their own interests when they are sued for divorce. As this case shows, by responding to the court summons, attending the court session, and insisting on reconciliation, the defendant devised a strategy to postpone the trial so that he could maneuver beyond the court to intimidate his wife to compensate him.[5] As for the plaintiff, her primary concern was to obtain a court receipt of divorce as proof of her status as a divorcee in order to legalize her current marriage with her new husband in Malaysia. She never imagined that she would experience divorce in such an intimidating way. She did not realize that she would need much more time to produce the proof. Not surprisingly, she was also absent at the last hearing when the court decision was issued because she had to fly back to Malaysia. She requested her neighbor to mail the proof of divorce to her.

Case Two: A 42-year old man appeared before the religious court in Praya to submit his *talak* petition in October 2010. He sought court permission to divorce his 37 year-old wife. The plaintiff, a state employee and teacher at an elementary school, married his wife in 1990 and had one daughter. Upon marriage, the wife, like most newly married women in Lombok, moved to her husband's house along with his extended family. They lived happily until a decade later when a conflict shook their union. The wife was said to have failed to maintain good

[5] The judges seemed quite aware of this strategy, as they told me, but they could not hasten the trial since the defendant was present at the beginning; they had to remain neutral by giving an equal chance to each disputant to produce evidence and witnesses. If the defendant is absent two times consecutively, or if his whereabouts are unknown (*ghaib*), the trial still might need two hearings to conclude.

communications and relations with her parents-in-law. The husband advised her many times to respect his parents. But as the plaintiff explained in his petition, tension erupted repeatedly. After a series of quarrels in 2000, the plaintiff repudiated his wife unilaterally beyond the court (*menceraikan termohon di luar pengadilan*). As a result, they lived apart; the plaintiff remained at his own home taking care of the daughter, while the defendant returned to her natal family and remained there. Ten years later, the plaintiff submitted his *talak* petition to the religious court in Praya. The court accepted the petition and summoned the wife to attend the hearing.

The first court session failed to reconcile the disputing parties. In the hearing following the failed mediation, the defendant commented on the *talak* petition, stating that she did not mind divorce because she thought the union was broken and irreparable. But she proposed a counterclaim should the plaintiff's petition be granted; she asked for one third of her husband's monthly salary because as a former spouse of a state employee, she deserved it. She also asked for joint property, consisting of two separate plots of land, including two permanent houses built upon them, three motorcycles, house appliances (a television and a double-door wardrobe), Rp. 20 million in savings, a plow and three cows.[6]

The plaintiff responded to the defendant saying that one plot of land was inherited from his parents, although he acknowledged that the house was built after he married her. Another plot of land and the other house had been bought after they separated. He further explained that the house appliances, plowing machine and two motorcycles had been sold prior to their separation. Another motorcycle did not belong to him, but to his current wife. He also affirmed that he did not have Rp. 20 million in savings and three cows. Before ending his response, he pointed out that the property of the defendant was also part of the joint property, of which he demanded a share. These included a plot of land and a house. To verify the disputants' claims and

[6] Field notes and courtroom hearing observation, January 11, 2011.

counterclaims, the judge and clerks investigated the disputed assets. They found two plots of land, two houses and one motorcycle on the part of the plaintiff; one house and a rice field on the part of the defendant. The judge required the parties to provide evidence and witnesses to support their respective claims and counterclaims for these assets.

The defendant produced a copy of his ID card, a copy of his marriage certificate, a personal statement as a state employee,[7] the documents of the estate and land owners as well as two witnesses. The witnesses informed the judge in the hearing that the main cause of the marital dispute was because of the defendant's inability to adapt herself to her husband's parents. None of them, however, said anything about the defendant's assets that the plaintiff claimed to be part of joint property. Meanwhile, the defendant presented three witnesses. They were all present at the hearing to testify about the assets that the defendant demanded to share. Two witnesses offered their testimony about one plot of land and the house built upon it but did not know about the other plot of land. One witness gave her testimony about the second plot of land and the house.

The judge accepted the plaintiff's evidence and his witnesses' testimonies. In his decision, the judge gave respective terms for each litigant. The judge granted the plaintiff's petition of *talak* because he produced strong evidence (documents and witnesses), but rejected his counterclaim for the joint property. The judge also punished him and required him to pay Rp. 5 million in consolation and Rp. 5 million in alimony to the defendant. The judge argued that these sums were due to the fact that the plaintiff had divorced his wife but he had not paid her

[7] All state employees have to get approval from their office in order to divorce and must include this approval in their divorce claim/petition, without which the case will not be processed. Otherwise, the case might be processed without such approval but the litigants should be aware of any legal risk liable to them should they insist on divorce without permission from their office. This plaintiff had requested permission from his office but he had not yet received it when filing his petition. Therefore, he had to write a letter stating that he was responsible for any legal consequence to divorce without approval from his office.

compensation. As for the defendant's counterclaim, the judge partially accepted it. He only granted a share of the joint property over the land and house about which her two witnesses testified. The judge did not approve her other counterclaim for one third of the plaintiff's salary because this did not fall under his jurisdiction but that of the state court of public administration (*Pengadilan Tata Usaha Negara*).

This case demonstrates how the litigants dealt with the court to settle a marital dispute that involved a narrative of past extrajudicial divorce. Although the case was registered by the plaintiff as a petition for *talak*, joint property seems to be the issue that concerned the defendant the most. Because she did not mind the divorce, she focused on compensation for being divorced arbitrarily. Although her counterclaim for the joint property was not fully granted, she still gained part of the property. Moreover, she received an additional Rp. 10 million in consolation and alimony, which she never thought she would receive, since she did not claim them previously. Her counterclaim for one third of the husband's salary was not supported to by the judge, not because she was not entitled to it, but because this was not in the domain of the religious court to decide.

The male plaintiff experienced this judicial divorce differently. He suffered most because he was forced by the court to share his assets, which he previously controlled and enjoyed alone without the defendant. He also had to consign a post-divorce payment to her. Although his *talak* petition was granted, he would rather not have filed this petition altogether had he known that he would have lost a considerable amount of assets, as he told me.[8] He, like the female plaintiff in the previous divorce case, only wanted an official proof of divorce in order to legalize his current marriage, which he consummated unofficially after divorcing the defendant in 2000. Because

[8] Interview and field notes, January 18, 2011. I almost always talked to the plaintiff when he was attending the hearing.

this marriage was not recorded, the status of his current dependents (new wife and two children) was unrecognized by the state. As a result, his dependents could not receive benefits from the state such as health care and extra salary for a state employee's dependents. To claim these benefits, he had to produce an official marriage certificate and family card documents, which unfortunately cannot be acquired without first acquiring an official divorce. By including his dependents in his family card, they are entitled to receive health insurance, additional allowance, and pension when he retired or died. It was for these benefits that he had to go to the court to petition *talak* from his (former) wife that he had divorced unofficially a decade ago. He thought that he could acquire the proof easily, inexpensively and without a long trial. But it was not that easy nor a short trial; he submitted his petition to the court in October 2010 and it was only granted in March 2011.

In this trial, the plaintiff also encountered a new experience of divorce that he never imagined he would encounter. For example, when the defendant proposed a counterclaim asking for a share of joint property, the plaintiff replied that some of those assets were in fact acquired after he divorced her out of court so she had no right to claim them. But the judge responded to the plaintiff saying that such a request might be considered if the defendant was able to prove her claim. "But I earned those assets upon our [the plaintiff's and the defendant's] divorce," the plaintiff argued. "If you have divorced, why then should you come here for a divorce?" the judge asked him rhetorically.[9] The plaintiff was surprised to hear the judge's statement but could find no answer, while the defendant just smiled. By saying this, the judge wanted to emphasize that the disputants were still legal spouses before the state. Consequently, all events occurring during the span of their separation were part of their spousal legal relationship.

[9] Field notes and observation of the courtroom hearing, November 4, 2010.

However, the plaintiff never thought that way. He would not have experienced this had he not turned to the court and felt self-sufficient with a *fiqh* ruling that admitted his past extrajudicial divorce. After the hearing on that day, the plaintiff asked me (because I was present in the courtroom at the time) about his peculiar experience of divorce. It was completely beyond his imagination that the judge would reply to him with such a statement. "Do you think that this happened [the judge did not count his past *talak*] because we have not adopted Islamic law, because the seven words (*tujuh kata*) of the Jakarta Charter (*Piagam Jakarta*) were revoked from our state's foundation principles (*Pancasila*)?" As a teacher, he was aware of the history of *Piagam Jakarta*, which bestows the application of Shari'a law for Muslims. It was originally part of the first principle of *Pancasila* before being removed. This principle stated "Belief in One God, with the obligation of the application of Shari'a law for its adherents." According to this, the establishment of Shari'a was obligatory. But since 1949, this phrase was removed so that it now states "Belief in One God only." The plaintiff's comment meant that the law the court employed was not Islamic law as he understood it.[10] If the judge applied the law as the plaintiff expected, he would never have asked him these questions and his wife would have not been eligible to propose a counterclaim for joint property.[11]

The state promotes a model of the Muslim family law of marriage and divorce that builds on the premises of reformed classical Islamic law. When the law changes, this affects legal

[10] This reminds me of the incident of the circuit court in Chapter One, where a *haji* challenged the judge because he perceived the judge was not in compliance with Islamic law when asking him to take an oath before offering his testimony.

[11] The relations between state law, *fiqh* and *adat* in the religious courts are complicated, especially in areas where legal pluralism exists, such as in Lombok and West Sumatra. In this regard, the religious courts may be seen as the proponent of state law instead of Islamic law, especially if their application of the codes is compared with *fiqh*. However, seen from the lens of religion or religious law, the religious courts are the proponent of Islamic law when compared with civil courts, which only upholds state law and *adat*. See Franz and Keebet von Benda-Beckmann, "Beyond the Law-Religion Divide: Law and Religion in West Sumatra," in Thomas G. Kirsch and Bertram Turner (eds.), *Permutation of Order: Religion and Law as Contested Sovereign* (Burlington: Asghate, 2009), p. 227-246. I will discuss this topic in detail in Chapter Four, sub-section two.

practices and creates new meaning. These two cases show how judicial divorce serves as a means of legalizing unofficial marriages. The plaintiffs were concerned mostly with the prospect of their current marriages, and thus attempted to save them through a legal procedure that requires them to conclude a judicial divorce. As for the defendants, they drew their attention to the economic value of marriage and divorce since they were particularly concerned with how to attract economic benefit from the divorce.[12] This is one concrete impact of the reintroduction of Shari'a law in state law. A further consequence pertains to the emergence of dissenting opinions about the limits of valid and legal divorce.

B. Validity and Legality in Islamic Law: Contesting Triple Divorce

There have been lingering disputes in Indonesian Islamic legal discourse over what constitutes divorce. The basic contention revolves around the validity and legality of divorce. On the one hand, religious and customary laws have their own definition of valid divorce, while on the other hand state law does not clearly address this; however, it does address the legality of divorce, which is approved by the court. As a result, contestations and controversies over this matter continue. According to Cammack, Young, and Heaton, the Marriage Law of 1974 is not particularly concerned with the question of valid divorce but rather with the regulation and reduction of male unilateral repudiation. They argue that "from the perspective of Islamic legal theory, an attempt to invalidate the *talak* legislatively would be wholly ineffectual. The divorce provisions of the Marriage Act do not address the validity of the *talak*, but are designed to regulate its use. A *talak* pronounced in violation of the statute is therefore unauthorized and

[12] For economic analyses of divorce, see Antony W. Dnes and Robert Rowthorn (eds.), *The Law and Economics of Marriage and Divorce* (Cambridge, UK: Cambridge University Press, 2002).

illegal but nonetheless effective."[13] They underline that the validity of divorce is not determined by state law but by the religious law. Instead of proposing a new definition of validity the state addresses the legality of divorce and marriage proceedings; to be legally binding, a marriage has to be registered and a divorce must be carried out before the court.

John Bowen points out that this ambiguity originates from a basic stipulation of Marriage Law 1/1974. The law credits the central position of religious law and religious belief as the foundations upon which the validity of marriage is established, as Article 2 [1] states that "marriage is valid if conducted in accordance with the religious law and belief of the parties concerned." This is followed by a second sub-article [2], which affirms, "Each marriage is registered according to current state regulations." As a result, Bowen says, confusion has spread widely, including among court officials.[14] My data from Lombok demonstrate that judges may approve an unregistered marriage by granting its status of legality through *isbat nikah* (marriage legalization). However, they never validate past extrajudicial *talak*. In this section, I would like to follow up this discussion by offering my empirical data from Lombok about triple divorce, a divorce pronounced by a husband to his wife three times at once (*talak tiga*), to illustrate the contestation over the boundaries of validity and legality in Islamic family law regarding divorce.

The following section examines three different approaches that Muslims in Lombok use to address the dispute over triple divorce. The first represents a non-judicial model that is adopted by Muslims in their communities. The second approach is adopted by state officials, such as judges and marriage registrars. Although judges mostly perceive triple divorce as a single divorce when it is submitted to the court for the first time, they may address it in different

[13] Mark E. Cammack, Lawrence A. Young and Tim B. Heaton, "The State, Religion, and the Family in Indonesia: The Case of Divorce Reform," in Sharon K. Houseknecht and Jerry G. Pankhurst (eds.), *Family, Religion and Social Change in Diverse Societies* (New York and Oxford: Oxford University Press, 2010), p. 191.

[14] John R. Bowen, *Islam, Law and Equality in Indonesia: An Anthropology of Public Reasoning* (Cambridge, UK: Cambridge University Press, 2002), p. 179-185.

ways. The third approach represents the litigants' experience in dealing with the court to resolve their marital disputes. The point that I would like to make here is that Muslims in Lombok, on the basis of their interpretation of *fiqh*, use the discourse of validity when engaging in disputes over a particular occurrence of *talak* outside the court, while state officials, such as judges and the officials of marriage registration offices, tend to use the discourse of legality on the grounds of state law when addressing the same issue. As for the litigants, instead of simply following the religious law or state law, they adopt whichever mechanism to settle their dispute over triple divorce that they think is most convenient. The ambiguity over the limits and boundaries of divorce thus might benefit them in particular situation.

A Non-Judicial Approach to Triple Divorce

Muslims in Lombok tend to approach disputes over divorce from the perspective of *fiqh*. I was told by informants about the occurrence of triple divorce and the ways in which they were commonly settled in accordance with the interpretation of Islamic law and local mechanisms of dispute resolution. They all underscored the same idea, i.e. that such *talak* is valid and final, and that reconciliation is prohibited. Consequently, a couple involved in a triple divorce must separate. If they are caught living together, they might be chased from their community because, according to my informants, their union is not socially and religiously acceptable. Living together after triple divorce is equivalent to fornication (*zina*), since the couple no longer has a valid marriage because reconciliation between them is forbidden. The couple may re-marry and re-unite only after the wife first marries another man (*muḥallil*, the one who makes it lawful) and then divorces him. This intervening marriage is called *taḥlīl*, which literally means "to make

something lawful."[15] Because reconciliation is unlawful, couples of irreconcilable divorce need an intervening marriage and divorce after which their union can be lawfully restored.[16] One incident below illustrates how a triple divorce was settled in accordance with this mechanism.

An informant whom I happened to meet at the religious court of Central Lombok told me that two years prior to my fieldwork, there was an incident of irreconcilable divorce in a village near Mataram. In this incident, a young married couple was forced to separate by their fellow neighbors after the couple experienced triple divorce but insisted on living in the same house. Since my informant did not know the details of the story, he recommended a name to me, an *ustadh*, who he thought could offer the best and most reliable information about the divorce since he was involved in resolving it. The *ustadh*, who graduated from an Islamic school and earned a bachelor's diploma, welcomed me when I asked to interview him about this incident.

In an afternoon of relaxed conversation, accompanied by a cup of tea and light snacks, he narrated the story.[17] He knew the couple who experienced the divorce. They lived only one block away from his house. The husband had no definite job and often behaved like a bachelor who spent his nights with his unmarried young peers going out and sometimes getting drunk. One day, this young husband fought with his wife over a particular household matter. They went on arguing with one another loudly and the conflict, in which the husband pronounced three *talaks*, was inadvertently heard by their neighbors (*didengar banyak orang*). The quarrel forced the wife

[15] In local terms, this sort of marriage (*taḥlīl*) is called *cina buta* (it literally means "blind Chinese"). However, the term *cina buta* in Lombok has nothing to do with the Chinese whatsoever. Rather, it implies "blind love" between an irrevocable triple female divorcee and a new man with whom she will conduct an "intervening marriage" before she can return to her first/former husband. However, in Malaysia, the origin of *cina buta* was closely related to Chinese men. See Michael G. Peletz, *Islamic Modern: Religious Courts and Cultural Politics in Malaysia* (New Jersey: Princeton University Press, 2002), p. 218-219 and Heather Strange, *Rural Malay Women in Tradition and Transition* (New York: Preager, 1981), p. 162-164.

[16] On the *taḥlīl* marriage, see Yossef Rapoport, *Marriage, Money and Divorce in Medieval Islamic Society* (Cambridge: Cambridge University Press, 2005), especially Chapter 5, p. 89-110 and Barbara Freyer Stowasser and Zaynab Abul-Magid, "Tahlil Marriage in Shari'a, Legal Code and the Contemporary Fatwa Literature," in Yvonne Hazbeck Haddad and Barbara Freyer Stowasser (eds.), *Islamic Law and the Challenges of Modernity* (Walnut Creek, CA: Altamira Press, 2004), p. 161-181.

[17] Interviews and field notes, March 14, 2011.

to leave her husband and go back to her parents. Less than a month later, the husband contacted her, expressing his regret, seeking her pardon, and appealing to her to come back to him. The wife accepted his apology and returned to him. They resumed their lives as if nothing had happened. From here, the *ustadh* emphasized, a serious problem emerged.

According to the *ustadh*, gossip about this couple's cohabitation spread from mouth to mouth quickly among the neighbors, who questioned such a reconciliation, which they thought problematic. From what they understood, the *talak* was final. The husband was not supposed to take his wife back and the wife had to marry another man and divorce him before she could return to her husband. The gossip became public in the village, as many challenged the couple to prove that they had properly complied with the religious law. The couple insisted on their decision, arguing that the *talak* was not meant to be final, and therefore they could reunite. But the people were not convinced because they believed that the *talak* was indeed final, as many heard it. The problem was thus brought to the village council for settlement.

The *ustadh* mentioned that the couple and their relatives, several other village fellows, himself and the head of the village were present in the village office to discuss and settle the dispute. They expected to hear an opinion from an official of the marriage registration office whom the people invited about whether the *talak* fell as a single or triple *talak*. The official did not explicitly address the question but stated instead that the *talak* would be counted as single if brought to the religious court and only after that would it bear a legal status. Being unsatisfied with this explanation, the people called in a religious court judge to hear his view.[18] Like the official of the marriage registration office, he stated that the *talak* would be registered as one divorce if the parties submitted it to the religious court. However, the judge maintained—

[18] The judge was from the Religious Court of Mataram but he had moved to another court when I investigated this case.

probably because he was under pressure to give an opinion in favor of the people—that the religious law and norms in the society had to be taken into a serious consideration to resolve this problem.

In the people's view, the *ustadh* said, the explanation given by both officials was not satisfactory. As a result, tension between the couple and their village fellows escalated. The couple contended that there was no clear ruling from the two officials. But the people persisted, forcing the couple to take one of two options. The first option was that if the couple wished to live in the village, the wife, whom the people believed to have been repudiated three times, first had to marry and divorce another man before reuniting with her husband. The second option was that if the couple insisted on their current decision, reuniting upon triple divorce without having an intervening marriage, they should leave the village.[19] The couple eventually took the first option. The wife left and went back home to consummate a provisional marriage. After the divorce from this intervening marriage and her '*idda* was over, all of which took about six months, she came back to her husband. By the time I was there, the couple had resumed their lives and had one child.

During our conversation, the *ustadh* mentioned the legal source that he and his colleagues used to handle the dispute. He said that they adopted the opinions taken from *fiqh*. According to the common views of Muslim jurists, he explained, a wife repudiated three times by her husband cannot be reconciled with him except after undergoing an intervening marriage (*taḥlīl*). He also explained how he acquired this knowledge. Twice every week he and his colleagues attended an Islamic study group in a nearby mosque. They read different classical works, mostly in Islamic jurisprudence (*fiqh*). This study session had been going on for years. It

[19] I have also heard this option from my key informant, AM, who one day told me that a *tuan guru* pledged to expel from his village spouses who reconciled after tripe divorce without having an intervening marriage.

was through this forum that dialogues, consultation and knowledge about Islamic law, marriage, divorce and other related subjects were forged and disseminated. The *ustadh*'s and his fellows' understanding about triple divorce were based on *fiqh*, which constitutes one important source for Muslim family law in Lombok. A very similar view about this matter among Muslim religious leaders throughout the island is also prevalent. For example, one influential *tuan guru* from Central Lombok embraced such a notion about triple divorce. He stated that *talak* can only happen twice for reconciliation to be permitted. Referring to the Qur'an, he said that the third *talak* is final, even if this occurs three times at once, after which the wife cannot be taken back. He believed in the efficacy of triple *talak* both from textual sources as well as from a logical point of view. "If I say to you I give you three pieces of cigarette, how many will you receive, one or three?" he asked me. "This is the same in *talak*, no matter how many a husband gives it to her wife, it will be valid."[20]

This narrative discloses a social norm, a non-judicial approach to triple divorce by the Muslim community beyond the court in Lombok. It reveals two important issues: validity in divorce and its settlement. First, the incident of triple divorce shows how the classical discourse of Islamic jurisprudence shapes the ways that disputes over this type of divorce are settled. What is deemed as a valid divorce is contingent upon the boundaries and limits established by the religious law. Cammack *et. al*. are correct in contending that "many Muslims continue to regard the regulation of family life as a matter of religious faith that is not subject to temporal intervention. The sacred law comes into force by virtue of its divine ordination and is not dependent on the state's recognition for its validity."[21] According to this argument, triple divorce by men enunciated at one time is a valid act that renders permanent separation. Second, the

[20] Interview and field notes, April 21, 2011.
[21] Cammack, Heaton and Young, "The State", p. 192.

incident discloses a model of enforced resolution of triple divorce. This is not a private matter between spouses, but a public concern. Although *fiqh* mandates an intervening marriage to legalize the reuniting of spouses in a triple divorce, it does not clearly force them to separate upon the divorce. It does not recommend their expulsion from the community either. By compelling the couple to accept one of these two options, neither of which is clearly sanctioned by *fiqh*, let alone by state law, the community applies its own interpretation of triple divorce and its consequences. According to this reasoning, since a triple divorce results in a permanent separation where a direct re-union is forbidden, there is no ground for a couple in triple divorce to remain together, because this is equivalent to adultery (*perzinahan*).

The Judges' Approaches to Triple Divorce

The above narrative also discloses the responses of state officials to the occurrence of the *talak tiga.* They tend to perceive it from the perspective of state law. Instead of addressing the question of whether the *talak* is reasonable, they turn to the discourse of the procedural legality of this type of divorce. In the eyes of these state officials, no *talak* is legally binding unless it is granted by the court. However, there seems to be no uniform view among religious court judges as to how to deal with *talak tiga*. Although most judges and clerks embrace the idea that a divorce lawsuit or *talak* petition submitted to them for the first time will be counted as a single divorce, there are various approaches to triple divorce.

For example, a senior judge, who just recently retired, maintained that the triple divorce is indeed valid, but judges can only admit one of the pronouncements because the state only authorizes them to decide one divorce in every lawsuit or petition. In other words, he maintained, judges are not allowed by the state to approve three *talaks* at once in a single divorce case. Therefore, he suggested, the correct ruling on triple divorce should read "to declare that only one

out of three *talaks* occurs (*menyatakan jatuh satu dari tiga talak*)."[22] By this, he sought to introduce a middle way for mediating between religious law and state law. Although he himself never decided a case of triple divorce, he knew colleagues who produced such a decision, which he thought was the right one.

However, in the eyes of some of his colleagues, such a decision would be awkward. One judge said that most judges would argue against such "a middle way position" on triple divorce because it would be unrecognized in today's practices. He maintained that for the sake of uniformity, the formulation of court decisions on divorce must be the same in all cases; the religious court decision must preserve the principle of certainty, and if different judges approach and decide *talak tiga* cases differently, they may cause confusion among litigants. Moreover, he pointed out the necessity to adopt the standard guidance of the religious court administration book that underlines the uniformity of court decisions on divorce.[23] In this book, the Religious Courts Body (*Badilag*) provides a standard formulation of court decisions on divorce or *talak*.[24] To this judge, law should create certainty, not ambiguity, and a valid decision must be grounded in the authoritative source of law endorsed by the state.

Another judge detailed his experience when handling a case of triple divorce. He drew his attention to the phrases or wording of *talak* to determine whether or not it is valid.[25] He told me that once he successfully mediated the litigants of *talak tiga*. When supervising the dispute in the mediation room, he interrogated the plaintiff's reason why he turned to the court. The plaintiff said that he resorted to the court after he had repudiated his wife three times. He

[22] Interview, May 9, 2011.
[23] Interview, May 30, 2011.
[24] According to *Pedoman Pelaksanaan Tugas dan Administrasi Peradilan Agama* [Guidance for the Religious Courts Work and Administration], for the sake of uniformity, all *talak* decisions should read "to permit the plaintiff to pronounce his one revocable *talak* (*talak satu raj'i*) to the defendant." See Supreme Court, *Guidance for the Religious Courts Work and Administration: Book Two* (Jakarta: Directorate of Religious Courts, 2010), p. 165.
[25] Interview, July 23, 2011.

pronounced the *talak* because he was unable to control his outrage during the conflict with his wife. Ironically, the litigants felt a stronger feeling of compassion and love for each other after the incident.[26] Therefore, they did not wish to separate. But their fellow neighbors considered the *talak* to be irreconcilable. By returning to the court, the litigants wanted their case to be decided as a single *talak* so they could re-unite without an intervening marriage.

The judge interrogated the plaintiff on the basic formula of the *talak* that he had uttered. He asked the plaintiff if he really pronounced the *talak*. The plaintiff replied that he had said to his wife, "If there were more than three *talak*, I would divorce you ten times."[27] The judge explained that this was a metaphorical, not a declarative sentence and was stated in a future tense that expressed a desire. This meant that the plaintiff had not really "dropped" (*menjatuhkan*) his *talak.* The sentence did not reflect the actual facts or the current state of the relationship because it referred to nothing but a metaphor. The fact of the relationship, the judge argued, was more important than the words; if the words were imaginary or metaphorical, the *talak* was not real. According to the judge, the plaintiff and his parents, who came along to the mediation, accepted his arguments but they had no idea how to convey this to their fellow villagers, who believed that the *talak* did occur and was irrevocable.

The judge advised them to tell their fellows that first, the litigants and their relatives were convinced that the *talak* did not occur and informed the people of this. Second, although the majority of Muslim jurists admitted the validity of triple *talak*, others disagreed. This meant that there was disagreement (*ikhtilāf*) among the jurists about it. In this situation, one should look into the fundamental sources of Islamic law, the Qur'an and the *ḥadīth*, not *fiqh*. Third, *talak tiga* was

[26] This was the most common reason I heard for which spouses of *talak tiga* insisted on re-union; they felt that their love among them was growing stronger after the *talak*. As a result, they did not mind to have an intervening marriage so that they could reunite.

[27] The Indonesian version is "*seandainya ada talak lebih dari tiga, aku akan talak kamu sepuluh.*"

contrary to the spirit of Islamic law. The reason why there was a first, second, and third or the final *talak* was that the spouses should learn a lesson at each stage so they could re-evaluate their relationship in the union. *Talak tiga* removed this opportunity that Islamic law offered for introspection. The plaintiff concurred and subsequently withdrew his petition. However, the judge suggested that the couple renew their marriage contract anyway. This was a practical means to avoid further adverse reaction from the people. In this way, the case was decided implicitly—not explicitly because the case was withdrawn without a court decision—as a single *talak* that exceeded the waiting period (‘*idda*), so the couple needed to renew their marriage contract. The judge told me that there was no negative reaction or objection from the people regarding the settlement of this case.

These three responses (the former judge, another judge and the mediator judge) demonstrate how triple divorce is approached differently by religious court judges. The retired judge was a senior judge who was formerly the deputy of the religious court head. He was chair of an Islamic organization, trained in Islamic schools (*pesantren* and *madrasa*), and sometimes referred to himself as a *tuan guru.* His view on triple divorce reflects his educational and socio-religious background as well as his status as a state-appointed judge. On the one hand, as a *tuan guru* who knows classical Islamic literature and the discourse of *fiqh*, he could not simply disregard the religious law as he admitted the validity of triple divorce. On the other hand, he could only grant one divorce in each divorce lawsuit due to the limited authority that the state bestows upon him as a judge. In this respect, triple divorce is not seen simply as a legal case but also, and more importantly, has much broader implications regarding the relationship between the state and religion.

However, seen from the state's point of view, as another judge advocated, the senior judge's contention was problematic because it was contrary to the standard formulation of a court decision. *Badilag* lays out the details of the religious court administration, which also includes the procedural guidance to handle legal cases and to issue decisions based on it. In the mind of this judge, the *Badilag*'s guide constitutes the ideal model that judges should follow in their duties in order to establish certainty in the law. To the third judge, however, the important question about triple divorce was neither how to mediate the tension between the religious law and state law regarding the status of triple divorce nor how to strictly comply with the standards of the religious court administration. Rather, the point was to critically examine if *talak* really did "fall" (*apakah talak benar-benar jatuh*). By comparing the words and the reality of *talak*, he thought one could grasp the core of the dispute. His experience suggests that a husband might use a metaphorical phrase in his *talak* which does not necessarily reflect the reality of the relationship at the time of the utterance.

The Litigants and Triple Divorce

Beyond these debates, litigants might encounter different experiences when they bring their disputes of triple divorce into court. Two divorce cases below illustrate how litigants cope with their disputes of triple divorce and how the court responds to them. Those cases were all registered as a single divorce lawsuit (*gugat*), and not a *talak* petition. It was the wives who brought the cases to the court, not the husbands.[28] One might not recognize them as triple divorce cases if one did not know the causes of the conflicts or if one's data depended only on court documents and hearings. The court decisions in these cases do not explicitly or implicitly indicate triple divorce because the plaintiffs did not mention it in their claims or courtroom

[28] This was either because the wife was the party most concerned with the incident or because there was an agreement between the spouses that the case should be filed as a divorce lawsuit.

hearings. This alone is an indication that triple divorce maybe framed in different ways by litigants or clerks. Or, to put it differently, "legal documents are written for legal purposes and, therefore, they tend to hide the conditions of their own constitutions."[29] It was through my conversation with one plaintiff and another informant that I became aware that these cases pertained to triple divorce.[30]

Case One: This case comes from a 37 year-old housewife with two children. She appeared before the court to sue for divorce against her husband, a 47 year-old state employee, whom she had married in 1989. I talked to her in the waiting room of the court prior to her second hearing. She initiated the conversation perhaps because she remembered me when attending her first hearing. From the conversation about the procedure of the hearing, we went into her case. She said that her case was complicated. She had divorced and reconciled with her husband in

[29] Baudouin Dupret and Barbara Driesken, "Introduction," in Baudouin Dupret, Barbara Driesken and Annelies Moors (eds.), *Narratives of Truth in Islamic Law* (London and New York: I.B. Tauris, 2008), p. 13.

[30] I was told by one clerk from another religious court in Lombok about a divorce lawsuit that a female plaintiff unwittingly revealed as a case of triple divorce. The clerk said that this plaintiff was unaware of this when filing her claim because the name of the defendant (husband) that she wrote down in her claim was different from the name of her husband displayed on the marriage certificate that she showed. After interrogating the plaintiff, the clerk realized the cause of the dispute. The plaintiff was divorced three times by her (first/former) husband but insisted on re-union. Because the *talak* was final it rendered reconciliation impossible without recourse to an intermediary marriage. Therefore, she married a man unofficially with the hope that she could ask for a divorce from him in order to remarry her former/first husband. But her second husband refused to repudiate her. Therefore this woman resorted to the court to sue for divorce from him. The clerk told me that at first he rejected her claim because if he accepted it, this would mean that the court received a claim from a woman with two husbands, one who was mentioned in her marriage certificate and the other who was the defendant in her lawsuit. He accepted her claim only after it was revised (Interview July 24, 2011). I saw the copy of the final court decision in this case. It was a very complicated case and seemed to me that the plaintiff was involved in relationships between two men; the one (the defendant) that she sued for divorce and another one (presumably her former husband), that the defendant accused of being the "third man" (*pria idaman lain/PIL*) that ruined his union with the plaintiff. From the narrative of the disputes included in this court decision, it seemed to me that later on the defendant was likely aware of what sort of marriage he had entered into. In his response to the claim, he stated that during his marriage with the plaintiff, he admitted to be in harmony with her only for one week because she returned to her parents a week after the marriage. Moreover, he explained that during the "one week marriage" the plaintiff often refused to have intercourse. In her revised claim, the plaintiff requested her unpaid dower, namely 2 *are* land, legalization of her (second unofficial) marriage and divorce. The defendant sued back by asking for Rp. 10 million ransom if she wanted a divorce. In the end, the judge authenticated the marriage and approved the divorce but turned down the dower and ransom requests respectively. The judicial divorce of this female plaintiff served as a means of getting back at her (former) husband. Since she still kept her original marriage certificate and registered her current claim as a divorce case of unofficial marriage, her previous marital status was not affected at all by her claim, as if nothing happened at all between her and her second husband.

accordance with the religious law (*fiqh*) twice prior to her current dispute. She did not explain the causes and details of her first two divorces but shared the third one.[31]

One day she received a text message from an anonymous number confirming that her husband had secretly married another woman and already had one child. She showed the message to her husband, who replied to her, saying "If that [message] is true, my *talak* falls upon you." She understood this statement as his denial of the message. However, she gradually saw changes in her husband: he often came home late and became very strict with his salary and monthly allowance for her. She attempted to trace the person sending the message and got further information from the sender about her husband's second wife and their child. Her husband no longer denied it. She consulted a *tuan guru* about her husband's statement in response to the previous message. The *tuan guru* confirmed that her husband's *talak* was automatically valid because his statement was true. Accordingly, this became the third *talak.* She thus went to the court to file a divorce claim.

She stated that she threatened to reveal her husband's illegal marriage before the judge if he attended the hearing. Her threat worked well because he never appeared before the court. Upon three consecutive hearings, her claim was approved without the defendant's presence (*verstek*). Because she neither told the whole story to the clerk when registering her claim nor informed the judge in the hearings, the court decision in her case did not include the narratives of her past divorces and reconciliations. Instead, she mentioned several other reasons for divorce in her claim: mutual mistrust, lack of transparency regarding her husband's salary and her monthly allowance, as well as recurring spousal conflicts. She also added that she had lived apart from her husband for four months. These were strong arguments for divorce, which she supported with two witnesses and the written documents of her ID and marriage certificate. Although she

[31] Field notes and courtroom observation, January 4, 2011.

realized that the court would issue her only one divorce, which theoretically allowed reconciliation, she would not use it as grounds to return to her husband because she no longer trusted him and, more importantly, as she admitted, because the *talak* was irreconcilable. To her, *fiqh* was a valid source of law but state law was equally important to settle her marital breakdown. Another case reveals a particularly distinct approach to triple divorce. However, unlike this plaintiff, the female plaintiff in the following case turned to the court and state law because she wanted to avoid *fiqh* stipulation concerning triple divorce.

Case Two: This case was also registered as *gugat*. Because I did not talk to either disputant, my knowledge about this case is based on an informant, my own notes of courtroom hearings and the court decision. Not until this informant told me the details of the case did I realize that this was in fact a dispute of triple divorce. Neither the court hearing nor the court decision in this case revealed this. But the case attracted my attention from the beginning when I attended the first hearing, where both the plaintiff and the defendant were present. The short conversation between them and the judge was puzzling to me.[32]

> Judge: What brought you to come [to the court] today? What went wrong?
> Plaintiff: We want to divorce.
> Judge: Why divorce? Don't you have a child already? Please consider your child [so you may not divorce]!
> Plaintiff: This is only to comply with the formal procedure of law. Our families and relatives have endorsed our decision [to divorce].
> Defendant: Correct. This is only to abide by the [formal] procedure. We and our families have agreed upon this decision.
> Judge: Well. But you must follow mediation before we can resume the trial.

[32] Field notes and observation of the courtroom hearing, February 9, 2011.

This dialogue was confusing to me. I thought the litigants agreed to voluntarily divorce because they had settled all disputes beyond the court and only needed an official proof of divorce.[33] I presumed that by telling the judge that the trial was only a formality, the disputants hoped to acquire proof of divorce immediately. But I was wrong. The litigants wanted their case resolved through reconciliation. The plaintiff expressed her intention to rescind her claim in the following hearing. The judge granted this and thus terminated the trial on the ground that the disputants reconcile peacefully (*penggugat telah berdamai dan rukun kembali dengan tergugat*). The court did not issue a decision (*keputusan*) of divorce but instead issued a decree (*penetapan*) that the claim was revoked due to the disputants' reconciliation. This was exactly what the disputants wanted; a court statement of reconciliation, but not a decision of divorce, as an informant later told me.[34]

According to this informant, the divorce was irrevocable. Upon the occurrence of the triple divorce, the litigants lived separately for a few months but the wife could not stand it any longer.[35] She initiated reunion with her husband, who welcomed her back, but they received a bitter reaction from the people, who judged her divorce as final. They called her ignorant of the religious law. But she persisted with reconciliation, especially after finding someone who offered her help. My informant said that the helpful man was likely a court clerk, or at least one who was very familiar with state law and court procedure.[36] This man recommended that the case be

[33] I know at least two couples who agreed to divorce voluntarily. They had settled all post-divorce issues. Neither debates nor argumentation happened among the disputants in the hearings because they just wanted to conclude the trial quickly. Their calm, non conflicting attitudes throughout the trials surprised the judges, who advised them several times to reconcile because they did not see any problems and disputes among the disputants.

[34] He was the defendant's cousin, a student at an Islamic university in Mataram whom I met serendipitously at a roundtable discussion on the campus.

[35] It was mentioned in the claim of this divorce that the extrajudicial *talak* occurred in 2009 and was brought to the court in the end of 2010.

[36] The court document in this case does not mention the litigants' educational backgrounds. In many cases, this is because plaintiffs do not include any information about their education in their claims or petitions either because they did not go to school at all or did not complete their elementary or secondary school.

brought to the court for mediation, which the plaintiff could use as proof to her fellows that the court had helped to reconcile her with her husband. She followed this suggestion, turning to the court, and gained a decree of reconciliation, which she showed to her village neighbors to prove that her household disputes had been mediated successfully without divorce. My informant told me that the strategy reduced the tension, although the couple later moved from town to seek a job, which also mitigated the tension.[37]

These three different approaches to triple divorce by Muslims, judges and litigants show that the circumstances of divorce are not firmly established but contestable. Divorce becomes the subject of contestation among Muslims in Lombok from various backgrounds regarding the ways in which disputes over the occurrence of triple divorce are determined and resolved. Local Muslims who adopt a non-litigation mechanism are concerned with the question of the validity of divorce and resolve it by referring to *fiqh*. The state officials from the marriage registry and the religious court approach triple divorce from the point of view of state law, which emphasizes the importance of the procedural legality of divorce. They insist on the formal procedure of the court to settle any problem regarding divorce. However, no single unified approach to triple divorce is found among the judges, who are split as how to best to deal with and decide on triple divorce. While these different models rest both on the religious law and state law as the bases for their approaches to triple divorce, litigants tend to be amenable to either one since their concern is chiefly how to cope with their marital disputes of triple divorce in the ways that most benefit them.

[37] Interview, March 14, 2011.

C. Women's Judicial Divorce: Islamic Law, Domination and Resistance

Judicial divorce partly symbolizes women's resistance to the domination of local interpretations and practices of Muslim family law in Lombok, such as male arbitrary repudiation and polygamy. In this pattern, husbands hold the privilege to terminate marital unions unilaterally and remarry without their wives' consent. These practices find their grounds in *fiqh*, which is endorsed by the custom of patriarchal society. It is by turning to the court that women attempt to subvert such hegemonic discourses. By examining some other divorce cases from the court, and looking at their broader socio-religious and cultural contexts, this section attempts to propose an analysis of judicial divorce as a locus of women's resistance against male domination endorsed by local practices of Islamic and customary law. By so doing, I hope to raise another important dimension of judicial divorce, which reveals patterns of domination and resistance in Islamic law.

Women's presence in the Islamic courts is by no means a new phenomenon throughout Islamic history.[38] Muslim women have used Islamic courts to file property claims, maintenance claims for either themselves or their children,[39] as well as divorce claims.[40] What is novel about women's presence in Islamic courts in contemporary Indonesia, which distinguishes it from

[38] Judith E Tucker, *In the House of the Law: Gender and Islamic Law in Ottoman Syria and Palestine* (Berkeley: University of California Press, 1998), Amira El Azhary Sonbol (ed.), *Women, the Family and Divorce Laws in Islamic History* (New York: Syracuse University, 1996), Leslie Peirce, *Morality Tales. Law and Gender in the Ottoman Court of Aintab* (Berkeley: University of California Press, 2003) and Maya Shatzmiller, *Her Day in Court. Women's Property Rights in Fifteenth-Century Granada* (Cambridge, MA: Harvard Law School, 2007).

[39] Michael Peletz, *Islamic Modern: Religious Courts and Cultural Politics in Malaysia* (Princeton: Princeton University Press, 2002), Erin Stiles, *An Islamic Court in Context: An Ethnographic Study of Judicial Reasoning* (New York: Palgrave Macmillan, 2008) and Ziba Mir-Hosseini, *Marriage on Trial: A Study of Islamic Family Law Iran and Morocco Compared* (London: I.B. Tauris, 1993).

[40] Ghislaene Laydon, "Obtaining Freedom at the Muslim's Tribunal: Colonial Kadijustiz and Women's Divorce Litigation in Ndar (Senegal)," in Shamil Jeppie, Ibrahim Moosa and Richard Roberts (eds.), *Muslim Family Law in Sub-Saharan Africa: Colonial Legacies and Post-Colonial Challenges* (Amsterdam: Amsterdam University Press, 2009), p. 135-164 and Anna Wurth, "The Normativity of the Factual: On the Everyday Construction of Shari'a in a Yemeni Court," in Abbas Amanat and Frank Griffel (eds.), *Shari'a: Islamic Law in the Contemporary Context* (Stanford: Stanford University Press, 2007), p. 165-177.

other Muslim countries, is that women actively petition for divorce. Divorce lawsuits initiated by women (*cerai gugat*) now constitute the greatest number of legal cases in the religious courts in Indonesia. According to the national data, *gugat* has reached nearly 60% of all divorce cases, while *talak*, or male repudiation, accounts for only 30% of the total cases received by the religious courts since 2008.[41] This pattern will likely remain largely unchanged in the next several years.

Year	Numbers and Percentage of Cases/Claims			Total
	Gugat (by women)	*Talak* (by men)	Other Cases	
2008	143,747 **(59%)**	77,773 **(32%)**	23,503 **(9%)**	245,023
2009	171,477 **(60%)**	86,592 **(30%)**	26,689 **(10%)**	284,749
2010	190,280 **(59%)**	94,099 **(29%)**	36,409 **(12%)**	320,788

Table 1: National data of legal cases/claims received by the religious courts in Indonesia 2008-2010 (Badilag 2008-2010).

Unlike what many might presume about Islamic law—that the law is discriminatory against women in terms of divorce because only Muslim men hold the right to repudiate their wives unilaterally—the most recent data on divorce from Indonesian religious courts demonstrate a new practice. Although women are not entitled in Islamic law to repudiate their husbands by verbally declaring "divorce phrases," as their husbands can do to them, women can initiate divorce and in fact constitute the majority of all divorce cases in the religious courts.

This phenomenon raises several questions. What does the increasing number of *gugat* cases mean for gender and power relations among Muslim spouses? How does Islamic law contribute to women's subjugation but at the same time becomes a resource to resist some aspects of such domination? What do contemporary practices of judicial divorce in Indonesian religious courts tell us about Islamic law? I will use my data from Lombok to answer these questions. I will show that the rising incidence of *gugat* reveals a transformation of Islamic legal practices as a result of Shari'a reinterpretation through the statutory regulation of marriage and

[41] Badan Peradilan Agama (Badilag), Mahkamah Agung, *Laporan Tahunan 2008-2010* [2008-2010 Annual Report] (Jakarta: Badilag, 2010).

divorce laws by the state. I will further demonstrate that *gugat* challenges the established gender hierarchy and curtails unbalanced power relations between Muslim spouses.

Islamic Law: Paradox of Domination and Resistance

To understand women's resistance in judicial divorce and the ambiguous nature of Islamic law in which both domination and resistance reside, it is necessary to broaden our perspective about Islamic law. Islamic law here is not understood only as a set of legal norms and stipulations laid down in classical-medieval Islamic jurisprudence (*fiqh*). It also includes modern interpretation and legislation as well as Muslim legal discourses and practices based on these sources. In other words, Islamic law is an on-going discourse, whose definition in the broadest sense includes norms, codes, interpretation, courtroom debates, and local practices.[42] Under this interpretation, *fiqh* and *fiqh*-based modern codes or statutes are used as sources of Islamic law. The understanding of Islamic law should therefore not disregard its normative doctrines, as long as they are used at the empirical level, but it also should include actual practices by Muslims in court and beyond.

As a legal norm, *fiqh* often works unofficially. It is not written in an official code; rather, is scattered throughout the rich material of classical works of Islamic jurisprudence, where compliance is discretional and contingent upon individual commitment. This literature constitutes the main corpus of studies read in Islamic schools. Despite its unofficial status today, however, *fiqh* has become a guide for the lives of Muslims, from their daily worship and ritual,

[42] Rifyal Ka'bah, "Islamic Law in Court Decisions and Fatwa Institutions in Indonesia," in R. Michael Feener and Mark E. Cammack (eds.), *Islamic Law in Contemporary Indonesia: Ideas and Institutions* (Cambridge, MA: Islamic Legal Studies Program, Harvard Law School, 2007), p. 83-98; Jørgen S. Nielsen and Lisbet Christoffersen (eds.), *Shari'a as Discourse: Legal Tradition and the Encounter with Europe* (Burlington: Asghate, 2010).

bodily purification, and permissible food to marriage and divorce.[43] It thus plays an important role in providing a ground for Muslims' rituals and social interactions.[44]

Islamic law may also serve as a fundamental source of national legislation. Muslim states have appropriated some of the sources of Islamic law, such as the Qur'an, the Prophetic tradition (*ḥadīth*) and classical *fiqh* literature, into state constitutions, modern codes, or statutes, to respond to the challenges of contemporary socio-political, legal and religious life.[45] In Indonesia, the Compilation of Islamic Law 1/1991 best exemplifies the integration of Islamic law (*fiqh*) into state law and the judicial system.[46] Along with Marriage Law 1/1974 and Religious Judicature Act 7/1989, the Compilation has become the official set of regulations for Muslim marriage and divorce in the country. Although most of its materials are derived from the traditional *fiqh* literature—and consequently commonalities between the Compilation and *fiqh* stipulations are prevalent—the Compilation also introduces new rulings and procedures for Muslim marriage and divorce that significantly differ from those of *fiqh*, a point to which women turn in to counteract the hegemony of *fiqh*.

In this regard, I build on Mindie Lazarus-Black and Susan Hirsch's perspectives on the relations between law, power and hegemony[47] and June Starr and Jane F. Collier's perspectives on law as the domain of contestation[48] to discuss domination and resistance in Islamic law in Indonesia. Lazarus-Black and Hirsch propose an analysis of law and power and their inter-

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[43] Classical literature remains the main subject taught in traditional Islamic schools (*pesantren* and *madrasa*) in Indonesia. Lombok is not an exception. See Martin van Bruinessen, *Kitab Kuning, Pesantren dan Tarekat: Tradisi-tradisi Islam di Indonesia* (Bandung: Mizan, 1995).

[44] See Chapter One Part C.

[45] Clark Lombardi, *State Law as Islamic Law in Modern Egypt: The Incorporation of the Shari'a into Egyptian Constitutional Law* (Leiden: Brill, 2006) and Nadirsyah Hosen, *Sharia and Constitutional Reform in Indonesia* (Singapore: ISEAS, 2007).

[46] Euis Nurlaelawati, *Modernization, Tradition and Identity: The Kompilasi Hukum Islam and Legal Practice in the Indonesian Religious Courts* (Amsterdam: Amsterdam University Press, 2010).

[47] Mindie Lazarus-Black and Susan F. Hirsch (eds.), *Contested States: Law, Hegemony and Resistance* (London and New York: Routledge, 1994).

[48] June Starr and Jane F. Collier (eds.), *History and Power in the Study of Law: New Directions in Legal Anthropology* (Ithaca and London: Cornell University Press, 1989).

relations, which are often paradoxical. They conceive of power as "fluid and dynamic, constitutive of social interactions, and embedded materially and symbolically in legal processes."[49] Power is not only something that is possessed but it is also contested and exercised. In this understanding, law entails "power that not only establishes hegemony but also stimulates oppositional discourses."[50] Lazarus-Black and Hirsch also note that "women may experience this paradox of law since many of them live under multiple dominations, some of which are created by law, yet the law simultaneously empowers them to contest power and gender biases."[51] Muslim women in Lombok live under plural norms and laws (*fiqh*, customary law and state law). Thus, it is by turning to the court that women attempt to challenge the contradictions that legal pluralism inflicts upon them.

According to Starr and Collier, law and legal rules "should not be treated as closed cultural systems that one group can impose on another," but rather as "codes, discourses, and languages in which people pursue their varying and often antagonistic interests."[52] They argue that "people or groups use legal rules to accomplish particular ends. Legal order may embody asymmetrical power relations, but power is always an interactional process. A certain group, dominant group or men, may enjoy certain legal privilege but they are also constrained by the law."[53] These perspectives help explain how Islamic law affirms hegemony through the imposition of different identities and roles for Muslim husbands and wives that in turn result in unbalanced power relations between them. But although marginalized, women can use the law to contest male domination. How does Islamic law endorse gender hierarchy and patriarchy while at the same time offer opportunities for women to challenge such biases?

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[49] Lazarus-Black and Hirsch (eds.), *Contested State*, p. 1-2.
[50] *Ibid*., p. 9.
[51] *Ibid*., p. 21.
[52] Starr and Collier (eds.), *History and Power*, p. 9.
[53] *Ibid*., p. 12.

Discourses on gender in Islam are often replete with patriarchal biases, prejudice and stereotypes.[54] The Qur'an exegesis, commentaries of the Prophetic tradition, and, especially, classical works of Islamic jurisprudence (*fiqh*), and to some extent modern statutes of Muslim family and personal laws, are seen as examples of literary and legal genres that often espouse gender biases.[55] Judith E. Tucker states that despite acknowledging the variety of men's and women's roles in the family, Islamic law in a general sense assigns specific roles and identities, which position women as dependent, vulnerable, and weak and men as authoritative, worldly, and strong. Such positionality and subject formation still linger in modern Muslim marriage law, sometimes reinforced by local patriarchal traditions.[56] Tucker refers to classical Islamic jurisprudence as well as modern legislation of Muslim family and personal status laws when advancing her arguments. Her contention is also relevant with respect to Muslim marriage law in Indonesia.

The Indonesian Marriage Law 1/1974, Religious Judicature Act 7/1989, and the Compilation of Islamic Law 1/1991 still preserve an element of patriarchy that affirms gender hierarchy, although these laws also reform the substance and procedure of marriage and divorce. These state laws were all enacted during the New Order (1967-1998), which promoted the housewife as a model for women and promoted the husband as the head of the family.[57] These

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[54] There are copious amounts of literature discussing this issue. See for example Leila Ahmed, *Women and Gender in Islam: Historical Roots of a Modern Debate* (New Haven: Yale University Press, 1992), Amina Wadud, *Qur'an and Women: Reading the Sacred Text from Women's Perspective* (New York: Oxford University Press, 1999), Fatima Mernissi, *The Veil and the Male Elite: A Feminist Interpretation of Women's Rights in Islam* (Massachusetts: Addison-Wesley Publication: c1991) and Asma Barlas, *Believing Women in Islam: Unreading Patriarchal Interpretation of the Qur'an* (Austin: Texas University Press, 2002).

[55] Najla Hamedah, "Islamic Family Legislation: The Authoritarian Discourse of Silence," in May Yamani and Andrew Allen (eds.), *Feminism and Islam: Legal and Literary Perspective* (New York: New York University Press), p. 331-346.

[56] Judith E. Tucker, *Women, Family and Gender in Islamic Law* (Cambridge, UK: Cambridge University Press, 2009), p. 83.

[57] Kate O'Shaughnessy, *Gender State and Social Power in Contemporary Indonesia: Divorce and Marriage Law* (London and New York: Routledge, 2009), p. 30-40.

codes define discrete identities and roles for Muslim subjects according to their gender, which is not substantially different from the norms of *fiqh*.[58]

Article 31 [3] of Marriage Law 1/1974, for instance, defines the husband as the head of the family and the wife as the mother of the household. Article 44 [1] further assigns specific roles for husbands and wives, stipulating that a husband is the protector of his wife and the sustainer of his family; sub-article [2] determines that the wife is responsible for the household and domestic matters. A similar view is reiterated in the Compilation of Islamic Law. For example, Article 80 [1] of the Compilation states that the husband is to serve as a guide for his wife and family, to protect and sustain his family, to teach religion to his wife and to provide support and education so long as his wife remains at home and is obedient. Article 83 [1-2] substantiates the wife's distinct role in the family, where she is required to obey her husband and is responsible for taking care of the household and domestic matters. If she fails to accomplish this role, as Article 84 declares, she is deemed disobedient unless she has just cause. It is clear from these stipulations that husbands and wives are assigned different roles and responsibilities in accordance with their gender. The law establishes working divisions and spatial boundaries where domestic areas fall under the wife's domain.

Although the Marriage Law adopts the principle of monogamous marriage, polygamy is not categorically forbidden. This is another point on which the law is said to have preserved elements of patriarchy. Article 3 [1] of Marriage Law, for instance, stipulates that a court may consider approval of a husband's proposal to remarry if all parties (the wife and children from the first marriage and the prospective wife) consent. This stipulation is reproduced in the Compilation of Islamic Law, especially in Article 55. What makes these codes different from *fiqh* on polygamy is that while the latter is more amenable to polygamy, the former adds

[58] This is one of Tucker's contentions. See Tucker, *Women, Family and Gender* (2009).

procedural burdens that render polygamy difficult in practice because it is now subject to court approval. However, state law does not outlaw polygamy.

Nevertheless, despite such stipulations that confirm gender inequality, the Indonesian codes promote a balanced position for men and women before the law in terms of initiating a lawsuit or petition.[59] These codes introduce regulatory procedures for judicial divorce. With this new procedure, husbands and wives may take legal action if their spouses do not fulfill what the law demands regarding their respective roles and obligations. For example, Article 31 [1] of Marriage Law states that the husband and the wife assume equal rights and responsibilities and that [2] both are entitled to take legal action independently. Likewise, Article 34 [3] states that if either spouse neglects his/her obligations, the other spouse can file a lawsuit. Equal status before the law in terms of initiating divorce and the procedure of litigation for divorce are elaborated in detail by the Religious Judicature Act, especially from Articles 66 through 88. This law affirms a crucial change regarding procedures of divorce. With this change, Muslim wives can find new mechanisms to resolve their marital disputes more easily than what *fiqh* offers them.[60] However, these modern Muslim family codes still contain biases inherited from classical Islamic legal discourses.[61] A contradictory mix of patriarchal law, gender biases and equality before the law in terms of litigation constitute the structural backdrop of women's judicial divorce.

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[59] Simon Butt, "Polygamy and Mixed Marriage in Indonesia: Islam and the Marriage Law in the Courts," in Timothy Lindsey (ed.), *Indonesia: Law and Society* (The Federation Press, 2008), p. 266-287 and Katherine Robinson, "Muslim's Women Struggle for Marriage Law Reform in Contemporary Indonesia," in Amanda Whiting and Carolyn Evans (eds.), *Mixed Blessings: Laws, Religions and Women's Rights in the Asia-Pacific Region* (Leiden: Martinus Nijhoff, 2006), p. 183-210.

[60] There are some mechanisms in *fiqh* that women can use to initiate divorce, such as *khulu'* (divorce by ransom paid by wives to their husbands) and *ta'liq talak* or conditional divorce. However, these are more accessible for women from high class and wealthy families than for their lower class counterparts. See Fariba Zarinebaf-Shahr, "Women, Law, and Imperial Justice in Ottoman Istanbul in the Late Seventeenth Century," in Sonbol (ed.), *Women, the Family*, p. 81-95. I will discuss this topic, the changing approach of the religious courts to divorce and how this benefits more women than to men in Chapter Four.

[61] Siti Musdah Mulia and Mark E. Cammack, "Toward a Just Marriage Law: Empowering Indonesian Women through a Counter of Legal Draft to the Compilation of Islamic Law," in Feener and Cammack (eds.), *Islamic Law*, p. 128-145.

Judicial Divorce as Women's Resistance

Judicial divorce reflects a range of resistance that women put up to counteract patriarchy and gender biases in the local practices of Islamic law in Lombok. This can be construed from several vantage points. First, the increasing number of female divorces marks the emergence of new patterns of marital dissolution. This trend is in contrast to the locally prevalent practice of extrajudicial repudiation by men who manipulate *talak* to dominate and control their wives. Women confront such domination through judicial divorce. Second, judicial divorce serves as a medium through which women challenge the validity of unilateral male repudiation. Women question the very premise of male power and authority in terms of terminating the union. Third, the judicial divorce reflects women's rejection of polygamy. They prefer divorce over defending their husbands' right to polygamy. To better understand these dimensions of resistance, analyses of the broader social contexts of the domination of Islamic law on Muslim family lives as well as illustrative examples of divorce cases from the court need to be presented.

There are at least three domains in which the influence of *fiqh* has been prominent in Lombok: marriage, divorce and polygamy. My data from the court shows that 59 divorce cases (43%) involve unofficially married spouses. They do not record their marriages partly because *fiqh* practices, which do not require marriage registration, are considered sufficient socio-religious grounds for marriage. Divorce is another domain. My data demonstrate that 21 divorce cases (15%) contain narratives of spousal conflicts associated with extrajudicial repudiation. Such *talak*, which symbolizes male superiority, is considered valid by Muslims because it fits the criteria of validity in *fiqh*. Moreover, the fact that polygamous marriages without prior consent from wives or proper procedures of marriage registration still exist, about 19 cases (14%) from

my data, suggest other evidence of the dominant discourse of *fiqh* because *fiqh* and state law both do not forbid polygamy. The religious law is often used to justify polygamy.

The role of *fiqh* in Muslim marriages in Lombok is undeniably crucial. As previously discussed in Chapter One, a Muslim marriage will never be accepted socially as a valid conjugal union without being confirmed by *fiqh*.[62] *Akad nikah* (a marriage contract in accordance with Islamic law) is an essential requirement that must be fulfilled prior to the final phase of a series of processes in traditional marriage. The sufficiency of *fiqh* as a social regulator of customary marriage often supersedes state marital regulation. As a result, marriage registration, which is required by state law, is downplayed. Here I will present other evidence of the strong influence of *fiqh* in Muslim marriages in Lombok.

This evidence can be seen in court decisions on divorce, especially among couples with unregistered marriages. These court decisions include narratives of the disputants' marriages, such as the following:

> *Pernikahan penggugat dengan tergugat tersebut telah dilaksanakan menurut syariat Islam, akan tetapi pernikahan tersebut tidak dilaksanakan dihadapan Pegawai Pencatat Nikah. Oleh karena itu, hingga saat ini, penggugat dan tergugat tidak memiliki akta nikah. Dalam rangka penyelesaian perceraian, penggugat mohon agar pernikahan penggugat dan tergugat diisbatkan* (The plaintiff's and the defendant's marriage was consummated in accordance with Islamic law but it was not conducted before a marriage registration official. Therefore, the plaintiff and the defendant have no marriage certificate. The plaintiff therefore asks for authentication of the marriage prior to divorce approval).

[62] H. Lalu Lukman, *Tata Budaya Adat Sasak di Lombok* [Sasak Custom and Culture of Lombok] (Mataram: 2003) and Maria Platt, "Patriarchal Institutions and Women's Agency in Indonesian Marriages: Sasak Women Navigating Marital Continums," *PhD Dissertation* (Victoria, Australia: La Trobe University, 2010).

Such plaintiffs include a request of marriage legalization in their divorce claims because their marriages have not been recorded. The court cannot approve a divorce if the marriage itself is not recognized by the state. Therefore, such admission must be given before divorce. What is important here is that marriages comply with the stipulation of *fiqh*, despite the fact that they do not comply with state marriage regulations. The couples are primarily concerned with the fact that their marriage does not break religious law.

Another area where *fiqh* assumes considerable influence concerns divorce by male pronouncement (*talak*). There is a consensus among Sunni Muslim jurists that this type of divorce occurs if correctly pronounced by husbands because it "is a performative utterance; the pronouncement of the correct words in correct form can produce a change in the status of others."[63] In a patriarchal society such as Lombok, this discourse fits perfectly well with the central position of husbands as heads of the family, who have the power to conclude divorce arbitrarily. In her observation about rural life in Lombok in the 1960s, Krulfeld makes a glaring statement about the uncontested authority of men in divorce. She says, "A woman must have her husband's consent to a divorce unless she is abandoned for a year or beaten severely. Sasak women declared that they had no rights to initiate divorce, while men could easily obtain the same. Divorce was frequent but always at the man's option."[64] In a later decade, Cederroth found this pattern of easy divorce more common among orthodox Muslim communities than among *adat* families.[65]

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[63] Kecia Ali, "Marriage in Classical Islamic Jurisprudence: A Survey of Doctrines," in Asifa Quraishi and Frank E. Vogel (eds.), *The Islamic Marriage Contract: Case Studies in Islamic Family Law* (Cambridge, MA: Islamic Legal Studies Program, Harvard Law School, 2008), p. 11-45.

[64] Ruth Krulfeld, "Sasak Attitudes towards Polygamy and the Changing Position of Women in Sasak Peasants Villages," in L. Dulse, E. Leacock and S. Ardemer (eds.), *Visilocality and Power* (New Delhi: Oxford University Press, 196), p. 201.

[65] Sven Cederroth, "Islam and Adat: Some Recent Changes in the Social Position of Women Among Sasak in Lombok," in Bo Utas (ed.), *Women in Islamic Societies: Social Attitudes and Historical Perspectives* (London: Curzon 1983), p 160-71.

If *talak* occurs for whatever cause, a wife will be sent back by her husband or his representatives to her parents, known locally as *mengantar istri pulang ke rumah orang tuanya* (dropping off a wife at her parents'). One female informant told me that divorced women in her village may take away with them household appliances, utensils, or other objects they brought to the marriage upon the occurrence of *talak*, but they rarely inquire about joint property because they feel embarrassed (*malu*).[66] Many women accept unilateral divorce from their husbands. Fatalism and deterministic views mark the worldview of Sasak Muslims when encountering a dramatic life change, such as sickness, death, or divorce. Instead of thinking about such issues in terms of causality (cause and effect), many believe that what happens is simply God's decision or a fate (*nasib*) that they should endure (*sabar*).[67]

Neither scholars nor my informants explicitly argue that easy divorce by men is closely related to the privilege that the religious law accords them. Rather, they suggest that men's social status (wealth, class) as well as the kinship system of patriarchal society constitute the backdrop of social structure that facilitates the arbitrary use of male unilateral divorce. However, I would argue that *talak* constitutes an arena where patriarchy, gender biases, and *fiqh* coalesce. If Krulfeld and Cederroth were more concerned specifically with *fiqh*, they would have pointed out the position of the law in *talak* more clearly. If male arbitrary divorce is interrogated from an Islamic legal point of view, for example, by posing questions to the Muslim religious leaders and the commoners that follow them, they would argue that arbitrary divorce by men does not

[66] Interview March 17, 2011. Female divorcees will in general receive financial support from their parents or relatives or they may earn money themselves. In *gugat*, most female plaintiffs only seek divorce. Disputes over joint property following divorce are, not surprisingly, very low. In my data, only one of the 125 female plaintiffs asked for a share of joint property.

[67] Platt, "Patriarchal Institutions," p. 130; Asnawi, *Kematian Bayi antara Takdir dan Kesalahan Pola Asuh: Menyingkap Pola Perawatan Bayi di Lombok Nusa Tenggara Barat* (Mataram: Pustaka Irfani, 2005) and M. Cameroon Hay, "Women Standing between Life and Death: Fate, Agency and the Healers of Lombok," in Lyn Parker (ed.), *The Agency of Women in Asia* (Singapore: Marshall Cavendish Academic 2005), p. 34-37.

contravene the religious law and that divorce cannot occur without male consent. My conversations with *tuan guru* and observations from courtroom hearings confirm this contention.

In my visit to an Islamic school and conversation with the *tuan guru* about arbitrary divorce, he suggested that it belonged exclusively to the privilege of man. Men are entitled to effectuate divorce simply by saying "I divorce you" to their wives. Divorce will even be effective as irrevocable if the *talak* is pronounced three times at once.[68] Another *tuan guru* contended that according to a Prophetic tradition, divorce occurs when verbally enunciated by the husband even if he does not have a serious intent or consent from his wife.[69]

The view that divorce is exclusively a male prerogative is widespread among the people of Lombok. A number of male defendants use this argument at court to contest divorce lawsuits filed by their wives. They want to demonstrate their uncontested pride and position as the head of the family, who has the authority to either maintain or dissolve the union. They might express the opinion that divorce can only be granted if they agree to it or if their wives can afford to pay compensation for it. For example, male defendants often inform the judges that they still love their wives and thus want reconciliation. Or they state in the courtroom that their household problems have been settled beyond the court to persuade the judges to overturn divorce claims. But these statements are not necessarily true, as lying in the courtroom is not uncommon among disputants.[70] Different tactics and strategies are used by husbands in these proceedings.

First, male defendants may attempt to block divorce claims from being approved by the court or slow down the trial so as to renegotiate compensation or some other type of agreement

[68] Field notes, March 12, 2011.
[69] Field notes, April 3, 2011.
[70] Several times I saw wives accuse their husbands of lying during hearings. That men are less reliable in court is not unique to Lombok, as this also happens in the Islamic court in Malaysia. See Peletz, *Islamic Modern*, p. 128. For a general overview of gender representation among Malay men, see Michael G. Peletz, "Neither Reasonable nor Responsible: Contrasting Representations of Masculinity in a Malay Society," in Aihwa Ong and Michael G. Peletz (eds.), *Bewitching Women, Pious Men: Gender and Body Politics in Southeast Asia* (Berkeley: University of California Press, 1995), p. 76-123.

beyond the court.[71] However, female plaintiffs are often aware of such manipulation and therefore mostly insist on continuing the trial. So are the judges, who commonly only consider a proposal of reconciliation if this comes from a plaintiff. Second, male defendants may ask their wives for compensation for divorce. To them, divorce can be granted only on the basis of an exchange of ransom. This sort of argument has to do with the concept of *khul'* in *fiqh*, where wives may ask for divorce by giving up their dower or other financial rights against their husbands. Although at hearings male defendants often convey this demand implicitly, others do so quite explicitly.[72] In other words, when men reject their wives' divorce lawsuits, they do not necessarily intend to reconcile with their wives in order to resume a harmonious life with them but decline the claim so as to put their wives in a dilemma; they are neither repudiated nor reconciled (*menggantung status istri*).

These responses reveal male attempts to defend their central role and authority in marital dissolution, which they presume cannot happen without their consent. This hegemonic view is exactly what female plaintiffs attempt to subvert. By bringing these disputes to court, the women try to redress unbalanced relationships by cutting off their husbands' authoritarian power in deciding the fate of their union. Below are two examples of *gugat* that illustrate such resistance.

Case One: This claim was proposed by a female plaintiff, a 19 year-old housewife, against her 30 year-old husband. The couple married in 2009 and had one child. Since August 2010, their marriage had been in trouble due to several reasons. The plaintiff explained that her husband rarely fulfilled religious obligations such as daily prayer. He often got drunk and used to hit her

[71] Refer again to divorce cases in Chapter Two, especially Case Three.

[72] One male defendant shouted loudly in the courtroom hearing to refuse his wife's claim of divorce. She filed a divorce claim upon returning from working abroad and finding her husband cheating with another woman. But the husband rejected the claim unless she compensated him, saying "If you pay me Rp. 20 million, I will give my *talak* to you no matter how many [*talak*] you wish, ten or a hundred." Field notes and the courtroom observation, November 24, 2010.

without cause. She tried to compromise with the situation by telling him to abandon his bad behaviors, but he kept repeating them. She left the conjugal house to return to her parents to test whether he would change and take her back. After a few months of living apart, there was still no certainty as to how the dispute would end since her husband had never come to take her back home. As the head of the family, he was supposed to do so. The plaintiff was in a dilemma, trapped in a precarious and ambiguous marital status. She therefore wanted to end the uncertainty by filing a divorce claim in court. In her claim, she asked for authentication of her marriage, because it was not recorded, the right to be their child's guardian, Rp. 300,000 monthly support for the child, and a divorce. She later withdrew her demands for the child guardianship and support.

Both plaintiff and her husband were present at court for mediation in the first hearing. She refused to compromise and insisted on divorce. Her husband wanted reconciliation and kept reiterating this in the second hearing but she insisted on resuming the trial. The judge thus read the claim. The defendant admitted some points regarding the marriage and the child but rejected others. He acknowledged neither abandoning his daily prayers nor being drunk, although he admitted these were his past behaviors prior to marriage. He also said that he never beat his wife. When the judge confirmed to him that his wife wanted divorce, he firmly stated "No, I do not want divorce," to which she replied, "I defend my claim. I want divorce."[73] The judge postponed the hearing, as is always the case in such situations, to give the parties time to reconsider their decision while instructing them to come back again to the court in a week. He specifically ordered the plaintiff to produce her proof and witnesses to endorse her claim. The defendant looked annoyed because the judge continued the trial. In the following session, the defendant was not present while the plaintiffs' witnesses gave their testimonies. Because the defendant was

[73] Field notes and the courtroom observation, November 23, 2010.

absent, he was recalled by the judge to come at the next session. He appeared again at the following hearing and was instructed by the judge to produce his own proof and witnesses to support his arguments. But again he did not obey the judge's command, for he never reappeared before the court. After a series of postponements of the court hearing, the judge eventually granted the claim.

From the first time he came to court, the defendant was not very happy because he knew he would lose; court was not a favorable place for men to settle marital disputes.[74] He could not control the situation when his wife turned to the court. He therefore made a minimal effort to affect the trial. First, he proposed reconciliation. When he became aware that his wife was not interested in this, his other endeavor was to skip every other session so that the judge would postpone the hearing. This strategy only prolonged the sessions but could not prevent them from occurring. At least it would cause inconvenience to the plaintiff for she always had to attend the hearing. It seemed obvious that the defendant used this strategy because he was unable to produce his witnesses and evidence. The plaintiff realized that her husband would never change even if she dropped the claim. Her husband's unwillingness to pick her up at her parents' house when she left him was palpable evidence. Going to the court was her last recourse to end her marital problems. She had no other mechanism to end her dilemma except by using the court to challenge her husband's arbitrariness.

Case Two: A housewife, a 22 year-old university student, appeared before the court to file her divorce lawsuit against her husband, a 40 year-old state employee working at the local hospital.

[74] This can be seen from both men's position as petitioners of *talak* and defendants in *gugat*. Overall, the numbers of *talak* petitions in Central Lombok have been around 9 per cent over the last ten years (see Table 1 of Chapter Two). My data show that more male than female defendants are absent at hearings. Only two (16%) out of twelve female defendants in *talak* were absent while eighty (64%) out of one hundred twenty five male defendants never attended a *gugat* hearing, either because they were unknown (*ghaib*) or they ignored the court summons.

They married at the beginning of 2009 but entered into irreconcilable conflicts six months later. The plaintiff proclaimed that her husband was very jealous about her male student colleagues, often got angry without cause, and beat her. Moreover, she felt that her husband did not really love and take care of her. This situation continued for months without indication of a quick solution. One day she called her husband to ask permission to attend her grandmother's funeral but he did not answer the call; she went anyway. This offended him, and in turn he sent her a text message mocking her, calling her a bitch and telling her to do anything as she wished, even if she wanted another man.[75] She then went home to her parents. Her husband never called her back to him, nor did he divorce her by *talak*. She decided to bring the dispute to court by filing a divorce claim in October 2010. The court accepted the claim, summoned the defendant, and opened the hearing.

Both she and her husband attended the first hearing and mediation, but the dispute remained unresolved. At the second hearing, the defendant responded to the claim by denying most of his wife's points and arguments. He said that he always loved his wife and still supported her. He denied having repudiated his wife when sending her the text message; what he meant by it was to let her do anything she wished. He acknowledged that he never picked her up from her parents since she left him. Ending his responses, he firmly stated that he would not divorce his wife. The plaintiff defended her claim by producing evidence and witnesses. She presented her ID, a copy of her marriage certificate, and her parents as her witnesses. They gave testimony about their daughter's household, which they claimed to be in trouble due to the defendant's faults. The defendant rejected the testimonies and produced his own witnesses.

[75] The plaintiff's father showed me the message when I talked to him prior to the hearing. He said that according to an official from the religious office, the message could be considered as a sort of indirect repudiation. Field notes, November 24, 2010.

He presented four people: his three siblings and another female colleague. Surprisingly, they all convinced the judge that divorce was the best solution for the couple.[76] This was against the defendant's wishes, who insisted on defending the union, and surprised the judge, who expected the witnesses to endorse the defendant's aversion to divorce. But the defendant still insisted on not divorcing. Later he told the judge that he had spent a great deal of money on the wedding as well as for his wife's school fees. He said that if the plaintiff reimbursed at least half of these sums, she could leave him. The plaintiff denied this, saying that it was her parents who paid her school fees. The judge asked the defendant if his relatives attended the wedding. He confirmed this. The judge rebuked him, saying that asking reimbursement for a wedding ceremony that his immediate family members also enjoyed was morally untenable. The judge then approved the plaintiff's claim.

This case reveals that the defendant was unwilling to divorce his wife. His insistence not to release his wife was not because he wanted reconciliation but because he wanted to imprison her in an ambiguous marital status until she compensated him. He was aware that the marriage could no longer be saved but would not let his wife go without her buying the divorce.[77] As for the plaintiff, she realized that she could not easily escape her troubled union. She had to struggle to resist her husband's hegemony through court as this was the only available means to achieve that end. She submitted her claim in October 2010 and gained approval from the court in February 2011. Like the female plaintiff in the previous case, she used *gugat* as a means of subverting male hegemony in the context of *talak*. On other occasions, women would even challenge unilateral *talak*. They forced their husbands to turn to the court to contest arbitrary

[76] It seems to me that there was no communication or coordination between the defendant and his witnesses about what sort of information or testimonies they should give at the hearing. One of the witnesses told me that the dispute between the plaintiff and the defendant had been long, but the defendant only informed his witnesses about the divorce just before he asked them to be his witnesses. Field notes, February 7, 2011.

[77] This male defendant's response is parallel to that of Case 5 in Chapter Two.

divorce. Thus, *talak* petitions may also reveal narratives of women's resistance, as the case below illustrates.

Case Three: A 25 year-old man, a motorcycle mechanic, appeared before the court to file a petition of *talak* against his 20 year-old wife. The couple married in 2009 but still lived in the husband's parents' house although they already had one child. The husband explained that his wife was uncomfortable to stay longer with her parents-in-law and was less attentive to raising the child. As a result, misunderstandings and disputes repeatedly occurred between the couple. This resulted in extrajudicial repudiation. Upon the *talak*, he dropped his wife off at her parents' house. However, she refused the *talak* and forced him to bring the dispute to court. His *talak* petition was accepted. Both parties attended the first hearing. Below is a transcript of the courtroom conversation between the disputants and the judge in the first hearing, which ran very quickly.

Judge: Why do you want a divorce? You are still young.
Plaintiff: No longer suitable.
Judge: You have one child already.
Defendant: I do not want to divorce.
Judge: Well, you should seek a mediator judge to discuss your problems before we resume the trial. Please come back here again [after mediation] next week. I want to hear the result of the mediation.

The disputants left the courtroom to see a mediator judge. They were received by a female judge but she failed to bring them back to their marital union since each party persisted in their respective stances. They reappeared at the second hearing.

Judge: How did the mediation go?
Plaintiff: No reconciliation.
Defendant: No divorce.

Judge: You see, your wife does not want divorce.

Plaintiff: [We are] no longer a suitable couple, sir (*tidak jodoh pak*)!

Judge: Well, that depends on you [if you attempted to preserve the union, you would not say this]. (The judge read the petition to the defendant and she responded to it.)

Defendant: We had a child not long after marriage (by this she meant they were a very suitable couple). We have no problems, no disputes, all is going well. He just dropped me off at my parents. Then I received the court summons a few days later to appear before the court.

Judge: So what do you want?

Defendant: I want to maintain [the union].

Plaintiff: But I have divorced her and sent her back home to her parents sir!

Judge: So you persist [on asking for divorce]?

Plaintiff: Yes sir.

Judge: How about you?

Defendant: No divorce sir!

Judge: Do you have evidence and witnesses who know your disputes?

Plaintiff: Yes.

Judge: Bring the evidence and invite them [to the hearing] next week.

In the next hearing, the defendant was not present but the session continued with the testimony from the plaintiff's part. The judge ordered the clerk to convey the results of the day's hearing to the defendant as well as summon her again to attend the next session. When the couple appeared in the courtroom a week later, the plaintiff told the judge that he and his wife had reached agreement on the settlement of the divorce. At the same time the clerk brought a letter from the defendant, who was absent, stating that she agreed to divorce only if her husband would pay her consolation as well as monthly support for the child. The judge instructed the plaintiff to consider his wife's demand and return once again to court. Both disputants showed up at the next hearing, confirming their settlement of the divorce. The judge questioned the plaintiff about the consolation payment and support for the child. He agreed to pay Rp. 500,000 for the

consolation and Rp. 250,000 for the monthly support of the child. But the judge requested Rp. 1 million for the consolation. After a short negotiation, the plaintiff agreed to this amount, upon which his petition was granted. Two weeks later, the disputants reappeared before the court for the session of pronouncement of repudiation (*pengucapan ikrar talak*) and consignment of the payments.[78]

Before this dispute was brought to the court, the plaintiff told me that he had tried to settle this problem through a non-litigation mechanism. Upon the pronouncement of the extrajudicial *talak*, a representative of each party convened meetings to discuss it, but to no avail. Although the village officials and religious leader (*tuan guru*) were present in those meetings and offered their confirmation that the repudiation was indeed valid, they failed to convince the wife, who kept challenging it. Her husband thus went to the court to lodge a *talak* petition as his wife requested.[79] As the courtroom conversations show, the wife rejected the divorce throughout the first half of the hearings because she did not want divorce but wanted to live with her husband independently from her parents-in-law. She would only accept divorce after being guaranteed that her entitlements and support for the child would be fulfilled by her husband.

The point that I want to raise here is not that the *talak* was approved but that it was contested and how the court opened up the possibility of contestation for women. The power and privilege of men to conclude unilateral repudiation were being questioned. There is no doubt that under *fiqh* and local custom in Lombok extrajudicial *talak* is valid. But this woman still resisted. By disputing the *talak*, she questioned the basic premise of male hegemony in Islamic law and patriarchal culture. Moreover, by submitting this problem to the judicial and litigation processes

[78] Field notes and courtroom observation, February 2, 2011.
[79] Field notes and interview, January 5, 2011.

the wife also maximized her post-divorce settlement, which her husband might have evaded if this matter had not been supervised by the court.

Another area of family law influenced by *fiqh* and patriarchy in Lombok is polygamy. This is a hegemonic domain that women also attempt to subvert. As with customary marriages, which often go unregistered because the social and religious norms accept them, polygamy has to do with the fact that it is not forbidden in Islam although it requires equal justice, which is nearly impossible to fulfill. In the 1970s, Judith Ecklund noted in her ethnographic fieldwork in a village of the central district of Lombok that a marriage could be quickly consummated among a young couple, but divorce could also occur just as easily, often followed by a polygamous remarriage. She ascribed this to Islamic law but also pointed to economic and social status as contributing factors for men to marry more than one woman.[80]

This was the situation a few decades ago. However, even today polygamy has not become extinct. The truth is that it is not as easily available to men as it used to be. Grace's village-based study in rural east Lombok found that marriage, followed by divorce and remarriage, sometimes in polygamous unions, were not uncommon in the 1990s, although women were more critical of it.[81] At one Islamic school in Lombok, as one recent study shows, polygamy became means of spreading Islam by the school founder and leaders, who interestingly enough also offered blessings and supplications for women to shield themselves from being taken as second wives.[82] However, the general attitude of the school community toward polygamy was disapproval. A wife of a male school teacher stirred up violence by embarrassing

[80] Judith Ecklund, "Marriage, Seaworms, and Song: Ritualized Responses to Cultural Change in Sasak Life," *PhD Dissertation* (Cornell: Cornel University, 1977), p. 21.

[81] Jocelyn Grace, "Sasak Women Negotiating Marriage, Polygyny and Divorce in East Rural Lombok," *Intersection: Gender, History and Culture in the Asian Contexts*, 2004.

[82] Bianca Smith, "Stealing Women, Stealing Men: Co-Creating Cultures of Polygamy in a Pesantren Community in Eastern Indonesia," *Journal of International Women's Studies*, Vol. 1, November (2009), p. 189-2007.

her husband in public for his unilateral decision to marry a female student, who was later stigmatized as "stealing other women's men" because she seduced a married man.[83] Despite the fact that the teacher's wife's resistance did not stop him from marrying his female student, such a harsh reaction and the public support for the wife demonstrate a bias against polygamy.

As previously explained in Chapter Two, more clients come to court to resolve their marital disputes in which polygamy is one of the issues than those who seek court approval for polygamy. In this regard, the number of women using the court to claim divorce against their polygamous husbands is much higher than those of men petitioning the court to remarry. Some of these women are co-wives who sue for divorce after being treated unjustly. They were initially amenable to polygamy but later found misery and irreconcilable conflicts with either their husbands or co-wives in the course of their marriages. Other women do not tolerate polygamy and consequently prefer divorce to remaining in the union once their husbands remarry, as the *gugat* case below illustrates.

Case Four: A 30 year-old female peasant appeared before the court to file a divorce lawsuit against her 36 year-old husband. She had been married to him for ten years and had two children. She explained that her household was in trouble. Her husband, who arrived home from working in Malaysia, no longer took care of her and the children in the ways that he used to; he had lost his affection for his family. He often spoke to her with disrespectful language in the presence of their neighbors. Moreover, he married another woman, which the wife could no longer tolerate. As a result, she left him and went back to her parents. The court accepted her claim and initiated a hearing.

[83] *Ibid*., p. 200.

The wife needed three court sessions to have her claim approved since her husband (the defendant) never attended the hearings; however, the trial proceeded relatively quickly. In the first hearing, the wife was asked by the judge to reconsider her decision to divorce but she refused this advice. She was ordered to come back again to the court in a week and produce her evidence as well as two witnesses to offer testimony in case the defendant, who would be recalled again, did not attend. At the second hearing, the defendant was again absent while the plaintiff presented her evidence and one witness, who endorsed her explanation about the household disputes and the reasons for divorce. A second witness did likewise in the following hearing. The judge granted the claim without the defendant's presence (*verstek*), since he missed the hearing twice consecutively.[84]

The reaction that this woman demonstrated to her polygamous husband is parallel to other women's responses to the same issue. In her study of polygamy in Indonesia, Nurmila notes that a common response by her female informants to polygamy is asking for a divorce.[85] They also show a critical view of the Qur'anic verses regarding polygamy. For example, one of the informants in her study regretted that people read only the first passage of the verse that does not forbid men from marrying more than one woman but neglect the last part of the verse, which conveys the important message that no one would be able to uphold justice in polygamy.[86] I did not hear this sort of argument, but this plaintiff displayed a similar attitude toward polygamy. Furthermore, her resistance against the domination of a patriarchal culture that defends polygamy is worth discussing. She struggled harder against this socio-religious and cultural barrier in the village council than in her endeavor to settle the dispute through the court.

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[84] Courtroom observation, December 29, 2010.

[85] Nina Nurmila, *Women, Islam and Everyday Life: Renegotiating Polygamy in Indonesia* (New York and London: Routledge, 2009), p. 80.

[86] *Ibid*., p. 105.

The plaintiff said that prior to her decision to file the claim in court, she and her husband met several times to resolve their dispute. During these meetings, mediated by the head of the hamlet as well as involving four *tuan guru*, her husband expressed his unwillingness to divorce her, arguing that he could maintain her and his other wife justly. Most of the participants in these meetings supported him. They saw no harm in her husband's remarriage since he could afford to support two wives economically and had pledged to remain unbiased toward either of his wives. Therefore, they strongly urged the wife to accept the council's recommendation. However, she rejected the proposal not because she feared for her economic situation, but because she could not share her husband with another woman and live side by side with her co-wife.[87]

She narrated that prior to leaving for Malaysia, her husband asked her permission to remarry. But she did not approve, and would never approve this, threatening instead to leave him if he insisted. Her husband acquiesced and then a few months later went to Malaysia to work there for about two years. Although acknowledging him as a responsible man since he sent money home while working in another country, she noted a drastic change in him since he returned from abroad. What offended her most was that he married another woman without her consent. She immediately left him, although he still attempted to convince her that he would not neglect her. To prove his words, he came to visit and persuade her to return to him but she was not interested. He then sought assistance from the village council, but not from the court, to mediate between him and her. He avoided going to court because he knew that this might lead him into trouble. Through the council he could enforce his views without restriction, and was partly able to compel his wife to accept the arbitration, since that was a medium where male hegemony was enforced and patriarchal ideology was secured. The Lombok village council, like

[87] Field notes, December 22, 2010.

the *Panchayat* in rural India,[88] represented the male point of view since most, if not all, of its members are men. It was thus non-accommodative to women's voices. The wife was aware that the council was not sympathetic to her, nor was it willing to support her in the rejection of her husband's polygamy. This is the reason she switched to the court to overcome such domination.[89]

The judicial divorces presented in this chapter reflect women's resistance against the biases of local interpretations and practices of classical Islamic law (*fiqh*), which fit largely into the local conception of gender and patriarchy regarding marriage, divorce and polygamy among Muslims in Lombok. It should be born in mind that female resistance is not novel. Women have long resisted such hegemony in various ways. Krulfeld showed that although Sasak women do not hold power in the same way as men do, they might show power in different ways to resist against their abusive husbands. For example, wives refused to cook or attempted to embarrass their husbands in public.[90] Since cooking and child rearing are considered essential roles of women in Lombok, and since women are required to obey their husbands (both are relevant to the formulation of gender roles both in *fiqh* and in state laws regarding marital responsibilities and the division of public and private roles), such refusal of domestic responsibilities and the slandering of husbands in public constitute blatant female resistance.

In more recent studies on agency among rural Sasak women in Lombok, Syarifuddin and Platt show that women might leave a conjugal relationship (*ngerorot*) when they are in dispute with their husbands over a particular issue.[91] By leaving their husbands, the conjugal house, and

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[88] See Erin P. More, "Law's Patriarchy in India," in Lazarus-Black and Hirsch (eds.), *Contested State*, p. 89-117.

[89] *Ibid*.

[90] Krulfeld, "Sasak Attitudes," p. 201.

[91] Syarifuddin, *Perlawanan Perempuan Sasak: Perspektive Femenisme* (Mataram: Universitas Mataram Press 2007) and Maria Platt, "Patriarchal Institutions and Women's Agency" (2010).

all household and other domestic responsibilities, women show that they resist what Islamic law and social conventions require them to accept. These forms of resistance reveal women as independent agents, not simply as passive victims of patriarchal law and society. However, it is my argument that although critically resisting male domination through such varied mechanisms, there is no guarantee that women can escape from troubled unions because it is their husbands who traditionally have the power and authority to decide whether to remain with them or to divorce them. In other words, although women may refuse to cook and raise their children, or even leave the conjugal house as a protest against their husbands, they are unable to legally escape marriage if their husbands do not consent to release them. Not until women turn to the state religious court can they challenge such male hegemonic power in ways that traditional agency or resistance do not allow. By doing so, they are able to abandon a troubled union, officially terminating their wedlock. It is against these socio-religious and cultural factors that judicial divorce symbolizes women's resistance.

Such resistance is facilitated by the changes in divorce and marriage law introduced in the modern codes that make men and women equal before the law, although these codes still espouse the spirit of patriarchy and some gender biases. As has been discussed earlier, several provisions of the codes preserve gender hierarchy and elements of patriarchy, and the practices of marriage and divorce in Lombok still reveal non-egalitarian gender relations. Although both state and local legal and religious systems give men certain privileges and endow them with power that women do not enjoy, the law is not a closed system but is open for contestation by various groups of people. The underprivileged and less powerful, such as women, can and do use the state law to challenge local power relations. These paradoxes are reflected in judicial divorces at the local religious court of Central Lombok.

CHAPTER FOUR
COURT DECISIONS, JUDICIAL DISCRETION AND THE REINTERPRETATION OF THE SHARI'A

Religious court decisions in Indonesia offer very important insights about various aspects of Islamic legal discourses and practices. They reveal the limit of law and judges' discretion and the changing approaches of the religious courts to divorce. They also feature reinterpretation of Shari'a law and its integration into the modern codes in Indonesia that provide the normative basis for current judicial divorce practices, such as *talak* and *gugat*. These are the points that will be discussed in this chapter. The first section of this chapter will examine religious court decisions on divorce in order to examine the limitations of the law and the judges' responses to this problem. Modern codification does not always provide detailed provisions on every aspect of law, so this might not be sufficient to solve every legal problem. Nevertheless, judges cannot decline claims or petitions simply because the statutes are wanting; instead, they have to find alternative sources for a ruling. Their willingness to either include or exclude non-state law such as *fiqh* and customary norms (*adat*) in their decisions demonstrates the dynamics of legal pluralism. On the one hand, judges treat state law, *fiqh* and custom as mutually constitutive sources; on the other hand, they approach them as exclusive from one another. Although judges often make reference to *fiqh* when statutes are lacking, they can be very critical of the religious law as well as of customary norms if these are deemed to be against the statutes.

Prior to the promulgation of the modern codification of law that began in the middle of the twentieth century, *fiqh* was applied in the religious courts as the fundamental substantive law. *Fiqh* exerted a strong influence on judicial practices, shaping categories and procedures of litigation for marital disputes and dissolutions. For example, while men could easily petition the

court for the validation of extrajudicial *talak*, second *talak* or third *talak*, women had to struggle through a range of legal mechanisms, such as *syiqaq*, *fasakh*, *taklik talak* and *khuluk* to obtain divorce and sometimes lost their claims. Now the categories and procedures of judicial divorce are standardized on the basis of the gender of petitioners: *talak* for men and *gugat* for women. This reformulation brought about a tremendous impact on judicial practices because men and women could equally exercise their prerogative to dissolve a marriage. The second part of the chapter will examine this issue, analyzing several past court decisions on divorce to trace the evolution of judicial divorce practices and demonstrate that the increase in female divorce (*gugat*) cases had to do with the changing legal approach to divorce.

The last part of this chapter will examine the doctrinal bases of judicial divorce reform. It will show how the state has played an important role in reinstating Shari'a law into its legal and judicial domains. Instead of removing the various categories of Islamic divorce, the state re-interprets them for new meanings and contexts that potentially empower women. Islamic divorces such as *talak*, *khuluk*, *syiqaq* and *taklik talak* will be examined in this section to illustrate how they are reintroduced by the new codes, what new notions are invoked, and how this contributes to changes in judicial divorce. This shows that the reinterpretation of Shari'a law in the context of the state law and judicial system reconstitutes Islamic family law practices in Indonesia both procedurally and substantially.

A. The Limitations of Law and Judicial Discretion

Judges always include in their decisions sources of law or legal references (*dasar hukum*) derived from statutory provisions as justifications for their rulings. This demonstrates that judges

do not issue their decisions arbitrarily in accordance with their own personal whims,[1] but in compliance with a systematic procedure of justice along with reference to the authoritative sources of law. By referring to unified statutes, as opposed to diverse sources of law or unsystematic legal reasoning, judges seek to establish certainty, not ambiguity.[2] But what happens when statutes lack clarity or when the application of their provisions in a particular context might instigate hardship for justice seekers? How do judges respond to this problem? What substitute sources or alternative considerations do they adopt? What is the normative role of judges in adjudication? By examining religious court decisions on divorce, this section will discuss the limitations of the law and judicial discretion. It will show that when statutes are lacking, judges commonly refer to *fiqh* or use commonsense notions of justice and fairness to decide cases. This does not mean, however, that judges refer to *fiqh* more than state codes, such as the Compilation of Islamic law. Rather, it suggests that religious law remains a useful and important although secondary resource for judges to settle legal disputes at religious courts.[3]

[1] This is Weber's critique on Islamic law. He said Islamic law is unsystematic, irrational and backward because there is no fixed procedure as to how Muslim judges make their decisions. This critique is no longer relevant to the contemporary practices of Islamic law at the religious courts in Indonesia. On the critiques on Weber's thesis, see Lawrence Rosen, *The Justice of Islam: Comparative Perspective on Islamic Law and Society* (Oxford: Oxford University Press, 2002) and Michael G. Peletz, *Islamic Modern: Religious Courts and Cultural Politics in Malaysia* (New Jersey: Princeton University Press, 2002).

[2] As Lev notes, upon Indonesian Independence critiques were often directed against legal and judicial pluralism since they might create ambiguity, arbitrariness, or uncertainty. Therefore, judicial unification and codification of law were advocated by the government. It was for this reason too that the state finally eliminated *adat* courts in the 1950s because *adat* confirmed the primacy of diverse ethnic and cultural practices and local powers that could endanger the newly born nation-state of Indonesia. See Daniel S. Lev, *Legal Evolution and Political Authority in Indonesia* (The Hague: Kluwer International Law, 2002), p. 55-70.

[3] Sumner and Lindsey argue that "the Religious Courts have consistently maintained support for the state's Pancasila nationalism and interpretation of shari'a that is based not on the traditional sources of Islamic law, the Qur'an, *hadith* (traditions of the Prophet Muhammad) and traditional *fiqh* (Islamic jurisprudence), but on state legislation, even if that is in conflict with the traditional sources." See Cate Sumner and Tim Lindsey, *Courting Reform: Indonesia's Islamic Courts and Justice for the Poor* (New South Wales, Australia: Lowy Institute, 2010), p. 10. I would say that their contention would be most relevant with respect to divorce since the new regulations and procedures of divorce introduced by the state are in many ways in sharp opposition to those of *fiqh*. However, in general *fiqh* is still referred to by judges when giving decision on divorce and other cases when state law is lacking or ambiguous.

Post-colonial Indonesian legal and judicial systems inherited to some extent the Dutch civil law.[4] In this system, codified statutes constituted the source of law, to which judges must refer when deciding cases. Theoretically, judges were not allowed to issue a decision that contravened the positive law; their decisions had to match the statutory provisions. But when state law was lacking or when its application might in a particular situation create severe hardship for claimants, judges would inevitably use their own discretionary power of legal reasoning to find a relevant ruling. According to my informant judges, judges today hold three main roles in adjudication.[5] The first role is that they are to apply (*menerapkan*) the existing statutes. Judges are supposed to single out the relevant rulings or provisions from the codified law and deploy them in the cases being examined. The second role is that judges have to reinterpret (*menafsirkan*) the law if it does not clearly offer explicit stipulations on a particular issue or if the application of the law may cause a hindrance for justice seekers. Alternatively, they may use their own reasoning and discretion to discover (*menemukan*) a relevant ruling.[6]

The Lack of Statutes

The lack of law does not justify judges to decline cases filed before them for resolution; they are required to dig up "living law," unwritten conventions, mores, religious norms and the like, that exist in society to resolve legal cases. Judges may not reject a filed case on the grounds that no law or code exists about the case. If such a filed case is provided with valid evidence and witnesses as well as supported by convincing arguments, judges must proceed to trial.[7] In other words, in theory hardly any claim is rejected because of the lack of the law's clarity.

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[4] Tim Lindsey and Mas Achmad Santosa, "The Trajectory of Law Reform in Indonesia: A Short Overview of Legal Systems and Change in Indonesia," in Tim Lindsey (ed.), *Indonesia: Law and Society, 2n Edition* (New South Wales, Australia: The Federation Press, 2008), p. 2-3.

[5] Field notes and interview, January 10, 2011 and June 8, 2011.

[6] This suggests that contemporary Islamic law practices feature parts of civil and common law systems, although in the early period Islamic law was best defined as juristic law. See Knut S. Vikør, *Between God and the Sultan: A History of Islamic Law* (Oxford: Oxford University Press, 2005), p. 4-11.

[7] Religious Judicature Act 7/1989, Article 56.

Consequently, judges have to engage in deliberate efforts of legal reasoning (*ijtihād*) to classify cases, verify claims and mete out justice, even if the existing code does not provide enough grounds for a ruling.

A large number of *gugat* cases are decided in accordance with the existing codified statutes because the scope and nature of these cases mostly match the provisions of the statutes. Judges do not have to struggle to find a ruling. They may even order clerks to formulate and type the decisions, especially if similarities exist among cases. In this regard, judges only provide a general guide for clerks to compose a decision. As a result, court decisions on divorce display a common pattern not only in language and structure, but also in precedent, especially if divorce cases bear the same causes of dispute. For example, most of the court decisions on *gugat* from Lombok cite Shaikh Muḥyiddīn's view in his work *Ghāyat al-Marām* stating, "If a wife's resentment toward her husband increases exceedingly, a judge may effectuate her husband's repudiation of her [if she asks for this]."[8]

Despite such common patterns, judges might encounter a complex case, which requires deliberate examination because the statutes are lacking or because the nature of the case is very complicated. They must attempt to find justification, arguments, and alternative justification from sources other than the statutes. The question is what sort of precedent or considerations are judges willing to adopt to endorse their decisions and why? The following examples illustrate how judges deal with this question.

[8] When I asked a young judge about this work, he said that neither he nor the other judges possessed this book. Even when searching for the title and the author of this work in *Kitāb al-Shāmila*, a collection of classical juridical works, this young judge did not find it. When he asked senior judges, they said that they adopted this opinion from their predecessor judges without verifying the original source. Interview, November 25, 2010. This suggests that judges may copy from previous decisions blindly to issue their own decision due to similar patterns and scope of a dispute.

Case One: A 37 year-old housewife approached the religious court of Giri Menang, West Lombok, to sue for divorce against her 42 year-old husband. She explained that she married him in Saudi Arabia in 1994 after she met him when they were there as migrant laborers. Due to the hardship of presenting her family guardian (*wali nasab*) at the time of the marriage, her brother on behalf of her family, relegated his authority to a man in Saudi Arabia to act as the substitute guardian (*wali hakim*) to conclude the plaintiff's marriage. The litigants consummated their marriage although the marriage was not recorded, so they had no official marriage certificate.

One year into the marriage, the wife returned to Lombok while her husband followed one year later in 1996. After living together for years with three children, the couple faced economic problems because they did not have a regular income since returning from abroad. Conflicts emerged accordingly as the husband, the breadwinner, failed to provide adequate support for his family. To generate more income, he resumed working in Saudi Arabia. While working there, he married another woman. This marked a new level of the conflict. When the plaintiff moved to join him in Saudi Arabia, he did not take care of her since he lived and spent most of his time with his new wife. In 2007, the husband and his second wife returned to Lombok while the plaintiff remained abroad until 2010. Upon her return, she turned to the court to settle her marital disputes, demanding legalization of her marriage and asking for divorce.

The court accepted her claim and opened a hearing. The defendant was summoned to attend the hearing but he never responded. Meanwhile, to substantiate her claim, the plaintiff produced proof of residence and two witnesses. The first witness, the plaintiff's brother, testified that the disputants married in Saudi Arabia in 2004, but he confirmed that he did not know the substitute marriage guardian. He told the judge that the plaintiff informed her mother about her marriage but she neither asked for a family guardian nor revealed her substitute guardian to her

family. Furthermore, this witness acknowledged that the disputants' household was in trouble due to lack of economic support and the defendant's second marriage. He also affirmed that the defendant had not supported the plaintiff for five years. This was also more or less the testimony offered by the second witness. Here the judge was most concerned with the marriage guardian because none of the witnesses acknowledged knowing the guardian. How did the judge deal with this issue? What did the existing code say about this? What was the judge's legal basis (*dasar hukum*) and argument to decide the claim?

The judge wanted to make sure that the marriage was valid. This was the first point to clarify. If the marriage was invalid from the point of view of Islamic law, then the divorce that the plaintiff sought could not be granted because the marriage itself was legally defective. In his consideration, the judge argued that the appointment of a guardian through the delegation of authority (*taḥkīm*) by the bride (the plaintiff) to another man was neither explicitly recognized nor forbidden by the statutes. The Compilation of Islamic Law 1/1991, for example, stipulates that a "substitute official guardian (*wali hakim*) can only act as a guardian provided that the family guardian (*wali nasab*) is unavailable, unable, or reluctant to conclude the marriage."[9] *Wali hakim* refers to a male guardian who is officially appointed by a *hakim* (the government or judge) to conclude the marriage for those whose family guardian is unavailable or unwilling for one reason or another to conclude the marriage. The situation in Saudi Arabia limited the plaintiff's access to her family guardian and thus allowed her to have a substitute official guardian. As the first witness did not know or formally delegate his authority to a particular person to be the substitute guardian, then either the plaintiff herself or someone else of her non-kin or family members had assigned an arbitrary *wali* for her. Does this break the law?

[9] The Compilation of Islamic Law 1/1991, Article 23.

The judge suggested that the plaintiff did not necessarily transgress the law. To endorse this decision, he provided sound legal grounds and mentioned this explicitly in his decision. Because he did not see a sufficient explanation about this matter in the statutes, he searched for alternative sources. He found a relevant opinion from two Muslim jurists, al-Shāfi'ī (d. 820) and al-Qurṭubī (d. 1288), as quoted by Sayyid Sābiq (d. 2000) in *Fiqh al-Sunnah*. These scholars contended that it was permissible for a woman herself to appoint a trusted man to be her own marital guardian in a situation where a family guardian is not available and an official substitute guardian cannot be acquired easily. By adopting this view, the judge suggested that the status of the plaintiff as a female migrant laborer might have inflicted hardship upon her and prevented her from finding an official substitute guardian from either the Saudi Government or the Indonesian Embassy. As these earlier jurists maintained, such a condition allowed the plaintiff to assign herself a guardian to officiate her marriage. This opinion served as alternative grounds for her action. The judge perceived these jurists' opinion as the most relevant basis on which to justify the plaintiff's marriage and thus to authenticate it.

Once this issue was resolved, the judge moved to examine the demand for divorce. The plaintiff produced her proof of residence and two witnesses, who testified to the causes of the marital disputes. This was sufficient evidence for the judge to grant the divorce. Furthermore, the defendant's absence from the court session not only gave the judge the impression that he was at fault for instigating the trouble but also accelerated the speed of the trial. The judge authenticated the marriage and approved the divorce in three consecutive hearings.

In general, judges tend to approve petitions of marriage legalization so long as the petitioners produce strong evidence and no objection is proposed by third parties about the marriage. As I discussed in Chapter Two, for the sake of public interest, the court might accept

after the fact petitions of marriage legalization. It is for this reason that this judge was willing to search for an accommodating view and alternative provision from *fiqh* to be applied to this case rather than to question the validity of the marriage because the status of the guardian was not verified. Indeed, the judge might have doubted the validity of the marriage and then disqualifed it, since one of its fundamental conditions was in question. In fact, religious courts can annul a marriage (*pembatalan nikah*) according to Articles 70-76 of the Compilation of Islamic Law. Article 71, for example, states that a marriage can be annulled if the guardian is not qualified to conclude a marriage.[10] Since the guardian of this marriage was not recognized by the witnesses, his position was problematic. The first witness even denied having given his authority to the guardian, as the plaintiff asserted in her claim. Hence, the information about the guardian given by the plaintiff in her claim—where her brother was said to have delegated his authority to another man to officiate her marriage—was fabricated. These facts alone could have been enough for the judge to disqualify the marriage or at least turn the claim down. But the judge disregarded this. Instead of questioning the legality of the guardian, the judge was more interested in searching for an authoritative precedent from Muslim jurists that could be used as justification for the appointment of a marriage guardian so he could authenticate the marriage.

This case illustrates the use of *fiqh* as a source of law. The judge may base his decision on the religious law when state codification is lacking. It is thus too simplistic to say that classical Islamic jurisprudence is symbolic or is thoroughly replaced by the modern codes of judicial practices at the religious courts. *Fiqh* often serves to fill the gap of statutes and the lack of precedent that the modern codification creates. A second case below illustrates a similar pattern. In this case, the judge also turned to *fiqh* when adjudicating a woman's claim for past

[10] *Ibid*. Article 71 [e] states that a marriage without a guardian [for the bride] or is concluded by an unqualified guardian is invalid.

unpaid support (*nafkah lampau*) because he did not find any relevant precedent for this in the statutes.

Case Two: A 36 year-old woman appeared before the religious court in Mataram to petition for a divorce. She sued her husband, a 36 year-old court clerk, because he neglected her for years without sufficient support. She explained that even though she loved her husband, he did not really love her because he was married (*dijodohkan*) to her by his parents. She narrated that upon the marriage in 2000 she followed him to Kupang, East Nusa Tenggara, where he was appointed as a court clerk, and lived there for two years. When she became pregnant, she returned to Lombok to deliver the baby upon her husband's request. A few months after giving birth at her parents-in-law's home, she brought the baby to Kupang. When she became pregnant a second time, her husband again demanded that she give birth in Lombok because her family and relatives could assist her in taking care of the baby. She obeyed. While her husband remained in Kupang, in 2004 she moved to Mataram to stay with her parents. She and her husband lived apart and rarely met since that time and this situation continued until 2008. During the course of this separation, she only received support for the first twelve months because her husband suddenly quit sending her an allowance in 2005. Because there was no certainty as to how the dispute would be settled, she turned to the court to petition for a divorce.

She proclaimed that during the five years living in Mataram after the birth of the second child, her husband only provided support for one year at Rp. 300,000 per month (or Rp. 3,600,000 for the total amount) in 2004. She stated that the amount was not sufficient to support her and her two children. She thus filed a Rp. 1,000,000 per month back maintenance claim. She calculated that the total amount of her unpaid support was Rp. 60,000,000 for five years (2004-

2008). Since her husband had already given Rp. 3,600,000, he had to pay the difference, which was Rp. 56,400,000. She included this amount in her claim. In addition, she also demanded 40 per cent of her husband's salary for the support of the two children until they became independent economically. She also asked for the right to raise the children alone (*hak asuh anak*). The court accepted the claim and opened a hearing for her.

The defendant never attended the hearing, even though he had been summoned by the court. The plaintiff produced her proofs of residence and marriage and her children's birth certificates as well as a letter of approval of divorce from her office, since she was a state employee. She also presented two witnesses, who used to be neighbors and worked at the same office as her husband in Kupang. The first witness informed the judge that he knew that the litigants' marital union was in trouble but was unaware of the actual cause of the conflict. He told the judge that the disputants rarely communicated with each other. He heard rumors that the defendant had become engaged to another woman. One day he was told by the defendant's superintendant that the defendant once asked permission for two weeks leave to visit his wife and family in Lombok. But it was revealed later, he added, that the defendant never returned home but was heading toward Java to accompany his girlfriend. This witness was told by the defendant that he never loved his wife (the plaintiff) but his parents compelled him to marry her. He testified that the defendant was a state employee with Rp. 3 million gross monthly salary. The second witness offered similar information but added that she did not see the defendant when visiting the plaintiff after she had the first baby. The witness was told by the plaintiff that her husband did not take care of her anymore and was dating another woman. Because the defendant never attended the hearing nor sent his legal representative, the judge concluded the trial without his presence (*verstek*).

Based on her examination of the evidence, the written documents and the testimonies, the judge (a woman) found that the disputant's marriage was broken. The long separation between the plaintiff and the defendant had induced conflicts between them. This, the judge argued, was not the model of marriage that the law envisioned. Quoting Article 1 of Marriage Law 1/1974 and Qur'an 30:21, the judge asserted that the objective of marriage was to establish a happy (*mawaddah*), blessed (*rahmah*) and tranquil (*sakinah*) family. The disputants failed to achieve these legal and moral objectives of marriage. Therefore, the judge contended, there was justification to grant the divorce because the disputants' marriage had lost its meaning and purpose and because there was no point in maintaining the household, which was broken in such a way that it was not possible to reconcile the conflicting couples. The judge then moved on to consider the claim of unpaid support.

The judge argued that "in principle, according to the law a husband remains required to give support to his wife even though the support passes unfulfilled." In other words, because there is no expiration date of support, a husband would still have to provide support for his wife even if he had been in arrears for a long period of time. To uphold this argument, the judge quoted three Muslim jurists' views; all were Shāfi'i jurists. The first view was taken from Abū Isḥāq Ibrāhīm al-Shirāzī (d.1092), the author of *al-Muhadhdhab*, who stated, "If a wife is not disobedient [to her husband], she is entitled to support. If the support passes unfulfilled, it becomes a debt [for the husband] which will never cease even though time goes by." The second opinion was derived from Ibrāhīm ibn Muḥammad al-Bājūrī (d. 1890), the author of *Ḥāshiyāt Kifāyat al-Akhyār*, who stated, "If a husband prevents his wife or wives from receiving her/their rights, such as the division of alternating nights (in polygamous marriage) and support, a judge can force him to fulfill such rights if his wife/wives demand it." The third opinion was from

I'ānat al-Ṭālibīn fī Shaḥ Fatḥ al-Mu'īn, authored by Muḥammad Syatā Dimyāṭī, which affirms, "It is obligatory [for a husband] to provide one *mudd*[11] of food per day [to his wife as substitute or compensation] if she does not eat next to him."

Furthermore, the judge stated that the defendant's absence in the court sessions did not exempt him from liability regarding his due support. Although he never attended the hearings, the defendant sent a notification informing the judge that he could not afford to pay the amount claimed by his wife. This proved, the judge argued, that the defendant did not deny the fact that he had ignored his family but simply expressed his objection to the claim. Therefore, based on *fiqh* precedent as well as on the defendant's negligence, the judge ordered the defendant to pay Rp. 300,000 per month for the entire unpaid support. This totaled Rp. 15,000,000 that the defendant had to fulfill.

As for the claim of support for the children, the judge stated that according to the Compilation of Islamic Law, especially Article 105, fathers bear the responsibility for providing support for their children. It affirms that should divorce occur, children can determine by themselves with which parent they would live. If they have not reached twelve years of age, then the mother will raise them while the father is responsible for their maintenance. Since the defendant was a state employee with a regular monthly salary, the judge required him to pay Rp. 750,000 per month for the maintenance of the two children. So the total monthly amount the defendant had to pay was Rp. 1,050,000. In addition to this maintenance award and child support, the judge assigned the plaintiff the right of custody.

Here we see how the judge decided the claim, basing all relevant rulings on the statutes except for the claim of past unpaid support. From the judge's point of view, neither the Marriage Law nor the Compilation of Islamic Law specifically mandates past support to be paid to a wife

[11] One *mudd* is roughly equal to 0,75 liters.

that initiates divorce. The Compilation of Islamic Law, for example, stipulates that the children's maintenance will be incurred by the father, while the mother reserves the right to nurture children under twelve years old upon divorce. However, it does not stipulate past spousal support owed to wives seeking divorce.[12] The Compilation does prescribe male financial responsibility upon repudiation, however. It stipulates that upon the approval of the *talak* petition, men are required by law to provide consolation (*mut'ah)*, alimony (*nafkah*), living allowance (*maskan*), and clothing (*kiswah*) for their wives during their *iddah* (waiting period) over three menstrual cycles.[13] However, the statutes do not specify any settlement and arrangement should divorce occur at the wife's request. Despite the absence of full legal precedent, this judge, as this divorce case demonstrates, still awarded the female plaintiff payment of her past unfulfilled support.

In her consideration, the judge argued, "According to law, spousal support is essentially never due so long as it has not been given by the husband" (*pada dasarnya menurut hukum, seorang suami diwajibkan untuk memberikan nafkah kepada istrinya meskipun telah lewat waktu*). What the judge meant here was that neither state law nor customary law but *fiqh* provides legal grounds for back maintenance claims. This suggests that *fiqh* remains a relevant source of law when the codes are silent. Moreover, this and the previous divorce case reveal that *fiqh*, which in many respects espouses patriarchal elements and gender biases, can in fact still be used to empower women's legal status and social position. These two cases demonstrate that religious court judges tend to look for *fiqh* stipulations as the bases to examine divorce claims when state law is lacking.

[12] Article 41 (c) of Marriage Law 1/1974, for example, offers only a very general explanation of the consequences for spouses after divorce. One of these is that the court may oblige the former husband to provide maintenance or any other relevant arrangements for his former wife. Interestingly, the judge did not quote this provision.

[13] The Compilation of Islamic Law 1/1991, Article 149.

Dynamics of Legal Pluralism: Statutes, Fiqh and Customary Norms

However, in other divorce cases, judges may be very critical of *fiqh*, custom and social norms if these are contrary to state law, as the following divorce case illustrates. I have already discussed this case in Chapter Two regarding the pattern of the litigants' reasons and strategies of divorce. Here I am concerned with another aspect of the case: the relationship between custom, *fiqh* and state law as reflected in the court decision on the following divorce lawsuit. I have shortened the narrative and focused my comments on the complex relations between state law, *fiqh* and custom that this case reveals.

Case Three: A 17 year-old housewife petitioned for divorce to the religious court of Central Lombok. She explained that her husband, a 25 year-old coolie, failed to support her properly and was an indignant person, and that he used to beat her. Furthermore, her parents-in-law did not like her and often intruded upon her household. Due to continuous conflicts in her household, she was repudiated by her husband and sent back home to her parents. Four months later, she turned to the court to file her divorce claim. The court accepted her claim and opened a hearing. The disputants attended the first hearing and accepted mediation but failed to compromise. The defendant refused the claim, saying that apart from arguing with each other, he neither hit his wife nor repudiated her when sending her back; he only meant to place her temporarily with her parents. He asserted that he would never divorce the plaintiff unless she paid him Rp. 5,000,000 compensation. The plaintiff rejected his demand. She then presented two witnesses. One of them, her father, confirmed that the defendant did repudiate his daughter when he sent her home. Her other witness testified that the defendant's parents disliked the plaintiff, which incited conflicts among them. The sole witness for the defendant, his own father, informed the judge that the

conflict between the disputants had intensified after the plaintiff established a relationship with another man. After examining the evidence and the witnesses from each party, the judge approved the claim of divorce and overturned the defendant's counterclaim.

There are several important points in this case from which we can examine the relationship between state law, *fiqh* and customary norms. The first point is that judges apply state law strictly, even at the expense of *fiqh* and customary law. Part of the reason for the judge's rejection of this defendant's counterclaim was because the judge upheld strictly the formal procedure of litigation (*hukum formil/acara)*. The procedure required that testimony be given by two witnesses.[14] But the defendant only produced a single witness. The judge was not so much concerned with the substance of the testimony as with how it was offered and whether this fit the formal procedure of litigation. Other cases confirm this pattern of strict application of the procedure of law. In Case Five in Chapter Two, for example, the judge overturned the female defendant's counterclaim for her unpaid *mahar* because she failed to produce a written official document, which was required by the law to support her counterclaim, although she brought two witnesses. According to the judge who handled this case, written documents are stronger than testimony. Therefore even though this female plaintiff produced two witnesses who confirmed her unpaid *mahar*, her claim was not approved by the judge because she was unable to produce written official documents; her *mahar* was not mentioned in her marriage certificate. Similarly, in the present case, the male defendant failed to present two witnesses so the judge denied his counterclaim.

These two cases show that the formal procedure of litigation (*hukum formil*) is strictly enforced. This is an instance where state law is in conflict with *fiqh* and social norms. Under the

[14] In his decision, the judge stated that the defendant's sole witness did not meet the minimum requirement of evidence because according to the law a single testimony amounts to nothing (*unus testis nullus testis*).

local interpretation and practice of Islamic law and custom regarding marriage and divorce in Lombok, documentation is not emphasized; oral tradition and witnesses are deemed more than enough evidence for marriage. In fact, a large number of Muslim marriages in Lombok are conducted without proper documentation. The judges' rejection of the defendants' counterclaims in these two cases demonstrates how judges strictly follow the formal procedure of litigation at the expense of the religious law and social norms.[15]

The second point in this case is that certain elements of customary norms or social practices are not accepted by judges when they are seen to contravene *fiqh.* As this case shows, the judge dismissed the compensation sought by the defendant because this was a sort of extortion, which had no legal basis whatsoever. I noticed that several male defendants requested ransom from their wives seeking divorce, but none was approved. Male defendants often ask for compensation when sued for divorce, especially when their wives have recently returned from working abroad. Such compensation may also be proposed by men if they paid a high price of *pisuka* (wedding expenses charged to the groom), or when the practice of asking for money prevails in the village where the disputants originally came from, as in this case.[16] But judges rarely approve such demands because these are different from *khuluk*, which is sanctioned by Islamic law. According to the judges, *khuluk* in accordance with the prescription of *fiqh* is a divorce initiated by a wife where she forfeits her entitlement of support or returns her *mahar* to her husband to release her from the union. The compensation is agreed upon by the wife, not proposed by the husband. The correct procedure, the judges explain, is that the wife proposes

[15] According to one judge, a claim of petition will not be accepted (*tidak diterima*) if it does not follow the formal procedure of litigation (*hukum formil*). This is not because of the lack of substantive law; however, if this happens, judges may still consider alternative sources of law to fill the gap. Interview, November 22, 2010.

[16] A man, who claimed to be the plaintiff's suitor, told me that the defendant demanded the plaintiff pay Rp. 5 million compensation because this is the convention in their village. Any party initiating divorce must compensate his/her spouse at least Rp. 5 million. Interview, January 5, 2011.

compensation while the husband accepts, not vice versa because this might resemble extortion. However, the judges do not immediately reject a male defendant's request for compensation but first confirm with the female plaintiffs whether or not they have conceded. Since most, if not all, female plaintiffs refuse to honor the divorce compensation proposed by their husbands, such demands are rarely approved by the judges. Because such demands are not sanctioned by Islamic law, this refusal illustrates how the judges invoke Islamic law to override customary norms. A similar pattern also occurs in inheritance cases, where judges uphold *farā'iḍ* (estate division according to Islamic law) and overlook local practices of estate division.[17]

The third point this case discloses is that judges may reject *fiqh* and customary norms altogether because these are contrary to state law. This judge did not consider the cultural significance of delivering wives home to their parents as a valid religious-cultural practice of divorce for Muslims in Lombok. As the narrative of this divorce reveals, the plaintiff contended that she was repudiated when her husband dropped her off at her parents. A few months later, she established a new relationship with another man, apparently upon the end of her waiting period.[18] But in the judge's eyes, divorce did not occur, even though this was how the people perceived it. In contrast, after being informed by the defendant about the plaintiff's current relationship with another man, the judge admonished the plaintiff, saying, "You are still the valid and legal spouse of the defendant, so you have to leave [the man whom you are currently living with]."[19] The judge was uninterested in examining *mengantar istri pulang* (sending the wife to her parents), not because he did not understand this norm as an outsider; indeed, this judge was

[17] See again the case of inheritance discussed in Chapter Two. However, since joint property (*gono-gini*), a customary practice regarding the division of spousal property upon divorce which is not known to *fiqh*, is accommodated into the Compilation, state law can adopt custom in some cases.

[18] It seemed to me that four months after her *idda* was over the plaintiff had unofficially married her suitor, who implicitly stated this to me.

[19] Field notes and courtroom observation, December 21, 2010.

an indigenous Sasak, who was very familiar with local practices such as this. However, he insisted that this could not be regarded as divorce because divorce is only legally binding after being approved by the court.

The judge disregarded this cultural norm. The expression of *mengantar istri pulang* is a very common form of extrajudicial divorce in Lombok. In the discourse of *fiqh*, this can be classified as *kināya* (allusive, implicit) as opposed to *ṣarīḥ* (clear, explicitly stated) divorce, especially if a husband does not verbally pronounce his *talak*.[20] But in most instances, husbands send their wives home to their parents only after repudiation. So either way, this practice can be admitted as divorce under *fiqh*. The judge's response to this type of divorce demonstrates how on the basis of state law he rejected recourse to *fiqh*, which acknowledges the validity of extrajudicial repudiation as well as local norms that sanction *mengantar istri pulang* as a valid procedure and occurrence of divorce. Here state law, religious law and culture all collide.

What the three divorce cases in this section underscore regarding the limit of law, judicial discretion and the place of customary norms and *fiqh* as bases of legal discretions, is that legal pluralism in Indonesia is limited and that the relations between *fiqh* and customary practices on the one hand and between *fiqh* and state law on the other hand are quite varied. Although judicial reforms have been introduced and new codes have been promulgated, parts of the religious law and customary norms are still accommodated by judges, except those that relate to extrajudicial divorce. This holds true especially if codified law is lacking. Prior to the introduction of state law and court reform, which began only a few decades ago (1970s), *fiqh* was the main substantive law in the religious courts. Because *fiqh* had been established with such deep historical roots in the religious courts, its position was not easily replaced by the codes. Nurlaelawati notes in her

[20] In the classical Islamic legal discourse, an implicit statement or action is binding if it is intended to be so. See Paul S. Powers, *Intent in Islamic Law: Motives and Meaning in Medieval Sunni Fiqh* (Leiden: Brill, 2006).

study that when judges turn to *fiqh*, they identify the religious court as distinctly "Islamic," distinguishing it from other courts.[21] This means that there has been an ideological persistence, not simply a legal aspiration, to defend *fiqh*.

This persistence applies to customary norms as well. Nationalization and unification of the law has integrated some elements of customary law into statutes. Joint property (*gono-gini*) is one example in this respect.[22] Another is the social ethics regarding the maintenance of litigants' privacy in divorce.[23] However, certain elements of *fiqh* and *adat* may not be accepted if they are seen as opposing state law. The judges' refusal to recognize extrajudicial divorce, expressed in the local practices of *mengantar istri ke orang tuanya*, confirms this thesis. However, on the whole, the position of *fiqh* seems to be less affected than that of *adat* in the modernization of the law and court procedure in Indonesia. While *adat* courts have been liquidated,[24] religious courts are maintained and modernized, even though they are now fully supervised by *Mahkamah Agung* (the Supreme Court), which is secular. While the judges might reject a local convention of inheritance allotment, they would still look to *fiqh* references that do not deviate from state law to endorse their decision on inheritance cases.[25]

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[21] Euis Nurlaelawati, *Modernization, Tradition and Identity: The Kompilasi Hukum Islam and Legal Practice in the Indonesian Religious Courts* (Amsterdam: Amsterdam University Press, 2010), p. 222.

[22] Compilation of Islamic Law 1/1991, Article 85-97. However, joint property is still found among the societies with bilateral kinship systems, such as the Javanese. The accommodation of this custom into state law thus does not necessarily represent the *adat* of patriarchal societies, such as the Sasaks of Lombok and the Bataks of North Sumatra.

[23] Religious Judicature Act 7/1989, Article 80 (b).

[24] For further discussion on this topic, see Lev, *Legal Evolution*, p. 55-65.

[25] See again the example of inheritance claim discussed in Chapter Two, section B. On other examples of inheritance cases where judges disregard customary patterns of inheritance division at the expense of state law, see Erman Rajagukguk, "Pluralisme Hukum Waris: Studi Kasus Hak Wanita di Pulau Lombok Nusa Tenggara Barat 2010" (the article was downloaded from this site http://ermanhukum.com/Makalah%20ER%20pdf/Pluralisme%20Hukum%20Waris%20Lombok.pdf). This also happens elsewhere in Indonesia, such as among Muslims in Aceh and among Christians of Batak, North Sumatra. See John R. Bowen, *Islam, Law and Equality in Indonesia*: *An Anthropology of Public Reasoning* (Cambridge, UK: Cambridge University Press, 2003), especially Chapter One, and Sulistyowati Irianto, "Competition between State Law and Customary Law in the Courtroom: A Study of Inheritance Cases in Indonesia," *Journal of Legal Pluralism and Unofficial Law*, 91 (2004), p. 91-112.

According to Ratno Lukito, because the direction of national policy moves toward legal unification, *adat*—which is purely local and symbolizes plural norms and values of different ethnicities and societies—is more susceptible to reform than *fiqh*, which is less plural in Indonesia since the majority of Muslim are followers of the Shāfi'ī school.[26] In other words, unification of law reduces the chance for *adat* accommodation significantly more than *fiqh* due to the diversity of *adat*, which does not fit the ideal of uniformity. While *adat* is unlikely to be unified, the Compilation of Islamic Law is in part an effort to codify *fiqh,* and the enactment of Religious Judicature Act 7/1989 approves the idea of "the Indonesianization of Islamic law," rather than "the Islamization of Indonesia."[27] Thus both *adat* and *fiqh* are not allowed to trespass the ideology of state nationalism and unity. Moreover Lukito, like many others,[28] suggests that the position of *fiqh* remains stronger than that of *adat* since *fiqh* supports the principle of political unity.[29] However, in general, he underscores that "at the practical level, the claim of legal modernity, with uniformity as its core ideology, cannot fully work since official state law has limits when the real domestic situation nourishes legal pluralism. The history of law in Indonesia can thus be described as predominantly a continuing encounter between the idea of legal uniformity and the fact of plurality."[30]

Due to the existence of plural laws and customs, legal unification cannot be fully realized without the state abrogating certain provisions of *fiqh* and customary practices. Although the

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[26] See Ratno Lukito, *Legal Pluralism in Indonesia: Bridging the Unbridgeable* (London and New York: Routledge, 2013). On a different perspective about *adat*, see Jamie S. Davidson and David Henley (eds.), *The Revival of Tradition in Indonesian Politics: The Deployment of Adat from Colonialism to Indigenism* (London and New York: Routledge, 2007). This book focuses on the growing use of *adat* in the post-Reform era of 1998, analyzing both positive and negative impacts on Indonesian social and political practices. One major problem with the revival of *adat* is that it could threaten Indonesian unity and potentially encourage inter-ethnic conflicts.

[27] Mark E. Cammack, "Indonesia's 1989 Religious Judicature Act: Islamization of Indonesia or Indonesianization of Islam?" in Arskal Salim and Azyumardi Azra (eds.), *Shari'a and Politics in Modern Indonesia* (Singapore: ISEAS, 2003), p. 76-95.

[28] See, for example, Arskal Salim and Azyumardi Azra, "Introduction: The State and Shari'a in the Perspective of Indonesian Legal Politics," in Salim and Azra (eds.), *Shari'a,* p. 1-16.

[29] Lukito, *Legal Pluralism,* p. 201.

[30] *Ibid*., p. 198.

introduction of the Marriage Ordinance of 1974, Religious Judicature Act of 1989 and Compilation of Islamic Law of 1991 have brought about changes in Islamic law and its legal practices in the religious courts, these did not result in a total eradication of *fiqh* and customary norms. As Welchman argues, "the relationship between the judiciary and the text remains dynamic; judges sometimes fill the gaps left by legislation, at other times they display antagonism to certain legislative interventions and at yet others their remedies to particular issues pre-date legislative attention and may inform the substance of subsequent legislation."[31] It is therefore the case that when legal provisions are lacking and when the adoption of the law may cause injustice, judges will search for alternative legal grounds.[32] What I would like to further draw from this issue is the existence of various models of accommodation, conflict, and tension caused by legal pluralism in Indonesian religious courts. The relations between *fiqh*, as well as customary practices, *vis-à-vis* state law in the religious courts are not uni-directionally linear but varied and complicated.

Based on the divorce cases in this section as well as on other cases discussed in the previous chapters, there are various patterns of relationship between state law, *fiqh* and customary norms. First, *fiqh* and state law may be mutually exclusive, which results in the rejection of *fiqh*. Extrajudicial divorce and triple divorce are the best examples in this regard. *Fiqh* stipulates that divorce by male repudiation takes effect even if it falls out of court. This is also what *adat* social norms in Muslim societies, as in Lombok, hold. Conversely, state law requires divorce to be concluded and agreed upon by judges before the court. This is the area

[31] Lynn Welchman, *Women and Muslim Family Laws in Arab States: A Comparative Overview of Textual Development and Advocacy* (Amsterdam: Amsterdam University Press, 2007), p. 52.

[32] Judicial discretion happens everywhere. On this issue in Morocco, see Lawrence Rosen, "Equity and Discretion in a Modern Islamic Legal System," in *Law and Society Review*, 5 (1980-1): 217-245; in Palestine, see Nahda Shehada, "Justice without Drama: Enacting Family Law in Gaza City Shari'a Court," *PhD Dissertation* (The Hague: Institute of Social Science, 2005); and in Tunis, see Maaike Voorhoeve, "Judicial Discretion in Tunisian Personal Status Law," in Maaike Voorhoeve (ed.), *Family Law in Islam: Divorce, Marriage and Women in the Muslim World* (London and New York: I.B. Tauris, 2012), p. 199-230.

where tension between *fiqh*, along with *adat, vis-à-vis* state law most commonly occurs. In a society where extrajudicial divorce is rampant, such as Lombok, conflicts of legal pluralism are unavoidable. Complying with state law in dealing with extrajudicial divorce may cause state law to negate these norms of custom or *fiqh*.

In addition to extrajudicial divorce, child custody can also be subsumed under this pattern of critical dialectic. One senior judge told me that judges might turn to *fiqh* instead of the state codes to decide claims on child custody.[33] They might issue a decision that contravenes state law. However, I have seen no example of a court decision to prove this statement. This senior judge's view is similar to those of other judges' exposed in Nurlaelawati's research.[34] They claim that *fiqh* offers variant stipulations on child custody that enable them under specific situations to produce the most relevant ruling.[35] Meanwhile the codes, such as the Compilation, only stipulate that upon divorce, mothers deserve custody of their children who are under twelve years old.[36]

The second pattern is that *fiqh* provides stipulations that are complementary to state law. Past spousal maintenance (*nafaqat al-māḍi*) and indirect testimony (*istifāḍa*) are included in this category. As Case Two in the previous section of this chapter reveals, the judge discovered alternative provisions regarding past support or back maintenance not from state law or from

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[33] He even said that the higher the court, the more judges would use *fiqh* rather than the modern codifications, such as Compilation of Islamic Law. Interview, May 9, 2011. Indeed, I heard the same argument given by a professor who authored a number of books on Islamic law in Indonesia during a conference in Mataram. Field notes, March 26, 2011.

[34] Nurlaelawati identifies three areas where judges' decisions may not be given in compliance with the statutes, especially the Compilation: child custody, legalization of unregistered marriage and age at marriage. She also found some cases of inheritance where judges' decisions are contrary to the statutes. See Nurlaelawati, *Modernization, Tradition and Identity*, p. 143-160.

[35] According to Hallaq, *fiqh* is more flexible than the codes because *fiqh* always provides various legal options while the latter uses single language and unification. See Wael B. Hallaq, *Shari'a: Theory, Practices, Transformation* (Cambridge: Cambridge University Press, 2009), p. 467-473.

[36] On a different judge's approach to child custody in the Shari'a court in Gaza, where the judge may endorse social convention rather than the codes, see Nahda Shehada, "Negotiating Custody Rights in Islamic Family Law," in Thomas G. Kirsch and Bertram Turner (eds.), *Permutation of Order: Religion and Law as Contested Sovereign* (Burlington: Asghate, 2009), p. 247-262.

adat, but from *fiqh.* The absence of such provisions in state law does not necessarily invalidate the claim of this type of support. Nor does it suggest that women are not entitled to it. The scarcity of explicit codes offers the opportunity for the judge to find alternative relevant rulings from other sources. As *fiqh* provides alternative stipulations on past maintenance, it thus serves as supplementary grounds for rulings on this issue.

Indirect testimony is another example. One judge said that indirect testimony refers to an affirmation given by a person who neither sees nor directly experiences a particular incident or occasion but attests that such a thing exists, occurs or is real, as the people in general confirm it or at least do not deny it. In order to offer this sort of testimony, one can base his/her information on common sense or general knowledge about a particular thing, object or person. Direct contact or experience with such an object or a person is not required to provide information about it. This testimony can be accepted as alternative valid evidence when direct witnesses are unavailable. This judge acknowledged that although he had not received this testimony in practice, he would seriously consider it if direct witnesses were unavailable and other mechanisms of adjudication did not exist. Judges always command the parties to produce at least two witnesses to support their divorce claims or *talak* petitions. The witnesses must be able to offer reliable information primarily about the parties' marital status and the roots of their marital disputes. In such cases, it is recommended that witnesses attend the marriage, see the quarrels and hear the conflicts between spouses because these are the problems that judges want to investigate.[37] But what if a claimant fails to present even a single witness, who knows, sees or hears directly a marital conflict? Can anyone else replace a direct witness?

[37]According to Religious Judicature Act 7/1989, Article 76 (1), family members or close relatives and friends of disputing parties may give their testimonies at court.

According to one judge, indirect testimony would help resolve a problem such as this. Although he himself never received indirect testimony, he would consider such testimony and would not decline claims simply due to plaintiffs' inability to produce direct witnesses because such a refusal might cause an enduring dilemma over a litigant's legal status. Another judge told me that he regretted once hearing that a woman's divorce lawsuit was not accepted because her evidence was incomplete.[38] When filing her claim, she stated that her marriage was in trouble because her husband was very cruel, often committing violence against her. Accordingly, conflicts occurred between the couple repeatedly. She returned to Lombok to sue for divorce against her husband, who insisted on not divorcing her. According to the information that this judge received, the woman's claim was not accepted by the court because she could not support it with any reliable proof or witness. Her lack of evidence had to do with her marriage. She eloped with her male suitor to Jakarta to consummate the marriage. Only two of her relatives witnessed the marriage, which itself was not officially recorded. These relatives were threatened by death by her husband if they offered testimony about the marital dispute at court. So, neither a marriage certificate nor two (direct) witnesses were produced by the plaintiff. These were the reasons for which her claim was not accepted (*tidak diterima*). But in this judge's view, the court could consider indirect testimony and suggested this to the woman so that her claim could still be examined and granted. He wondered if there were any other means to resolve her dilemma. Her marital status was frozen, locked in by an authoritarian husband who did not want to let her go and by the austere application of litigation procedures that did not accept her evidence.[39]

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[38] Field notes and interview, November 22, 2010.

[39] Field notes and interview, May 31, 2011. This case as well as another divorce case where the female plaintiff's demand for her unpaid *mahar* was not approved due to her lack of evidence (Case Three of Chapter Two) reveal that modernization and reform of Islamic family law and judicial systems may not always be advantageous. This is partly what Hallaq, Sonbol and Welchman are concerned with. See Hallaq, *Shari'a*, p. 454, Welchman, *Women*, especially Chapter 2, p. 19-26 and Amira El Azhari Sonbol, "A History of Marriage Contract in Egypt," in Asifa Quraishi and Frank E. Vogel (eds.), *The Islamic Marriage Contract: Case Studies in Islamic Family Law*

Third, both *fiqh* and state law may exclude customary norms. Inheritance and divorce ransom sought by male defendants are the best examples. As the inheritance case in Chapter Two reveals, the judge approved the plaintiffs' demand to have their disputes over an estate division settled in accordance with *farā'iḍ* (the Islamic law of inheritance), whose provisions are to a considerable degree still preserved in the Compilation of Islamic Law. As a result, the judge ordered the estate division, which had been divided unilaterally by the male defendant in accordance with the local convention of inheritance division, to be reassessed so that each heir could receive his/her share proportionally according to the *farā'iḍ*. Counterclaims on divorce compensation requested by male defendants are another example. This is a very popular practice in Lombok. Because such claims are not necessarily the same as *khuluk*, which is sanctioned by Islamic law, judges rarely approve them. One fundamental condition of *khuluk*, as the judges argue, is that compensation should come from, or be agreed upon by wives, not by husbands, who demand such compensation.

The last pattern of the legal pluralism is that *fiqh*, local customs, and state law may be mutually supportive of each other contingent upon a particular consideration, such as public interest. One clear example in this respect is the legalization of unrecorded marriages. For the sake of public interest, an unofficial marriage must be legalized. This type of marriage is commonly based on the local interpretation of Islamic law as well as on customary norms, but not on state law. Although the statutes set a time limit for marriage legalization, judges may

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(Cambridge, MA: Harvard Law School, 2008), p. 87-122. In societies where oral tradition is more emphasized than written documentation, which constitutes crucial evidence for modern judicial practices, court may not be the best option for women to negotiate and settle their marital disputes. Although judges could still consider other sources of substantive law than the statutes, they tend to be very rigid in applying the procedure of litigation. One senior judge told me that the procedure of litigation (*hukum acara/formil*) is more important than substantive law (*hukum materiil*) because *hukum acara* serves as a frame upon which the judge's authority and court competence are defined. Interviews June 14, 2011. This may be a reason why many people, like the Muslims in Lombok, keep conducting marriage and divorce unofficially to avoid having trouble with the state and legal institution, which always require written documentation.

ignore the limit. According to the law, only those whose marriages were conducted prior to the enactment of the Marriage Law of 1974 can petition for legalization of past unregistered marriages.[40] However, judges may still approve petitions of marriage legalization for other reasons, such as to gain a child certificate, to obtain pension payments, or to get a visa to perform the pilgrimage to Mecca, provided that petitioners are able to produce strong evidence of marriage and that no objection against the marriage is filed in court by third parties.

B. Changing Legal Approach to Divorce

Another important feature that religious court archives reveal concerns changes in judicial divorce. Until a few decades ago, the religious courts would still frame divorce claims in accordance with the categories of *fiqh* such as *talak*, *syiqaq*, *fasakh*, *taklik talak*, *nusyuz* and *khuluk*. Today, judicial divorce has been classified into two kinds according to the gender of the petitioner: *talak* for men and *gugat* for women. This new approach has helped women access the court and petition for divorce more easily. At the same time, this reformulation of divorce has diminished male power and authority in effectuating unilateral termination of marital unions. As a result, women now use the court to settle their marital disputes more frequently than men, as the increasing rate of *gugat* divorce demonstrates.

Previous studies of divorce in Indonesia show that the rate of divorce has to do with demographic factors, such as poverty, low education, early arranged marriages,[41] or with the wife's high social status.[42] Another recent study argues that since divorce has remained high

[40] On this limit, see again the discussion on marriage legalization in Chapter Two.

[41] See, for example, Hildred Geertz, *The Javanese Family: A Study of Kinship and Socialization* (New York: Free Press, 1961); Philip Guest, "Marital Dissolution and Development in Indonesia," *Journal of Comparative Family Studies*, 23: 1 (Spring 1992): p. 95-113, Gavin W. Jones, Yahya Asari and Tuti Djuartika, "Divorce in West Java," *Journal of Comparative Family Studies*, 25: 3 (Autumn 1994): p. 395-414 and Premchand Dommaraju and Gavin Jones, "Divorce Trends in Asia," *Asian Journal of Social Science*, 39 (2011), p. 725-750.

[42] Charles Hirschman and Bussarawan Teerawichitchainan, "Cultural and Socioeconomic Influences on Divorce during Modernization: Southeast Asia 1940s to 1960s," *Population and Development Review* 29:2 (2003):

among those born after 1985 regardless of their demographic backgrounds, the upturn in divorce has been influenced by "media exposure and increasing emphasis on women's rights," as a result of political changes and developmental idealism.[43] These are important findings; however, no one has so far looked at the religious court archives for other possible explanations. Because the courts have become crucial institutions for marital dispute adjudication and resolution, they must hold a very pivotal role in this matter.

This part of the chapter, therefore, aims to examine a number of court decisions on divorce occurring prior to the enactment of the statutes and Muslim family codes, such as Religious Judicature Act 7/1989 and Compilation of Islamic Law 1/1991.[44] These archives are rich sources that inform us of the practices of divorce prior to the enactment of the Marriage Law of 1974. I argue that the religious court archives of divorce offer another answer to the increasing incident of women seeking divorce. This concerns the changing approach to divorce, which in turn offers women greater access to divorce. As will be clear from the following discussion, previously men had a greater access to court for either petitioning *talak* or declining their wives' claims of divorce, while women often encountered ideological and procedural constraints that diminished their avenues for divorce. This situation has now been reversed since the promulgation of new legislation and codes that advocated new rules and court procedures for judicial divorce.

215–254 and Gavin W. Jones, *Marriage and Divorce in Islamic South-east Asia* (Kuala Lumpur: Oxford University Press, 1994).

[43] Mark R. Cammack and Tim Heaton, "Explaining the Recent Upturn in Divorce in Indonesia: Developmental Idealism and the Effects of Political Changes," *Asian Journal of Social Science*, 39 (2011), p. 794.

[44] These examples are taken from many compilations of religious court decisions. See Peradilan Agama, *Himpunan Putusan/Penetapan Pengadilan Agama* (Jakarta: Proyek Pembinaan Badan Peradilan Agama, Departemen Agama, 1976). I am grateful to Professor Mark E. Cammack who kindly offered me this resource. Other compilations include Badan Peradilan Agama Islam, *Law Report Putusan/Penetapan Pengadilan Agama tahun 1979* (Jakarta: Badan Peradilan Agama Islam, Departemen Agama Republik Indonesia, 1980) and Ditjen Bimas Islam, *Putusan/Penetapan Pengadilan Agama seluruh Indonesia setelah Berlakunya UU No. 1/1974* (Jakarta: Ditjen Bimas Islam, Departemen Agama, 1977).

Talak: from Husband's Privilege to Court Approval

Prior to the promulgation of the Marriage Law of 1974, *fiqh* was the dominant substantive law of marriage and divorce at the religious courts. Its influence on judicial practices even continued in the years after the enactment of new laws. Under *fiqh*, *talak* denotes unfettered male authority in the termination of a marital union. Because the groom signs the marriage contract, theoretically he can end the contract arbitrarily. The very nature of the contract itself bestows upon him rather than his wife a greater power and agency in the termination of the marriage.[45]As a result, men might use their power to effectuate unilateral repudiation at their whim; they could divorce their wives out of court and report this incident to the sub-district office of religious affairs or the religious court.[46] The function of the religious courts at that time was to "verify and certify" extrajudicial repudiation as long as it could be proven. The final ruling that they produced was not a decree but a letter testifying to the occurrence of *talak*, which might not be subject to judicial review from the high court.[47] Three examples of *talak* below illustrate such early *talak* practices.

In March 1984, a woman appeared before the religious court in Praya, Central Lombok, to submit a petition of legalization of the *talak* enunciated to her two years earlier by her husband. During this period she could not remarry officially. Because she needed to clear up this ambiguity, she herself proposed the petition instead of her husband. She explained that her husband divorced her after a series of insoluble disputes, where she heard the repudiation

[45] This point has become the target of critiques from Muslim feminists, women activists and reformers. See Ziba-Mir Hosseini, "A Woman's Right to Terminate the Marriage Contract: The Case of Iran," in Quraishi and Vogel (eds.), *The Islamic Marriage*, p. 215-230.

[46] Daniel S. Lev, *Islamic Courts in Indonesia: A Study in the Political Bases of Legal Institution* (Berkeley: University of California Press, 1974), p. 146 and Hisako Nakamura, *Divorce in Java: A Study of the Dissolution of Marriage among Javanese Muslims* (Yogyakarta: Gadjahmada University Press, 1983), p. 44.

[47] The letter is called *Surat Keterangan Telah Terjadinya Talak/SK3T*. See Mark E. Cammack, Helen Donovan and Tim B. Young, "Islamic Divorce Law and Practice in Indonesia," in R. Michael Feener and Mark E. Cammack (eds.), *Islamic Law in Contemporary Indonesia: Ideas and Institutions* (Cambridge, MA: Harvard University Press, 2007), p. 103-106.

directly (*mendengar sendiri talak secara langsung*) from him, as did the people present on the occasion of the repudiation. The court agreed to open a hearing and summoned the husband twice but he never responded. The petition was approved after the plaintiff produced evidence of divorce, including two witnesses. In his consideration, the judge quoted, in addition to state laws, two Muslim jurists' opinions; one of them stated that divorce "falls" (i.e., occurs) once it has been pronounced by the husband in the presence of two witnesses. The court decision read "*menyatakan sebagai hukum syah menurut hukum Islam jatuhnya talak I (satu) suami pemohon kepada pemohon terhitung sejak iqrar talak tanggal 17 Mei 1982*" (Verification that the divorce is legally valid according to Islamic law. One repudiation that the husband has pronounced to his wife [the petitioner] in May 17, 1982, was valid).[48] This case was registered by the court as *pengesahan talak* (validation of repudiation).

Another example of former *talak* practice comes from Sumatra. In 1979, the religious court of Painan, West Sumatra, received a petition from a male plaintiff concerning his second repudiation. The court registered it as *penetapan talak dua raj'i* (certification of two revocable repudiations). No information was given about the first repudiation, but it likely occurred outside of the court. The petitioner explained that he was involved in perpetual conflicts with his wife and repudiated her once but reconciled immediately with the hope that the problem could be rectified. Since the disputes remained, the petitioner intended to repudiate his wife for a second time but wanted to do so at the court. The wife said before the judge that the marriage was broken and therefore she did not object to the petition, but she requested alimony and support for the children. Upon the male petitioner's consent to fulfill the defendant's request, the court approved the petition. Referring to various sources of *fiqh*, the court decision read "*menetapkan jatuh talak dua raj'i pemohon atas termohon*" (Stipulated that the petitioner's second revocable

[48] Praya Religious Court Decision No. 82/1984.

talak falls upon his wife).[49] The judge did not deny the validity of the first repudiation and thus accepted the *talak* proposed to him as the second *talak*.

Extrajudicial triple divorce could also be certified. A man turned to the religious court in Bangkinang in the Province of Riau, Northeast Sumatra, to submit a petition for the certification of his third repudiation, which had been pronounced two years earlier. The *talak* was stimulated by endless conflicts between the petitioner and his wife. The disputes resulted in two divorces and reconciliations but nothing could halt the third and final repudiation. The court accepted the petition and registered it as *ikrar talak yang ke tiga* (validation of the third repudiation). It opened a hearing and summoned the defendant (the petitioner's wife), but she was never present. The judge accepted the reasons for the divorce and the two witnesses that the petitioner produced. The judge approved the petition and in his decision he "validates the third repudiation that the petitioner enunciated to his wife on October 16, 1977."[50]

These are three cases of extrajudicial *talak* received by the religious courts in the 1970s and 1980s, and many other similar examples can be found in the court archives.[51] Although they are distinct from each other in terms of the number of repudiations, they underscore a common pattern of extrajudicial divorce and a unified perception of the judges about *talak* taking place beyond the court. Repudiation was valid when enunciated by the husband and the court would certify it. For the judge in Praya, the repudiation was valid because the petitioner herself heard it directly from her husband, as two other people witnessed. The Painan judge recognized the *talak* submitted to him regardless of whether the first or the second *talak* was put before him. The

[49] Painan Religious Court Decision No. 28/1979. See Badan Peradilan Agama, *The 1979 Law Report*, p. 83-84. *Talak raj'i* means revocable divorce.

[50] Bangkinang Religious Court Decree No. 10/1979. *Ibid*, p. 79-80.

[51] Petitions of male repudiation were usually registered and recorded by the religious courts as *pengesahan*, *penetapan* dan *persetujuan talak*. In Lombok, all three first instances of the religious court retained these classifications until the middle of the 1980s. So did the Directorate of Religious Courts of the Ministry of Religion. See Direktorat Pembinaan Badan Peradilan Agama, *Analisis Faktor Penyebab Terjadinya Perceraian* (Jakarta: Direktorat Badan Peradilan Islam Departemen Agama, 1990).

judge of Bangkinang wondered if the occurrence of the triple divorces could be verified and if the petitioner had sound arguments for it; he granted the divorce once he was convinced of this.

These judges cited the Muslim jurists' opinions, in addition to state law, to endorse their decisions. They wanted to reassure the litigants that their judgments were given under the framework of state law and, more importantly, that this did not contravene *fiqh*. The court decision from Painan, for instance, cited Articles 38-41 of Marriage Law No. 1/1974 and Government Regulation of Marriage Law No. 9/1975. Articles 38-41 of the Marriage Law deal with marital dissolution—which can only happen by death, divorce or court decision—and with the stipulation (especially Article 39) that "divorce can only occur before the court after the court fails to reconcile the disputing parties." These stipulations did not specifically address the issue of how many or which *talak* the court could admit. The Painan judge, like his colleagues from Praya and Bangkinang, might still have construed that *talak* was not valid until endorsed by the court. However, the explication of Islamic legal grounds in these court decisions implied that the religious law was paramount while the state law codes were of secondary importance.[52]

The Supreme Court decided that the certification of extrajudicial divorce by religious courts was wrong because this contradicted the Marriage Law and its regulations. The Court sent Circulation No. 13 of 1985 to all religious courts asking them to "reject any request to validate unauthorized *talak* (*talak liar*), that is, *talak* that does not comply with statutory requirements."[53] This circular was the first step toward the dismissal of petitions of extrajudicial repudiation. After the enactment of Religious Judicature Act 7/1989, where the procedure of divorce was

[52] According to Lukito, at both first instance and appeal levels, judges of the religious courts in general still share a common view about the validity of extrajudicial *talak* or confirm other provisions of *fiqh* in other cases. But Supreme Court judges are much more critical of *fiqh* when deciding cases received from the religious courts. See Lukito, *Legal Pluralism*, especially Chapter 5, p. 156-197. On another similar point, see Cammack, Donovan and Heaton, "Islamic Divorce," p. 106-107.

[53] *Ibid*., p. 108-109.

addressed at length, offering relatively equal opportunity for men and women for divorce, extrajudicial divorce claims were strictly prohibited. Today, a claim or petition for divorce can only be made, and will solely be understood as a request for one single divorce. Therefore, a past occurrence of extrajudicial *talak* is not legally binding; it must be redone at the court to obtain an official receipt of divorce. *Talak* is now classified as a contentious procedure with the wife standing as the defendant. It can no longer be simply certified without trial. With the introduction of state law and bureaucratization of *talak*, men are no longer able to exercise their traditional Islamic privilege of a unilateral divorce. *Talak* is now subject to court approval. It has become the state's concern and no longer a private matter between spouses.

Gugat as Women's Divorce

Prior to the unification of female divorce in *gugat*, Indonesian Muslim women could still navigate through various mechanisms to seek divorce at court. This, however, did not necessarily empower them; many failed in their claims. In addition to their lack of knowledge of the procedure of litigation, this failure was mainly due to an ideological problem regarding the perception of judges of divorce as solely a male prerogative.[54] Although women could petition for a divorce, they might not obtain it unless their husbands consented. As a strategy, they might provoke conflict or embarrass their husbands in order to trigger *talak*.[55] However, the court archives rarely reveal such tendencies. Instead of investigating this facet of divorce—which cannot be searched from court documents but must be explored through direct investigation of

[54] Bureaucratic rules and Islamic legal conservatism were also the issue that Malay women in Kedah faced in the 1980s. See Sharifah Zahela Syed Hasan, "Women, Divorce and Islam in Kedah," in Joseph Chinyong Liow and Nadirsyah Hosen (eds.), *Islam in Southeast Asia: Critical Concept in Islamic Studies, Vol. I, Southeast Asian Islam: Histories, Cultures and Identities* (London and New York: Routledge, 2010), p. 241.

[55] Mark E. Cammack, Lawrence A. Young and Tim B. Heaton, "The State, Religion, and the Family in Indonesia: The Case of Divorce Reform," in Sharon K. Houseknecht and Jerry G. Pankhurst (eds.), *Family, Religion and Social Change in Diverse Societies* (New York and Oxford: Oxford University Press, 2010), p. 178.

the roots and causes of divorce—I will attempt to examine women's experiences in acquiring divorce through a range of different legal mechanisms, as these are reflected in the archives of the religious court decisions on divorce.

Past religious court decisions on divorce reveal varied types of female judicial divorces. These included *taslim/ta'at* (allegiance to the husband), *nusyuz*, *khuluk*, *syiqaq*, *fasakh* and *taklik talak*. The reasons why a particular marital dispute was framed in a specific suit was contingent upon the litigants' understanding of the roots of the dispute as well as the court's response to the proposed claim. Male defendants used the notion of required female submission (*taat/taslim*) to reject their wives' divorce lawsuits. A claim of divorce made by a woman might be perceived by the judges as disloyalty against her husband. Consequently, she might be ordered to surrender to him. Court decisions on *nusyuz* were commonly issued upon men's request to call back their wives. As for female plaintiffs, problems concerning lack of support and desertion were the most common causes for which they claimed annulment of their marriage through *fasakh*. Few female plaintiffs resorted to *khuluk* to invoke divorce; however, most preferred filing *taklik talak* claims, especially if their husbands pronounced the conditional divorce oath at the time of marriage. Only when a spousal dispute was so intense that no legal means or procedure could settle it would *syiqaq* become the last resort. Prior to the introduction of *syiqaq* as a means for judicial divorce, some Muslim women converted temporarily to another religion to effectuate divorce because conversion automatically dissolves a marriage under Islamic law. Several cases below illustrate women's struggle to obtain divorce through these various avenues.

Taslim and Nusyuz

Past religious court archives on divorce display a number of *taslim* and *nusyuz* cases. These refer to female plaintiff's claims asking for divorce, but they were turned down because their decision to seek divorce was seen as rebellion against their husbands. Instead of approving their claims, judges most often commanded these female plaintiffs to obey their husbands, as the following case demonstrates. In 1929, a 19 year-old housewife appeared before the religious court in Surabaya, East Java, asking either for support or a divorce if her husband, who had been away for nine months, no longer wanted to save the union. Her household was fine during the first three months of marriage but got into trouble upon her husband's desertion, leaving her without support for months. The court accepted the claim and opened a hearing.

At the hearing the husband said he left his wife because he was upset because she did not listen to him and follow his wishes. He declared that he still provided partial support while away and promised to offer full support if only his wife would obey him. The plaintiff affirmed that her husband came back and forth to provide support but said it was insufficient. Although she supported her claim with evidence and witnesses, the claim was refused. The judge ruled her a deviant wife and instructed her to give her allegiance to her husband because he was still willing to fully support her. The judge also obliged the husband to fulfill his past spousal obligations and place his wife in an appropriate house so as to establish a decent life.[56] The case was classified as *wajib taat kepada suami/taslim* (compulsion to obey the husband). A similar case of *taslim* stemmed from the religious court of Tegal, Central Java. A female plaintiff told the judge that her husband neglected her for one and a half years without giving support. She abhorred him and turned her eyes on another man. She stated this openly before the judge and her husband, who

[56] Surabaya Religious Court Decision No. 262/1929. See Badan Peradilan Agama, *Himpunan Putusan*, p. 28-29.

did not mind arranging for support if she surrendered to him. The judge ruled the wife disobedient and commanded her to comply with her husband because he still agreed to feed her.[57]

These two examples of divorce cases reveal how women used to deal with their marital disputes and how the courts perceived their claims. For these female plaintiffs, the core of the problem revolved around lack of support or insufficient allowance. Contrarily, for the judges, like the male defendants, the most important issue was the wife's obedience. The cases were thus classified by the courts as cases of female disobedience. Under this classification, the female plaintiffs were ordered to return to their husbands. Their requests for divorce were rejected because their husbands were still willing to support them. On other occasions, judges might even discharge a man from any responsibility of spousal support if the man found his wife recalcitrant (*nusyuz*) and was able to prove it before the court, as the following case reveals.

In 1929, the religious court of Surabaya, East Java, received a petition of *nusyuz* from a 37 year-old husband, who demanded the court to call in his 20 year-old deserted wife. This was the second time the couple had dealt with the same court. In an earlier trial, the wife was found guilty of disobedience after fleeing the conjugal home. In compliance with the court command, she returned to her husband, but after only a few days, she escaped again. The male petitioner demanded that the court force her back to him again or, to if she refused, stipulate her as disobedient. At court, the wife explained that she fled again because her husband did not give her an allowance (*uang belanja*). Furthermore, she said that she no longer liked him and asked for a divorce. At this time, she brought a letter from the official of the sub-district office to be delivered to the judge. In this letter, the official stated that the woman preferred divorce over returning to her husband. The judge then posed the following questions to her.

[57] *Ibid*., p. 31.

Judge: What made you leave your husband and what encouraged you to ask only for divorce from him?

Defendant: Because I no longer like him. I have no more love for him.

Judge: Do you wish to come back and obey your husband if he supports you fully?

Defendant: Even if he supports me fully, I still do not want [to return to him].

Judge: If you do not follow him, you may be in trouble because you no longer deserve support and clothes from him.

Defendant: No problem. I can bear the trouble because I do not like him.

The judge postponed the hearing for one week to allow the litigants to reconcile. They came back again to the hearing the following week. The judge wondered if the defendant had changed her mind after a week of deferral.

Judge: So, what do you think now? Did you decide to come back to your husband?

Defendant: No.

Judge: [To the plaintiff] This must be complicated. Why do you not simply end this problem. Just give her a *talak*!

Plaintiff: No. I still love her and promise to support her!

Judge: So, what do you want?

Plaintiff: Because she refuses, I hope you punish her, ruling her disobedient and instructing her to come back to me.

This time, the defendant brought another letter from the sub-district official. The judge explained that according to the letter, the official advised her to reconcile, but she insisted on divorce. The official thought it would be better for the court to offer a longer time for the couple to renegotiate their terms. The judge then asked the disputants if they agreed to this proposal. However, they wanted to hear the judgment right away because they had already come back and forth to the court several times. Through the court decision No. 152/1929, the judge stipulated that beginning from that day the defendant was disobedient and that she deserved neither divorce, support, nor clothes until she obeyed her husband. The court confirmed that the male

plaintiff was not responsible for any support, such as food, clothes and dwelling for the defendant until she acquiesced to him.[58]

This case suggests that while lack of spousal support constituted the main argument invoked by women to justify their decision to flee their husbands, female disobedience was central both to the male plaintiffs' arguments and the judges' understanding of the nature of the disputes. As a result, female defendants were ruled disobedient. The consequence of these decisions was that wives were not entitled to support and that husbands had no responsibility to provide maintenance. Wives were judged disobedient. In the above case, the judge regretted that the male plaintiff refused to conclude the trial by repudiating the defendant, but he had no power to press him to do so. The judge maintained that divorce was the husband's prerogative, which could not be demanded by a wife if he did not consent.

Khuluk

However, if a woman offered her husband compensation for divorce, this might affect the outcome of the trial. This procedure, called *khuluk*, is often equated with women's divorce and is still practiced throughout the Muslim world.[59] However, *khuluk* is not the best option for Muslim wives in Indonesia. Some religious court archives on *khuluk* suggest that women might fail to obtain a divorce through this mechanism; a woman's chance to win a trial through this mechanism is not certain, as the following two cases show. One example originated from the religious court of Sragen, Central Java. In 1943, a young 17 year-old housewife appeared before the court claiming divorce against her husband, who had left her for about three years. Apparently, the couple had not been in harmony since the beginning of their marriage. Apart

[58] *Ibid*., p. 34-37.

[59] Nadia Sonneveld, *Khul' Divorce in Egypt: Public Debates, Judicial Practices and Everyday Life* (Cairo and New York: The American University in Cairo Press, 2012).

from a few weeks, they never slept together in the same bed. Her husband left her without giving prior notice and only rarely visited her. The situation continued for nearly three years. She thought there was no sign that the union could be saved, so divorce was the best option. She would recompense him by returning half of her *mahar* if he agreed to divorce. During the hearings, the husband defended his decision to reject divorce, saying that he had left his wife because she refused to obey him. He often came back to persuade his wife many times but was not successful, even though he still provided partial support for her. He would not divorce her nor pay her half *mahar* unless she returned his water buffalo, which was worth Rp. 15. The judge gave the female plaintiff two options: either she had to surrender to her husband, because he in fact still fed her, or, if she continued to insist on divorce, she had to accept her husband's proposal. The judge explained that she might not return the total amount of Rp. 15 because the beast had been sold by her father, apparently for the expenses of the wedding, for Rp. 8.25. Because her husband still owed half of the *mahar* (Rp. 2.50), she just needed to reimburse him Rp. 5.75. She agreed and paid the difference a month later and a divorce was granted.[60] This case demonstrates the approval of a woman's claim of divorce by means of compensating her husband. If the husband refuses, his wife's compensation of divorce might be overturned by the judges.

In another case, a woman's *khuluk* request was not approved because her husband did not consent. This happened in the religious court of Banjarmasin, South Kalimantan, in 1941. A 21 year-old housewife lodged her claim of *khuluk* at this court. She had been married to her husband, a 25 year-old, for four and half years and had two children. Their household was stable until one day she felt that her husband was cheating, allegedly entering into an intimate

[60] The court decree was given in Javanese, as the disputants used this language in their litigation. *Ibid*., p. 129-132.

relationship with another woman. She resorted to the court to sue for divorce or to buy *khuluk* from her husband. The wife's representative conveyed to the judge at the hearing that she withdrew her accusation about "love affairs," but added that she was sick and unable to serve her husband properly. She therefore appealed to him to divorce her, even if she had to pay for it. The husband stated he would not divorce his wife because he still loved her. He explained that he would never accept any payment even if he were paid Rp. 10,000 (this amount was very high at the time) in exchange for the release of his wife. To substantiate his counterclaim, he quoted the opinion of the local *'ulamā'*, who said that the judge had no authority to force the husband to divorce his wife, even with payment. Should this happen, the divorce was void since it was given under pressure. The court decree reiterated this opinion. It stated that "since the defendant does not intend to divorce nor accept compensation to relinquish his wife, the judge has no right to approve the petition."[61] This case demonstrates how a woman may not be successful in *khuluk* because it requires male consent. A divorce was by no means certain if the husband refused it, even if the wife agreed to compensate him.

Murtad

Due to such difficulties in ending troubled unions, a number of frustrated Muslim women who could not find another way out converted to another religion from Islam (*murtad*) to void their marital status. However, this was a temporary strategy because they reconverted soon after a divorce was obtained. According to Islamic law, conversion away from Islam automatically dissolves a marriage. It also annuls the entitlement of a share in the estate. I did not find a single court decision on divorce issued on the basis of a woman's conversion in the archives, but there is evidence from other sources.

[61] Religious Court Decision of Banjarmasin No. 49/1941. *Ibid*., p. 133-136.

G.F. Pijper, an advisor for the Dutch colonial government, discovered several cases of divorce at the religious courts sought by women on the grounds of fake conversion.[62] For example, an aged woman with five children appeared before the religious court in Kediri, East Java, to submit a petition demanding payment of the support that her husband missed after deserting her for five years. She stated that if her husband refused, she preferred divorce even though she would have to make restitution for him.[63] The court accepted the claim and opened a hearing. The husband said before the judge that he left his wife because she was disobedient. He would only agree to divorce if she recompensed him a house, a rice field and 500 *gulden*, an offer that was likely meant to abort the claim. She rejected the proposal. The court did not decide the case on that day but postponed the hearing to give the disputants time to reconsider their decisions. A week later, the plaintiff attended the hearing, declaring that she was no longer a Muslim. The judge was shocked and in turn advised her to revoke her statement. He offered her up to four months (equal to three menstruation cycles) to rethink her decision before returning to the court. She reappeared after four months but declined to rescind her statement. The court eventually dissolved her marriage.[64]

Seeking divorce through conversion, however, sparked criticism from many interested parties such as *'ulamā'*, *penghulu* and *bupati* (the district heads). For example, in his book *Kitāb Qawānīn al-Sharī'a*, Sayyid Uthman, a noted Muslim scholar from Jakarta, condemned the practice of false conversion for the sake of divorce.[65] A *penghulu* from Demak, Central Java, contended that the religious courts were no longer competent to administer petitions proposed by

[62] G.F. Pijper, *Fragmenta Islamica: Beberapa Studi mengenai Sejarah Islam di Indonesia Awal Abad XX* (Jakarta: Universitas Indonesia Press, 1987), p. 64-78. Some female petitioners got quick court approval of marital dissolution after declaring themselves a convert and the court was convinced that they abandoned Islam. Some others, however, had to come back to the court twice or more, bringing new evidence that they had converted after their first arguments for divorce were denied.

[63] *Gulder* was the Dutch currency.

[64] *Ibid*., p. 73-74.

[65] *Ibid*., p. 77.

converts because the courts were designated only for Muslims.[66] This opinion was adopted later on by the High Islamic Court (*Mahkamah Islam Tinggi/MIT*) as its official stance. Through Decree No. 15/1938, the Court restricted religious courts of first instance from accepting any petition submitted by converts because, according to Article 134 [2] *Indische Staatregeling,* the courts could only adjudicate marital disputes among Muslims.[67] Negative reactions also came from the local district government in Java. The head of the district of Bojonegoro, East Java, for instance, disseminated a circular that prohibited the *penghulu* in that region from administering conversion-related marriages and divorces. The efficacy of the circular was proved in a case of divorce petitioned by a woman who declared herself a convert. The court rejected the petition, arguing that it could not handle a legal case filed by a non-Muslim.[68] The case was put in abeyance until it was eventually resolved through *syiqaq.*

Syiqaq

Through this procedure, a disputing couple might conclude a divorce on the condition that the wife, or her representative, agreed to pay '*iwaḍ* (a small amount of compensation) to her husband or to the court for social charity funds to generate divorce.[69] *Syiqaq* was rarely adopted as a means of judicial divorce until a new interpretation of the Qur'an[70] as its normative base was made by the religious courts in the 1930s. There were two views about the role of the mediator (*ḥakam*) introduced in this verse. First, the mediator was charged only with reconciling the

[66] *Ibid*., p. 76.
[67] Notosusanto, *Peradilan Agama Islam di Jawa dan Madura* (Jogjakarta: Universitas Gadjah Mada, 1953), p. 55-56.
[68] Pijper, *Fragmenta Islamica*, p. 75.
[69] *Ibid*.
[70] Chapter 4: 35 says: "And if ye fear a breech between them twain (the man and wife), appoint an arbiter from his folk and an arbiter from her folk. If they desire amendment Allah will make them of one mind. Lo! Allah is ever Knower, Aware." p. 25. See Muhammad M. Pickthall, *The Meaning of the Glorious Qur'an* (Beltsville, MD: Amana Publication, 2005), p. 25.

conflicting spouses, although they might effectuate divorce provided that the spouses agreed to do this. Second, the mediator held a position equal to that of a judge in the sense that he could approve of a divorce if either of the disputants concurred.[71]

In a 1938 Conference, the *Penghulu* and Clerks Association (*Perkumpulan Penghulu dan Pegawainya/PPDP*) adopted the second view above and promoted it nationwide through a short course for *penghulu* in Java and Madura.[72] Since that time *syiqaq* was used as an option to settle irreconcilable conflicts between spouses until the recent changes in the law. *Syiqaq* requires the judges to appoint two mediators, each representing a disputant, and charge them with the task of reconciling the parties. If they fail, other mediators will be assigned with the same role. If the newly appointed mediators are still unable to resolve the dispute, the husband's representative may declare a *talak* on his behalf upon receiving a small compensation (*'iwaḍ*) from the wife. Because mediators should be chosen from among the disputants' relatives, as the Qur'anic injunction states, they are often unable to remain neutral in the dispute. To settle prolonged disputes, the judges would commonly appoint arbitrators from among the court clerks to avoid such conflicts of interest.

Despite a potentially longer procedure that might follow, *syiqaq* proved workable, as the one following case shows. A 16 year-old peasant woman filed her divorce claim in the religious court of Purworejo, Central Java in 1975. She wanted a divorce because she no longer loved her husband, who dispatched her home to her parents three months after their marriage because she refused to serve him. They lived apart, staying with their own parents respectively. The husband rarely visited her. The couple never slept in the same bed (*qabla dukhul*). She was offended one day when receiving support, which was delivered not directly by her husband but by his

[71] Notosusanto, *Peradilan Agama Islam*, p. 49-50.
[72] *Ibid*., p. 50.

colleague. These were the roots of the dispute. The court agreed to open a hearing. Before the court, the husband admitted what his wife was complaining about but defended his position, arguing that his leaving was due to his wife's refusal to have intercourse with him. But he insisted on not divorcing her because he thought the dispute could still be resolved without the intervention of the court. The judge instructed the disputants to return to the court in a week along with their respective parents.

Since the conflict did not abate but escalated in the second hearing, the judge elevated the status of the conflict to *syiqaq* and appointed the disputants' fathers as mediators for them. The judge ordered the mediators to advise the litigants and report on their efforts in the following week. In the third hearing, the plaintiff's father explained that he had talked to the defendant's father about the conflict but they did not reach any agreement because the plaintiff's father, like his daughter, insisted on divorce while his counterpart had little to say about it. The defendant's father ceded the matter to his son, who refused divorce. Because the defendant's mediator was not present at this time, the hearing was postponed again. Both mediators appeared in the fourth hearing but they still did not bring any good news. The judge dismissed the family mediators, substituting them with two other arbitrators from the court, who would work out the issue and report to the judge the following week. After talking to the disputants, these new mediators concluded before the court that any effort to reconcile the disputants was futile because the dispute was so critical that separation appeared to be the only viable solution. The judge then asked the defendant's mediator to pronounce *talak* in the name of the defendant. Although the defendant objected, and silently left the courtroom without asking permission from the judge, the mediator declared a *talak* on behalf of the defendant. This marked the end of a long proceeding

where the judge's decree endorsed the *talak*.[73] This case suggests that *syiqaq* was a means to obtain women's divorce despite its perplexing procedure. Due to its rather long and complicated proceedings, however, *syiqaq* was still not an efficient route to divorce for women.

Fasakh

However, Muslim women might have recourse to two other options, namely *fasakh* and *taklik talak,* which were much more efficient than other procedures. As the religious court archives reveal, these are distinct categories, each with its own limits and advantages. *Fasakh* refers to marriage annulment by the court on the ground of a petition made by the claimants, usually wives. It is not demanding procedurally, yet female plaintiffs must convince the judges that they are not at fault for causing the marital breakdown. They are required to prove that it is their husbands who have instigated the trouble within the union. Sometimes female plaintiffs had to take an oath to enforce their claim in addition to substantiating the claim with strong evidence and witnesses. In general, women requested *fasakh* divorce because of lengthy spousal negligence and desertion that rendered them without secure economic support. Rather than being rebellious (*nusyuz*), they remain obedient (*taat/taslim*) and stay at home (*tamkin*); they are thus willing to endure unbearably long burdens. *Fasakh* may also be proposed on the grounds of lethal and incurable diseases. The court decrees on *fasakh* commonly read as "*difasakh/dirusak nikahnya*" (her marriage is dissolved), or "*fasakhtu nikāḥaha*" (I [the judge] have dissolved her marriage).

The cases below illustrate female divorce through *fasakh*. In 1976, the religious court of Banjarmasin, South Kalimantan, received a claim from a woman asking for "support, clothes and

[73] Dirjen Bimas Islam, *Putusan/Penetapan*, p. 125-132. Many other cases of *syiqaq* reveal the same pattern, where divorce could only be given after the arbitrators were appointed from the court. On other examples of *syiqaq*, see Badan Peradilan Islam, *Law Report*, p., 107-115 and Badan Peradilan Islam, *Himpunan Putusan*, p. 137-150.

dwelling from her husband or, if he is unable to fulfill these, *fasakh* over the marriage." She stated that she and her husband enjoyed the first four years of their marriage. However, the union broke down as her husband left the conjugal home due to an inconvenience (the court archive does not clearly mention what this was). Neither he nor his relatives ever came to visit her, nor did they send her money. The plaintiff claimed that she never wandered around nor spent the night away but remained obedient and at home during her husband's absence, as two witnesses testified. Because the husband's whereabouts were unknown and he never appeared at court, the petition was easily approved and the marriage was dissolved.[74]

Another example originated from East Java. A female peasant sued for divorce against her husband because he abandoned her for two years without providing allowance or leaving any valuable assets that she could sell to sustain her life while she remained docile. She made an oath to justify her claim and brought two witnesses. She requested that her marriage be dissolved. The husband never attended the hearing and the religious court of Blitar, East Java, where the claim was submitted in 1884, approved it, thus vitiating the marriage.[75]

Another case of *fasakh* divorce was from Sulawesi. In 1979, a woman turned to the religious court in Poso, Central Sulawesi, to have her marital union dissolved after her husband was infected by leprosy. The judge quoted the opinion of the author of *al-Muhadhdhab*, who says that if a husband is insane or contracts an incurable disease such as leprosy or impotence, the wife can dissolve the union. The judge was also concerned with the issue of support, which the defendant could not make even at a minimum amount due to his disease. He quoted another Muslim jurist's view from *Bughyat al-Mustarshidīn* that allows the wife to abandon the marriage

[74] Ditjen Bimas Islam, *Putusan/Penetapan*, p. 117-122.
[75] Badan Peradilan Islam, *Himpunan Putusan*, p. 151.

if the husband cannot provide a minimum standard of proper support. These two opinions clearly legitimized the judge's approval of this petition.[76]

These three cases disclose that *fasakh* was invoked after women suffered from hardship brought about by their husbands, who neglected them while they were not recalcitrant. Their obedience in troubled marriages induced by their husbands served as justification for the judges to approve their demand of marital dissolution.

Taklik Talak

Women could use the same grounds as for *fasakh* to claim divorce by another means, namely *taklik talak,* provided that these grounds were included in the marriage contract. The following cases demonstrate the examples of typical *taklik talak* divorces that happened as early as the beginning of the twentieth century. Under *taklik talak*, divorce can occur whenever one of the stipulated grounds exists. This used to be the most widely used method for Muslim women to claim divorce at the religious courts in Indonesia prior to the enactment of the Compilation of Islamic Law and the introduction of *gugat*. For *taklik talak* to be legally binding, the husband must pronounce an oath of conditional divorce when concluding the marriage contract. The conditions commonly include lack of support and six months desertion. The wife may insert into the contract other requirements as well, such as that the husband should not hurt her physically, will not take a second wife, or other relevant requests. Once any of these conditions occur along with the wife's objections, the husband cannot prevent the *talak* from happening. Three examples of divorce below illustrate typical *taklik talak* cases.

A petition of *taklik talak* was received by the religious court of Blitar, East Java, in 1902 from a 40 year-old woman. She claimed that her husband breached a conditional divorce clause.

[76] Badan Peradilan Islam, *Law Report,* p. 100-101.

The plaintiff explained that her husband read the conditional divorce clauses at marriage, when he stated that he would build her a house three months after marriage. Because the promised house had not been built five months after the marriage, she went to the court asking the judge to enforce the divorce. She brought two witnesses who were present at her marriage when the oath of conditional divorce was declared. Her claim was approved.[77]

In another case, the religious court of Wonogiri, Central Java, in 1974 refused a male defendant's plea to reject his wife's request of divorce after he transgressed his *taklik talak*. The wife appeared before the court complaining about her husband's behavior, which she believed had broken the conditional divorce oath. He frequently beat her and went gambling, things that he pledged not to commit. The husband was present at the court hearing and admitted to all the accusations, but was unwilling to repudiate her. Because the husband had pronounced the oath of conditional divorce and yet violated the terms, this divorce occurred inevitably, as the court decree stipulated.[78] Not surprisingly, *taklik talak* was used widely throughout the country, marking a typically Indonesian form of female divorce.[79] According to a senior judge, this mechanism was often used by wives because it was a straightforward procedure where the male defendants' objections were useless if their violations could prove a breach of the oath.[80] If a woman petitioned the court for a divorce through *taklik talak*, there was almost no room for her husband to refuse the petition.

The normative basis of conditional divorce in Indonesian Islamic courts is derived from the legal maxim formulated by Zakarīyī al-Anṣārī (d. 1520), quoted in *Ḥāshiya 'alā al-Taḥrīr* by al-Sharqāwī (d. 1812), which states: "Whoever makes his *talak* dependent upon an action, then

[77] Badan Peradilan Islam, *Himpunan Putusan*, p. 85.
[78] Badan Peradilan Islam, *Law Report*, p.68-69.
[79] Hisako Nakamura, "Conditional Divorce in Indonesia", *Occasional Publication 7,* Islamic Legal Studies Program, Harvard Law School (2006).
[80] Interview, February 22, 2011.

the *talak* occurs with the existence of that action, according to the original pronouncement."[81] Because a *taklik talak* hearing's objective is to prove that the husband has violated the stipulated conditions, it concludes very quickly, taking roughly ten minutes for each hearing.[82] This judicial practice was first instituted by Sultan Agung of the Javanese Islamic Kingdom, who reigned from 1613 to 1645 in Central Java. The practice has been preserved by the Ministry of Religion, which standardized the formula of conditional divorce and attached it to the last page of the marriage certificate.[83] The groom should either read the formula or sign the page at the time of the marriage contract, or do both. Although the declaration or signature of the oath of conditional divorce by the groom has continued up to the present, *taklik talak*, like other previous mechanisms of women's divorces, has rarely been taken up in recent judicial divorce practices.[84]

Up until the 1980s, these "Islamic female divorces" were still employed by the religious courts. Or, stated differently, marital disputes proposed by women were framed by the religious courts in accordance with the categories of divorce under *fiqh*. The national data of legal cases from first instance of the religious courts in 1987 demonstrated that 1,039 divorce claims were registered as *syiqaq*, 5,831 under *fasakh* and 42,534 for *taklik talak.*[85] In a slightly earlier year, 1983/1984, three first instances of the religious courts in Lombok reported 15 *fasakh*, 35 *taklik*

[81] Lev, *Islamic Courts*, p. 163.
[82] *Ibid*.
[83] *Ibid*., p. 17-25.
[84] In other Muslim countries, these categories of divorce remain applicable. Shah, for example, mentions four types of marital dissolution in Malaysia in accordance with Islamic Family Law (Federal Territories Act) 1984. They are "*talak* (by the husband), *khul'* (redemption by the wife), *ta'liq* (delegated repudiation by the wife upon the husband's breach of a stipulation agreed upon in the marriage contract), and *faskh* (judicial dissolution of marriage on one of the grounds provided by the law)." See Nik Noriani Nik Badli Shah, "Legislative Provisions and Judicial Mechanisms for the Enforcement and Termination of the Islamic Marriage Contract in Malaysia," in Quraishi and Vogel (eds.), *The Islamic Marriage*, p.183-199 and Hassan, "Women, Divorce and Islam in Kedah," p. 232-233. Meanwhile, *khul'* remains one of the most popular procedures of divorce by women in the Middle East. See Welchman, *Women and Muslim Family Law in Arab States* (2007).
[85] Direktorat Pembinaan Badan Peradilan Agama, *Analisis Faktor Penyebab Terjadinya Perceraian*, p. 85.

talak and 46 *syiqaq* claims.[86] Meanwhile, *nusyuz* had rarely been used since the middle of the twentieth century. The earliest statistical data of the legal cases of the religious courts dated back to 1957, where no claim based on *nusyuz* was mentioned,[87] suggesting that this mechanism was only accepted as way of framing judicial divorce in the first half of the twentieth century, as the cases in this section demonstrate.

All of these examples of past judicial divorces taken from different religious courts in Indonesia in the course of the twentieth century show that men and women experienced divorce very differently. Men turned to the religious courts to report and seek official approval of their extrajudicial repudiations. They might also appear at court hearings to refuse their wives' divorce and maintenance claims, accusing them instead of being recalcitrant. Unlike men, women used the court to seek divorce through various mechanisms. However, their claims for divorce might require male consent or become subject to court procedures that often rendered divorce unrealizable or overly complicated. It is these factors that now appear to be less of an issue for women since the introduction of the legislation that reformed judicial divorce.

C. Reinterpreting Shari'a Law, Re-gendering Divorce

By the end of the 1980s, the Indonesian government had endorsed Religious Judicature Act 7/1989 to standardize Muslim divorces. A further detailed explication of this reform was introduced through the Compilation of Islamic Law 1/1991. The Religious Judicature Act and the Compilation constitute the most important statutory grounds for changes in judicial divorce

[86] Proyek Pembinaan Badan Peradilan Agama, *Pengadilan Tinggi Agama Mataram dan Pengadilan Agama dalam Wilayah Hukumnya* (Mataram: Proyek Pembinaan Badan Peradilan Agama, Departemen Agama, 1983/1984), p. 24, 68 and 112.

[87] The year 1957 noted 11,726 *taklik talak*, 7,731 *fasakh* and 180 *syiqaq* divorce cases. Eight years later, in 1965, recorded 15,336 *taklik talak*, 10,621 *fasakh* and 639 *syiqaq* claims. See Lev, *Islamic Court*, p. 154. For the discussion on these three types of female divorce in Indonesian religious courts, see Cammack, Donovan and Young "Islamic Divorce Law," p. 99-127.

in the religious courts. The last section of this chapter will examine the new rules and procedures of divorce introduced through these codes and discuss how these have transformed judicial divorce in the religious courts. Although new categories and procedures of divorce have been introduced, the legislations still preserve some forms of Islamic divorce, such as *syiqaq*, *taklik talak* and *khuluk* yet apply them somewhat differently from their original meanings and parameters. Differently from before, *talak* (male repudiation), *talak ba'in sughra* (divorce which is irrevocable except through renewal of the marriage contract), and *talak raj'i* (revocable divorce), are now applied in ways that can empower women. This reinterpretation of Shari'a law and its integration into state law offer women greater access to court and greater power to initiate divorce.

As previously discussed, although *fiqh* shaped past judicial practices, its influence has become less pervasive since the implementation of the state legislations. The first steps toward introducing modern marriage and divorce laws began in the middle of the twentieth century with the enactment of Law 22/1946 on Registration of Marriage, the Divorce and Reconciliation, Marriage Law 1/1974, and Government Regulation 9/1975 on Implementation of Marriage Law 1/1974. These were followed by Religious Judicature Act 7/1989[88] and the issuance of Presidential Decree No. 1 of 1991 on Compilation of Islamic Law.[89]

Law 22/1946 required standardized registration for marriage, divorce and reconciliation, in which failure to comply was liable to punishment of up to three months in jail. Prior to this law, marriage registration was not unified throughout the country. Most parts of the outer islands beyond Java and Madura still followed regulations inherited from the Dutch, such as *Staatblads*

[88] The Religious Judicature Act 7/1989 was amended in 2006 and in 2009. New and extended provisions regarding the religious courts' domains, jurisdictions and operational managements were added.

[89] Counter Legal Draft of the Compilation of Islamic Law which was aimed to substitute the Compilation of Islamic Law was abrogated in 2004 due to its controversial provisions.

No. 348 of 1929, No. 482 of 1932 and No. 98 of 1933, while some other areas employed their own rules.[90] Law 22/1946 thus aimed to unify the plural regulation of marriage registration but did not establish a substantive marriage law. Not until about two decades later in 1974 did the government enact a unified substantive marriage law, the details of which were given through Government Regulation No. 9 of 1975. In this regulation, the laws apply to all Indonesian citizens regardless of their religious denomination. As a result, not all of their stipulations are relevant to Islamic practices. Indeed, the provisions concerning age of marriage, polygamy, divorce, consent to marriage and joint property, just to mention a few, are in many respects contrary to *fiqh*.[91]

However, the recent legislations and *fiqh* do converge in some crucial areas. One of the converging points pertains to the fundamental position of religion in marriage. According to Article 2 [1] of Marriage Law 1/1974, a marriage is valid if it is consummated in accordance with the religion of the parties. This stipulation is reiterated in Article 10 [2] of Government Regulations 9/1975 and the Compilation of Islamic Law 1/1991, especially Article 4, which states that Muslim marriages must be contracted according to Islamic law. These stipulations are intended to preserve marriage between parties of the same religion but not interreligious marriage, in which the parties are from different faiths.[92] Another example of the convergence between the legislations and Islamic law concerns the waiting period *(`idda*) for a female divorcee.

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[90] See the Elucidation of this Law.

[91] On new detailed provisions introduced through the Marriage Law, see June S. Katz and Ronald S. Katz, "The New Indonesian Marriage Law: A Mirror of Indonesia's Political, Cultural, and Legal Systems," *American Journal of Comparative Law* , Vol. 23, No. 24 (1974): p. 653-681 and Mark E. Cammack, Lawrence A. Young and Tim Heaton, "Legislating Social Change in an Islamic Society: Indonesia's Marriage Law, American Journal of Comparative Law," in Lindsey (ed.), *Indonesia: Law and Society,* p. 288-312.

[92] As a result, controversies over this type of marriage continue. See Simon Butt, "Polygamy and Mixed Marriage in Indonesia: Islam and the Marriage Law in the Courts," in Lindsey (ed.), *Indonesia: Law and Society,* p. 266-287 and Bowen, *Islam,* p. 240-252 and Lukito, *Legal Pluralism,* p. 156-166.

The marriage law prescribes that a female divorcee must maintain a waiting period after the dissolution of marriage (Article 11). The details of the terms for the waiting period are given in Article 39 of Government Regulation 9/1975. It stipulates that if marital dissolution occurs due to the husband's death, the waiting period of the wife lasts for 130 days. If the dissolution occurs because of divorce, the wife must maintain the waiting period up to three menstrual cycles. If the marriage dissolves while the wife is pregnant, she must wait until the baby is born. These stipulations match the concept of '*idda* in Islamic law, where a divorcee assumes the same terms for a waiting period according to each circumstance.[93]

Other similarities bear on the conditions of marriage and the grounds of divorce. Article 26 [1] of Marriage Law 7/1989 declares that a marriage consummated without a qualified guardian and two witnesses is subject to annulment. Article 39 [2] affirms that irreconcilable conflicts constitute valid grounds for claiming divorce. Government Regulation 9/1975 further specifies valid reasons for divorce. These include moral transgression (fornication, drunkenness, gambling), two years desertion, five years imprisonment, physical violence, incurable illness and irreconcilable conflicts (Article 19). Under Islamic law, a marriage can be annulled (*fasakh*) if it does not meet basic requirements such as two witnesses and a guardian for the bride. As discussed above, irreconcilably conflicting (*syiqaq*) spouses are recommended to adopt arbitrators (*ḥakam*) from their own relatives to negotiate and settle their uncompromising disputes. In the past, desertion, imprisonment, acute illness, and physical violence against wives were prevalent causes for women to have their marriages annulled (*fasakh*) or to claim *taklik talak* if these conditions were included in the conditional divorce oath at marriage. These are also

[93] On the discussion on *'idda* in Muslim jurists' views, see Judith Tucker, *Women, Family and Gender in Islamic Law* (Cambridge: Cambridge University Press, 2008), p. 100-104 and Jamal J. Ahmad Nasir, *The Status of Women under Islamic Law and Modern Islamic Legislation*, The Third Edition (Leiden: Brill, 2009), p. 159-162.

valid reasons to claim divorce under state law. These examples point to the congruence of the Marriage Law and its Regulations and Islamic law, despite certain disparities between them.

Meanwhile, two other codifications were directly concerned with Muslim marriage and divorce, namely Religious Judicature Act 7/1989 and Compilation of Islamic Law 1/1991. The first law deals with religious court jurisdiction, management, and technicalities as well as the procedure of litigation. The second law is a modern codification of Muslim marriage, inheritance, and endowment and is intended to be the substantive rule and the standard reference for religious court judges. What makes this Act and the Compilation differ significantly from the earlier Marriage Law and its Regulation rests on the fact that while the first two laws were specifically concerned with Muslim marriage and divorce, the latter two laws deal with marriage law for Indonesian citizens in general. Moreover, the Act and the Compilation propose a detailed exposition of new rules and procedures for Muslim divorce.

Substantially, the Act and the Compilation establish new guidelines for divorce that significantly depart from *fiqh*. Although they do not clearly set a limit for the criteria of valid divorce, they stipulate that divorce must occur at court and be validated by the court.[94] Divorce occurs only after it is granted by the court; the waiting period (‘*idda*) for the female divorcee is accordingly counted only after the court decision on divorce becomes legally binding.[95] Divorce must be based on valid reasons after the court fails to reconcile the conflicting couples.[96] Any divorce that trespasses these limits will not be admitted by the court. While extrajudicial divorce is valid under *fiqh*, it is not valid according to these codes. A further consequence of this is that a long separation between spouses—even if they have divorced and remarried unofficially

[94] Religious Judicature Act 7/1989, Article 65, and Compilation of Islamic Law 1/1999, Article 117.

[95] Religious Judicature Act 7/1989, Article 82 (2) and Compilation of Islamic Law 1/199, Article 123. See Also Government Regulation 9/1975, Article 18. Consequently, if a divorce case is appealed to cessation, ‘*idda* will begin once the case is decided by Supreme Court.

[96] Religious Judicature Act 7/1989, Articles 65 and 70 (1).

according to the local practices of Islamic law and customary norms—does not change their marital status according to the state so long as they have not divorced officially before the court. As a result, the spouses can still make reciprocal claims on each other. Either party, for example, can file a claim for joint property that they have earned in the course of their marriage because they are legally still a valid couple according to state law.[97]

Furthermore, because the codes require that divorce can only be claimed on the basis of conflict between litigants, divorce by mutual consent is prohibited. Put differently, married couples cannot voluntarily divorce before the court without providing arguments and evidence about their marital breakdown. The Compilation of Islamic Law defines marriage as a religious duty (*'ibāda*) and a solemn religious covenant (*mīthāqan ghalīẓa*) to obey God and to realize a happy and blessed family.[98] According to this definition, Islamic marriage is a moral-spiritual duty that carries divine injunctions: it is not only a mundane secular contract between a man and a woman, which can be arbitrarily ended when the parties consent to end the contract. This is, I think, an important reason why every divorce claim is subject to mediation or reconciliation before a court decision can be issued by the judges. Divorce is seen not only as a transgression of the modern ideal family as projected by the state through the marriage law,[99] but is also a deviation from Islamic tenets, which censure divorce as "God's most hated lawful act." Paradoxically, the state's redefinition of Islamic marriage is thus more "religious" than that of classical Muslim jurists, who approached marriage as a contract of domination of men over women.[100]

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[97] *Talak* divorce cases in Section One of Chapter Three best illustrate this.

[98] The Compilation of Islamic Law, Article 2 and 3.

[99] Kate O'Shaughnessy, *Gender, State and Social Power in Contemporary Indonesia: Divorce and Marriage Law* (London and New York: Routledge, 2009).

[100] This is the argument put forward by Ali. See Kecia Ali, *Marriage and Slavery in Early Islam* (Cambridge, MA: Harvard University Press, 2010).

In addition to these stipulations, Religious Judicature Act 7/1989 and Compilation of Islamic Law 1/1991 also introduced a new procedure of divorce. They prescribe *talak* for male judicial divorce. *Talak* was originally an Arabic term (*ṭalāq*), denoting male authority for unilateral repudiation. By contrast, the code stipulates *gugat* as the procedure of female judicial divorce. *Gugat* is an Indonesian word that means "lawsuit." In this respect, *gugat* refers to a unification of various past types of female divorces. The procedure of *talak* divorce is given in detail in Articles 66-72 of Religious Judicature Act 7/1989 and Articles 129-131 of the Compilation of Islamic Law 1/1991. The *gugat* divorce procedure is detailed in Articles 73-78 of the Act and Articles 132-137 of the Compilation. These procedures allow men and women to access divorce equally from the court, but they favor women over men in a number of ways.

First, a *gugat* lawsuit and a *talak* petition must be submitted to the district religious court where the wife resides.[101] Either as a plaintiff or as a defendant in judicial divorce, Muslim wives go to trial in the court of their district area. Accordingly, they must file their divorce lawsuits, or respond to a court summons for a hearing of *talak*, in their district religious court. In contrast, Muslim husbands are required by law to lodge their *talak* petition, or respond to their wives' *gugat* claims, to the court of their wives' district even if they do not live in the same district as their wives. This procedure lessens the female litigants' burden on, for instance, transportation fare, especially if they live in a remote rural area away from the court.

The second benefit for Muslim women pertains to the brief procedural process of *gugat*. Technically, *gugat* is a shorter proceeding and is less complicated than *talak*. Although in practice both *gugat* and *talak* trials may take months before a court decision is handed down, in principle *gugat* proceedings can be completed after only two or three hearings, especially when

[101] The only exception is if the wife leaves the conjugal house or lives abroad. Then the husband can file her petition to the religious court of his district or the religious court of Central Jakarta. Articles 66 and 73 of the Act 7/1989 and Articles 129 and 132 of the Compilation 1/1991.

male defendants do not attend the hearings. In *gugat*, a female plaintiff's main objective is to seek the court's decision (*keputusan*) to divorce her from her husband. If her claim is granted, and if her husband does not appeal to the appellate court, or is absent throughout the hearing, she will receive a divorce certificate three weeks or so thereafter. In *talak*, however, the male plaintiff's objective is to ask for the court's permission to repudiate his wife and, upon the approval of his *talak* petition, to formally declare his *talak*. If the petition is approved and his wife does not appeal or is absent throughout the hearing, he will still need one more court session for the *talak* pronouncement (*sidang ikrar talak*).

This last step can be frustrating for male plaintiffs because the session will only be held if it fits other requirements or conditions. First, a male plaintiff may have to cede a one-time consolation payment (*mut'a*). In many cases, judges commonly demand that male plaintiffs give this payment or another sort of valuable gift to their wives prior to the *talak* pronouncement. Moreover, if their wives propose a counterclaim asking for post-divorce maintenance (*nafkah iddah*), or other related claims, and such a counterclaim is approved by the judge either fully or partially, male plaintiffs will need to fulfill this demand too. Judges may postpone the session of *talak* pronouncement if such a payment has not been fully paid.[102] Finally, the session for the *talak* pronouncement should not coincide with the wife's menstrual period because this is highly condemned. To reassure that the wife is "clean," judges will always ask for her confirmation that she is not menstruating or pregnant.

According to the Compilation of Islamic Law, *talak* is classified into two kinds: *sunni* (permissible) and *bid'i* (prohibited).[103] A *talak* is permissible when it is given under the condition where the wife is not menstruating and no sexual intercourse has taken place during

[102] The second *talak* case (Case Seven) in section C of Chapter Two illustrates this. In *gugat*, a male defendant may propose a claim of joint property, but he cannot claim post-divorce maintenance.

[103] Nasir, *The Status of Women*, p. 125-126.

this period.[104] In contrast, a *talak* is prohibited when the wife is menstruating or is "clean" but has had sexual intercourse with her husband.[105] If the wife is not clean, the session of *talak* declaration will be deferred until the end of her period. I once saw a judge postpone the *talak* pronouncement because the female defendant was menstruating and tell the male plaintiff to be patient until his wife's period was over.[106] However, in *gugat*, judges never ask female plaintiffs these questions. The approval of *gugat* is not contingent upon whether or not a female plaintiff is menstruating or pregnant but whether the correct procedure is followed and evidence is accepted because *gugat* is at the wife's initiative.

Because of the complications that may occur in *talak*, a clerk told me that he once suggested that a couple wishing to divorce should file a *gugat* claim instead of a *talak* petition.[107] The couple agreed because they wanted an immediate divorce since they had settled post-divorce arrangements out of court. Under the guidance of the clerk, the wife, who acted as the plaintiff, composed a claim which included all of the necessary arguments and evidence. The husband pledged to be a "docile" defendant in the courtroom so that the divorce could be granted quickly. This scenario worked well. In the courtroom, the husband did not deny the wife's claim but simply confirmed it. The judge granted the claim after three hearings, which, for a standard case where both the plaintiff and the litigant always attended the hearings, was very quick.[108] In most cases where both plaintiffs and defendants never miss a hearing, trials commonly last longer because each party tends to make counter arguments and claims. Had this couple's claim been

[104] The Compilation of Islamic Law 1/1991, Article 121.
[105] *Ibid*., Article 122.
[106] Field notes and courtroom observation, May 18, 2011.
[107] Interview and field notes, December 1, 2011.
[108] The judge seemingly understood what was going on between the litigants. However, he could not refuse to approve the claim since the plaintiff met all requirement of procedure and evidence and since the litigants did not wish to reconcile during the mediation. Field notes, January 20, 2011.

filed as a *talak* petition, they would have waited longer because they would have needed another session for the declaration of *talak*.

The third benefit for women in judicial divorce is that the result of a court decision on *gugat* is *talak ba'in sughra* (*ṭalāq bā'in ṣughra*) which renders reconciliation prohibited except through a new marriage contract. Oftentimes, judges remind female plaintiffs upon the approval of their *gugat* claims to be wary about their husbands' proposals for reconciliation without renewing the marriage contract.[109] This sort of court decision is meant to protect women from unwanted unilateral immediate reconciliation by their husbands. Because *gugat* is normatively understood as a result of marital conflicts instigated by the husband, it is reasonable for any effort at reconciliation to be achieved by renewing a marriage contract that is agreed upon by the wives. The court endows wives with a power that enables them to control any future union through a newly secured marriage contract. As for *talak* petitions, the type of court decision in this case is a single revocable divorce (*talak raj'i*). This means that reconciliation during the '*idda* period is possible without necessarily renewing the marriage contract, although the reconciliation remains subject to wife's consent.[110]

These are concrete examples of how the reformation of Shari'a law or *fiqh* in the legislation and modern codes of Muslim marriage and divorce reconfigure conjugal relationships between husbands and wives. Under *fiqh*, *talak* is defined as the dissolution of a marriage contract concluded unilaterally the husband. Under state law, this original term is still maintained but its meaning and boundaries are reworked in a context that reduces the arbitrary use of male

[109] Judges mostly explain what sort of legal consequence that a decision of *gugat* or *talak* entail to the parties. Upon the approval of *gugat*, judges usually remind female plaintiffs that they cannot reconcile except through renewal of marriage contract. Or, if they wish to remarry, judges advise, they cannot do immediately but must wait until their *idda* is over.

[110] *Fiqh* does not require such consent while the code does. Article 167 (2) of the Compilation of Islamic Law.

repudiation: divorce is now no longer an arbitrary act, but must be grounded in sound arguments and evidence and approved by the court. I therefore concur with Cammack, Young and Heatons' thesis that the main objective of the marriage law is to restrict the use of arbitrary male repudiation by means of imposing procedural mechanisms that render *talak* a complicated avenue for the termination of marriage.[111] But an equally important point, I argue, is that divorce is also redefined in the codes to strengthen women's legal status. This is evident from the deployment of *talak ba'in sughra* in *gugat*, which aims to protect women from unwanted unilateral repudiation.

In addition to this reform, the legislation preserves other types of Islamic divorce. Religious Judicature Act and Compilation of Islamic law reintroduce *syiqaq*, *taklik talak* and *khuluk*, but apply them differently from their previous usages. Regarding *syiqaq*, for example, article 76 [1] of Religious Judicature Act 7/1989 stipulates that "when divorce is based on the reason of *syiqaq*, it is recommended that the testimonies from the close family members of the conflicting parties are heard before the decision of divorce can be issued," and [2] "the court appoints mediators to reconcile the parties after hearing the testimony." As I discussed earlier in this chapter, *syiqaq* mainly refers to a judicial procedure to settle irreconcilable conflicts between spouses. It requires a particular mechanism of marital conflict settlement that differs fundamentally from the others, such as *fasakh*, *taklik talak* and *khuluk*.

However, in today's judicial divorce, the traditional procedure of *syiqaq* is no longer applicable. Although the code explicitly stipulates that the court appoints a mediator from the litigants' relatives to settle their irreconcilable conflict, judges may or may not do this or may do it in different ways. More importantly, throughout my fieldwork I have never seen the

[111] Mark Cammack, Lawrence A. Young and Tim Heaton, "Legislating Social Change in an Islamic Society: Indonesia's Marriage Law," in Lindsey (ed.), *Indonesia*: *Law and Society*, p. 288.

appointment of mediators in divorce cases involving severely conflicting couples, as was the case for *syiqaq* procedures in past judicial practices. What now seems to be the case is that *syiqaq* is perceived as simply one reason for divorce, the settlement of which does not call for a specific mechanism. The case may follow either *talak* or *gugat* procedure, depending on who initiates the divorce. If a male plaintiff intends to repudiate his wife at court on the grounds of irreconcilable differences (*syiqaq*), his petition will be classified as *talak* and the procedure of *talak* divorce is taken accordingly. If a female plaintiff petitions the court for divorce on the grounds of irreconcilable differences with her husband, her claim will no longer be framed as *syiqaq*, as in the past, but as *gugat*, and consequently it will take the *gugat* divorce procedure to settle her dispute. From my courtroom observations during my fieldwork, it is clear how the procedure of judicial divorce on the basis of irreconcilable differences is applied; it will be settled through either the *talak* or *gugat* procedure.

Every contentious claim, including *talak* and *gugat*, requires mediation, regardless of the cause of such claims. This mediation is conducted after the first hearing and led by a mediator judge that the litigants agree to appoint.[112] Therefore, a separate mediation is no longer required, even for divorce cases on the basis of irreconcilable conflicts (*syiqaq*). What judges will commonly do instead is ask the witnesses if they agree to counsel or reconcile the litigants after they offer their testimony. Here, the judges recognize that a witness and a mediator might be the same person, who can both offer valuable testimony about the litigant's households as well as counsel and reconcile them. With this practical consideration, a separate mediation of divorce cases involving irreconcilable conflicts is only optional. In all divorce cases, judges ask witnesses to voluntarily mediate the litigants. "Have you advised the litigants to reconcile? If not, are you willing to do so?" These are very common questions that judges raise to witnesses before

[112] In future, litigants must provide their own professional mediators and pay themselves the fees for this.

ending the sessions of testimony. If the witnesses accept the offer, judges will usually postpone the hearing for two weeks or so—depending on the judge's own evaluation of the case or on mutual agreement between the parties—until they receive information from witnesses regarding the mediation. But if witnesses refuse to take on this voluntary task, judges will conclude the trial.

Taklik talak is another example of the revision of Islamic divorce in the code. Although the Compilation does not set a new definition of *taklik talak*, it does add one important stipulation. Basically, as Article 1 (e) of the Compilation states, *taklik talak* is an oath taken by the groom upon concluding the marriage contract. In this oath, he pledges to obey a number of conditions, where any violation will effectuate *talak*. However, as Article 46 (2) of the Compilation adds, in order for a *talak* to officially occur, wives have to put forward a divorce claim to the religious court upon the violation of the oath. In other words, even though a husband may breach the oath, a *talak* will not automatically occur if his wife does not file a divorce claim in court. It therefore requires a legal action on the part of the wife to generate divorce.

Although *taklik talak* is still admitted in the Compilation, in practice, like *syiqaq*, it is rarely used by women to claim divorce. Even though grooms are still required to pronounce the conditional divorce oath or sign it or both, no recent claim has been proposed or registered as *ta'lik talik* in the religious courts. Instead, women can propose divorce on the grounds of other valid reasons admitted by the legislation. As long as female plaintiffs are able to show strong arguments and produce valid evidence, their claims can meet the *gugat* divorce requirement. One palpable benefit for women from this shift of judicial divorce from *taklik talak* to *gugat* is that they may be eligible to file a claim, even though their marriages are not recorded. In this respect, they will need to propose authentication of their unofficial marriage and claim divorce at the

same time. They are not eligible to file divorce through *taklik talak* if they do not possess a marriage certificate as official written evidence to prove the breach of the conditional divorce oath by their husbands. The simplification and unification of women's divorce procedures such as *taklik talak* into *gugat* undeniably empowers women, especially those whose marriages are not recorded. Therefore, lack of marriage documents can no longer restrict women from petitioning for divorce at court.[113]

Khuluk is another example of how Islamic divorce is accommodated into the code and how it is reinterpreted differently from its past original meaning and usage. During my entire fieldwork I did not find a single *khuluk* divorce case, despite the fact that it is accommodated in the code. The Compilation still officially admits it. Article 1 (i) defines *khuluk* as a divorce that occurs upon the wife's request by means of making an agreed compensation (*'iwaḍ*) to her husband. But, again, like *taklik talak*, the Compilation inserts an important stipulation that changes the *khuluk* judicial divorce practice. Article 148 (6) of the Compilation states that should the parties disagree over the amount of the compensation, the court may handle the claim as a regular (*gugat*) divorce. This stipulation emphasizes the primacy of mutual consent as the basis of any compensation payment. If no agreement on this issue is reached between the litigants, *khuluk* cannot proceed. Consequently, a unilateral demand of compensation sought by male defendants from their wives seeking divorce (as very common practice in Lombok) is rarely granted because the wives usually refuse such demands.

What must be underscored from these changing judicial practices is that despite the integration of *syiqaq*, *khuluk* and *taklik talak* into the code, currently no judicial divorce is framed under these categories. Court decisions of divorce are rarely if ever put under *syiqaq,*

[113] See again *gugat* divorce case no. 4 in Chapter Two, where the female plaintiff was successful in her divorce as well as in her joint property claim despite her lack of a marriage certificate.

fasakh, taklik talak or *khuluk*.[114] Although the pronouncement or signing of the conditional divorce oath by grooms remains preserved, no recent divorce petition in the religious court of Central Lombok, as well as in other religious courts throughout the country, has been registered as *taklik talak*. This is the same with *khuluk, fasakh* and *syiqaq*. What is now most important is that litigants must be able to demonstrate strong reasons and arguments and obey the official procedures of litigation. If, for example, a woman asks for a divorce from the court on the ground of her husbands' moral transgression, such as abandoning religious obligations, she does not necessarily have to compensate her husband if he refuses the claim since the court may approve her valid arguments and evidence for divorce.

This examination shows that the incorporation of Islamic divorce procedures into state laws of divorce has altered judicial divorce practices. While in the past the roots of marital disputes might determine the procedure of divorce to be followed, now it is the gender of claimants that most affects the procedure. Although the causes of marital disputes leading to divorce may be different, the divorce procedures for men and women are officially fixed as either *talak* or *gugat*. While the revision of *talak* reduces unchallenged male power—because now men have to ask for court approval to repudiate their wives—the unification of women's divorce in *gugat*, by contrast, strengthens women's legal position because this enables them to effectuate divorce at court without their husband's consent through a simplified procedure of litigation. This is one of the most crucial points that have resulted from the statutory reform of judicial divorce in Indonesia.

[114] See again Table 1 in Chapter Two (Section B) on the all ranges of legal cases filed in the religious court in Central Lombok and Footnote 51 in Chapter Two on the national data of divorce cases filed in all first instances of the religious courts in Indonesia.

CONCLUSION

The reinterpretation of Islamic law, along with social factors such as court reforms, legal consciousness, and gender and power relations, have worked together to shape contemporary Indonesian Muslim divorce practices, especially female-initiated divorce (*gugat*). The religious courts constitute an important locus where Islamic law is applied, reinterpreted and contested among judges, court clerks and litigants. How these processes work is illustrated by the various claims or cases filed before the religious court in Central Lombok. Throughout the examination of these cases in the preceding chapters, I have demonstrated these points and highlighted how judicial divorce both impacts and is impacted by contemporary practices of Islamic family law in Indonesia.

Both religious court reforms and women's legal awareness of such reforms influence judicial divorce initiated by women. The majority of clients of the religious court in Central Lombok are rural women, who are seeking divorce. The most common reasons these women cite for seeking divorce are spousal negligence and irreconcilable conflicts, often due to polygamy and domestic violence. These women turn to the religious court in an attempt to clear up the ambiguity regarding their marital status. Spousal neglect, for example, puts women's marital status in doubt: they are neither divorced, but neither do they enjoy a harmonious marital union. Other women may appear before the religious court to seek divorce due to irreconcilable conflicts with their husbands because their husbands married another woman or committed violence against them. As the statistical data on the litigants' demographic backgrounds in Chapter Two show, the social status or position of the female plaintiffs at the religious court in Central Lombok are generally "housewife" and peasant. While some of them have a high school

education, the majority have only an elementary school level of education. This finding suggests that marital breakdown in Lombok mostly occur among less educated young couples, as the other studies of divorce in Indonesia demonstrate.[1]

Religious court reforms have helped women access the religious court. Since the end of 1980s, the state has reformed the judiciary in order to increase court services and accessibility. The establishment of circuit courts and free legal services (*prodeo*) are two important programs that have supported this reform. For example, the religious courthouses in Lombok are located in town and cities. Consequently, they are less accessible to many potential women clients, who live in remote rural areas. To solve this problem, the religious court now regularly conducts a circuit court, in which judges and court clerks travel to cover a number of different villages, and hold court hearings locally at village offices. The state has allocated a significant budget to support this program. In addition, the court also offers free legal services for poor clients. According to a national survey conducted in 2007, most of the religious courts' clients are poor women, who would have to pay fees nearly three to four times higher than their monthly income in their attempt to get justice from court. Therefore, without a waiver of court fees, it is almost impossible for poor women to obtain court services. The availability of such waivers has done much to promote poor women's access to justice. Another important court program initiated through reforms is the establishment of the center for legal aid (*pos bantuan hukum*). Although this center is currently only available at the religious court in the capital city, there are plans to set up a legal aid center in every religious court of first instance throughout the country. This center is staffed by trained legal consultants and academicians from university law schools and provides free assistance to poor litigants in composing their lawsuits. All of these court programs

[1] Premchand Dommaraju and Gavin Jones, "Divorce Trends in Asia", *Asian Journal of Social Science*, 39 (2011), p. 725-750 and Tim B. Heaton, Mark E. Cammack and Larry Young, "Why is the Divorce Rate Declining in Indonesia?", *Journal of Marriage and the Family*, 63 (2001), p. 480-490.

facilitate women's access to the court and stimulate them to use the law and court more frequently.

Women's legal awareness of the law and court system can be seen not only from the increasing number of female litigants but also from their strategic use of the courts to achieve their objectives. As nation-wide divorce data released by the Directorate of Religious Courts Body show, the rate of female-initiated divorce (*gugat*) has risen recently. This indicates that women have devised strategies to utilize the court to settle their marital problems. According to Sally Merry, when people go to court to inquire about rights and entitlements, they are conscious that the law may offer them the chance to achieve their goals in spite of the fact that the court may not always rule favorably on all of their claims.[2] Following Jean Comaroff and Pierre Bourdieu, Merry argues that practical knowledge, everyday life, and personal experience can become the basis for human consciousness.[3] This is relevant in order to understand legal consciousness and the various ways in which litigants experience the law and deal with the court in Lombok. The female plaintiff in divorce case No. 2 in Chapter Two, for example, resorted to the court, but only did so after she had obtained her share of joint property out of court so that she would not have to include a claim on joint property in her *gugat* divorce. This strategy was designed to accelerate the approval of her divorce and to avoid the complication of litigation. Another female plaintiff, as the narrative of divorce case No. 5 in Chapter Two shows, went to the court to reject her husband's demand of compensation after she had asked him for divorce because she was aware that such a demand had no basis in state law. The female defendant in *talak* divorce case No. 7 in Chapter Two used the court to maximize her entitlement of alimony by means of entering a long written counterclaim to respond to her husband's *talak* petition.

[2] Sally Engle Merry, *Getting Justice and Getting Even: Legal Consciousness among Working-Class Americans* (Chicago: The University of Chicago Press, 1990), p. 5.

[3] *Ibid*.

Although her counterclaim was only partially granted, she knew that she deserved alimony when her husband initiated divorce. These examples, and the other divorce case narratives discussed throughout the chapters of this dissertation, reveal women's consciousness of the law and the court system, and show that consciousness influences their strategies in litigation.

What I have extrapolated in this study from Merry's analysis of legal consciousness concerns the pivotal roles of legal institutions in offering people access to justice and in stimulating their eagerness to use the court. This point is mostly lacking in Merry's analysis. Based on her discussion, the courts she examined in New England, in the U.S., were very strict in selecting the issues brought by people. Merry distinguishes between "problems" and "legal cases." By problems she means issues that do not fit into legal categories, and thus are not deemed worth being heard by the court. Only when people are able to shape issues into relevant legal categories will the courts receive them.[4] By contrast, in Lombok, the religious courts rarely reject claims so long as they are filed in accordance with the established court procedure. Religious Judicature Act 7/1989 and its second amendment in 2009 require religious courts to accept all claims and to proceed with them to trial efficiently and with the least cost if claims are supported with valid documents and evidence.[5] Such substantive and procedural reforms, as well as the new religious court programs providing free legal services and circuit courts, are clear examples of judicial reforms in Indonesia that affect the religious courts' performance in handling legal cases and in stimulating women's consciousness to use the court.

The increasing rate of female initiated divorce (*gugat*) marks the changing gender and power relations between the spouses in Lombok. Because women do not share the right that men do to repudiate a spouse and because the religious court serves as the only place where Muslim

[4] *Ibid*., p. 13-16.

[5] Article 58 (2) of Religious Judicature Act 7/1989 and the Second Amendment of Religious Judicature Act 50/2009 Article 60 B (2).

women can seek a divorce, women are the majority of divorce seekers in the religious courts in Indonesia. The religious courts also have become a favorite site for women to settle their household conflicts because the courts offer them the power to subvert gender biases and patriarchalism. In Lombok, men are the head of family and are responsible for maintaining their family. These roles endow them with the privilege to control a marital union. Men's arbitrariness in controlling marriage can be seen from the high incidence of unilateral extrajudicial divorces and from the ways in which they respond to divorce lawsuits petitioned by their wives in the court. Male litigants may insist that the court acknowledge their extrajudicial *talak* as a valid mechanism of marital dissolution. They often refuse to divorce wives who ask for a divorce, not because they desire reconciliation but because they want to demonstrate their power as the head of the household, who can either maintain or dissolve a marriage. Women are perceived as the guardians of the household and are responsible for child nurturance and other domestic work. These conceptions of gender roles and the division between the private and public spheres are still preserved in the laws. Both traditional Islamic law and modern codes of Muslim marriage and divorce in Indonesia such as Marriage Law 1/1974 and Compilation of Islamic Law 1/1991, still endorse these roles.[6] However, these laws also guarantee equality for spouses to settle their marital disputes at court.[7] On one hand, therefore, the laws dominate women's lives, assigning them a particular role of gendered subject that creates asymmetrical power relations with their husbands. Yet, on the other hand, the laws also provide a tool for women to resist such domination.

Mindie Lazarus-Black and Susan Hirsch contend that law entails power that creates a paradox of domination and resistance. Here law is not understood from the positivist's legal

[6] See Article 3 [1], 31 [3] and 44 [1 and 2] of Marriage Law 1/974 and Article 81 [1] and 83 [1 and 2] of Compilation of Islamic Law 1/1991.

[7] Marriage Law 1/1974 Article 31 [1 and 2] and 34 [3].

point of view that equates law with coercion or a Marxist perspective that perceives law as a tool to serve the interests of the elite classes. Building on Michel Foucault's concept of power, they attempt to reformulate the relation between law and power. Accordingly, they maintain, power is not possessed and imposed from the top, but is "fluid and dynamic, constitutive of social interactions, and embedded materially and symbolically in legal process."[8] This conception allows scholars to broaden their analysis of the function of law, which becomes "simultaneously a marker of hegemony and a means of resistance,"[9] because law is not only used by the elite class to support their domination but is also manipulated by the lower class to resist their oppression. According to June Starr and Jane Collier, law is the domain of contestation for various groups of people, who seek different interests in it.[10] Understanding law simply as a closed cultural system where dominant groups impose their interests over other groups therefore ignores the fact that underrepresented people and marginalized groups often use law to reject their suppression.

Using Starr and Collier's and Lazarus-Black and Hirschs' analysis of power-law relations, judicial divorce in Lombok illustrates the paradox of Islamic family legal discourse where domination and resistance co-exist. The application of traditional *fiqh* law permits male unilateral divorce, unregistered marriage, and polygamy. Although the state codes regarding Muslim marriage and divorce do not officially recognize extrajudicial divorce and unregistered marriage, these practices continue and have de facto recognition. State codes also do not outlaw polygamy. All three practices are prevalent hegemonic practices of Islamic law that are inimical to women in Lombok. Extrajudicial divorce reveals women's inferior position *vis a vis* their

[8] Mindie Lazarus-Black and Susan F. Hirsch (eds.), *Contested States: Law, Hegemony and Resistance* (New York and London: Routledge, 1994), p. 2.

[9] *Ibid*., p. 9.

[10] June Starr and Jane F. Collier (eds.), *History and Power in the Study of Law: New Directions in Legal Anthropology* (Ithaca and London: Cornell University Press, 1989), p. 9.

husbands in respect to controlling a marital union. The narratives of marital disputes that are stimulated by polygamy reveal that men may marry another woman even without the consent of their wives. However, as these scholars' arguments regarding power-law relations suggest, the power of law is not simply possessed (by men) but is also contested (by women). Judicial divorce in Lombok symbolizes the struggle to exercise power among disputants.

In the words of Carolyn Evans and Amanda Whiting, who studied women in Asia and Pacific regions, women may find a "mixed blessing" in both law and religion. Normatively, they argue, "these diverse legal systems and religious doctrines have variously denied women authority and capacity to participate fully in the public organization of social, political and religious life; they have furthermore constructed gender and familial relations in ways that subordinate women. Yet, they have also offered promises of women's empowerment, and provided rules and procedures, norms, values, and interpretation of sacred traditions to deliver those emancipatory promises."[11] This type of "mixed blessing," is readily apparent in Lombok, where women face laws that constrain them, but also provide space in public through the state courts where women can challenge hegemonic legal and religious discourses.

When women go to court bringing narratives of household grievance, they symbolically challenge the division of public and private boundaries and shift gender relations. Divorce case No. 3 in Part C of Chapter Three illustrates how a female litigant used the court to challenge the validity of her husband's extrajudicial *talak*. Local discourses of Islamic marriage and divorce maintained that such a divorce was valid, so this woman was therefore required by the local elders and religious figures to accept a unilateral divorce. When she rejected this arbitrary divorce and turned to the court to seek either invalidation of the divorce or compensation for

[11] Amanda Whiting and Carolyn Evans (eds.), *Mixed Blessing: Laws, Religions and Women's Rights in Asia Pacific Regions* (The Hague: Martinus Nijhoff, 2006), p. 1.

being unilaterally repudiated, she broke through the limits of public and private space and gender ideology. Another woman resorted to the court after her husband married another woman, as the narrative of divorce case No. 4 in part C of Chapter Three demonstrates. She was advised by the *tuan gurus* to give her consent to her husband's second marriage because he was economically able to maintain a co-wife. She rejected the demand and went to court to seek divorce and challenge her husband. As the data from the religious court in Central Lombok show, litigants come to the court more to resist polygamy than to seek the court's approval of polygamy.

Gugat, or female-initiated divorce, reflects these changes in Lombok. It has allowed women to become active agents in determining the status of their marriage. Outside of *gugat*, there are of course other varieties of local resistance made by women against patriarchy and biases of gender relations. Some previous studies show that Sasak women may leave the conjugal house (*ngerorot*) when they dispute with their husbands.[12] By abandoning all domestic tasks, Sasak women show that they can exercise their agency and that they are not passive subjects in the patriarchal society. However, such traditional resistance is limited because it does not allow women to discard their status as legal spouses if their husbands do not want to divorce them. Only by resorting to the court for a divorce can women officially terminate a marital dispute without their husbands' consent. This means that *gugat* goes one step further than the traditional *Sasak* approach to female resistance. *Gugat* not only marks changes in gender and power relations between spouses but also, more importantly, signifies a shift in modes of traditional women's resistance in Lombok.

[12] Syafruddin, *Perlawanan Perempuan Sasak: Perspektif Feminisme* [Sasak Women's Resistance: A Feminist Perspective] (Mataram: Universitas Mataram Press, 2006) and Maria Platt, "Patriarchal Institution and Women's Agency in Indonesian Marriages: Sasak Women Navigating Dynamic Marital Continums," *PhD Dissertation* (Monash, Australia: La Trobe University, 2010).

Another important point about *gugat* concerns the evolution of Islamic law and limited legal pluralism in Indonesia. Prior to the enactment of modern Muslim family law codes in Indonesia, which included the Religious Judicature Act 7/1989 and Compilation of Islamic Law 1/1991, *fiqh* strongly influenced the procedures and categories of judicial divorce. Any divorce case filed in religious courts was framed under the categories of *talak*, *khuluk*, *syiqaq*, *fasakh* or *taklik talak*. With the enactment of the modern codes, these categories have shifted. *Talak* (male repudiation) is now redefined to limit the use of male power of unilateral repudiation, which is now subject to court approval. Interestingly, *talak ba'in kubra* is still invoked as part of court decisions in *gugat* cases as a way to finalize the divorce and to protect female plaintiffs because this type of *talak* restricts male unilateral reconciliation. In contemporary Indonesian judicial divorce practices, *talak* thus conveys the idea of the curtailment of male power. The reinterpretation of Islamic divorces suggests that the reform of Muslim divorce is premised upon the classical concepts of Islamic marriage law (*fiqh munākaḥāt*) but these concepts have been redefined and reconceptualized to fit different contexts and meanings that are relevant to the state legal and judicial reform agendas. Nonetheless, *fiqh* remains the main resource for judges' legal reference when the state codes are lacking in clarity or when strict application of the codes may endanger justice seekers or create severe public hardship. The approval that the religious court gives to *isbat nikah* (legalization of unregistered marriage), which substantially contravenes state law but is religiously and socially sanctioned, is the best example of how *fiqh* and social norms may be mutually constitutive sources of law in religious courts.

As the compilation of past religious court documents reveal, prior to the implementation of modern family law codes and judicial reforms, women who wanted a divorce faced an uphill battle. While men could easily divorce their wives out of court and request authentication of their

extrajudicial *talak* from the courts, women had to obtain male consent or follow complicated court procedures for divorce. Studies about Muslim family law in the contemporary Muslim world demonstrate that the reinterpretation of classical doctrines of Islamic law and its reintroduction via modern codification procedures has re-gendered Islamic law and empowered women's legal status.[13] *Gugat* is one profound example of this.

However, *gugat* features a very interesting point of legal practice in Indonesia that is not found in family law systems in other Muslim countries. *Gugat* has become the best mechanism for marital dissolution by Indonesian Muslim women by granting women much greater access to marital dissolution than they used to have. As I have discussed in Chapter Four, judicial divorce in Indonesia has been redefined according to the gender of the petitioner: *talak* for men and *gugat* for women. *Gugat* effectively sanctions the establishment of female divorce power by authorizing women to initiate divorce in ways that the traditional Islamic law does not allow. While *khuluk* (*khul'* or *khula* in South Asian and African Muslim countries or *talak tebus* in Malaysia) or other female divorces influenced by traditional Islamic law are still used in other Muslim countries,[14] they are now no longer used in Indonesia because these procedures are unified into *gugat*.

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[13] John L. Esposito, *Women in Muslim Family Law* (New York: Syracuse University Press, 1982), Ziba Mir-Hosseini, *Marriage on Trial: A Study of Islamic Family Law in Iran and Morocco* (London and New York: I.B. Tauris, 1993), Lynn Welchman, *Women's Right and Islamic Family Law: Perspectives on Reform* (London and New York: Zed Books, 2004), Lynn Welchman (ed.), *Women and Muslim Family Law in Arab States: A Comparative Perspective of Textual Development and Advocacy* (Amsterdam: Amsterdam University Press, 2007), Christina Jones-Pauly with Abir Dajani Tuqon, *Women Under Islam: Gender, Justice and the Politics of Islamic Law* (London and New York: I.B. Tauris, 2011) and Rubya Mehdi, Werner Menski and Jørgen S. Nielsen (eds.), *Interpreting Divorce Law in Islam* (Copenhagen: DJØF Publishing, 2012).

[14] Karin Carmit Yefet, "The Constitution and Female-Initiated Divorce in Pakistan: Western Liberalism in Islamic Garb", *Harvard Journal of Law and Gender,* Vol. 34 (2011): 553-615, Oussama Arabi, "The Dawning of Third Millennium on Shari'a: Egypt's Law No. 1 of 2000, or Women May Divorce at Will", *Arab Law Quarterly,* 16 (2001): 2-21, Nadia Sonneveld, *Khul' Divorce in Egypt: Public Debates, Judicial Practices and Everyday Life* (Cairo and New York: The American University in Cairo Press, 2012), Nik Noriani Nik Badli Shah, "Legislative Provisions and Judicial Mechanisms for the Enforcement and Termination of the Islamic Marriage Contract in Malaysia", in Asifa Quraishi and Frank E. Vogel (eds.), *The Islamic Marriage Contract: Case Studies in Islamic Family Law* (Cambridge, MA: Harvard Law School, 2008), p.183-199, Michael G. Peletz, *Islamic Modern: Islamic*

A comparison of *gugat* with traditional Islamic female-initiated divorce procedures, especially *khuluk*, which is often claimed to be the most favorable traditional avenue for Muslim women to gain a divorce, reveal that *gugat* offers a more flexible procedure and liberal mechanism of divorce than *fiqh*-sanctioned mechanisms. For example, if a woman seeks a divorce through *khuluk*, such as is available in Malaysia or Egypt, she has to give back her *mahar* to her husband or pay another kind of compensation to him. In other words, *khuluk* is divorce in exchange for the release of *mahar* or payment of compensation to husbands (male defendants). This does not happen in *gugat* divorce.

By law, Indonesian Muslim women are not required to return their *mahar* to their husbands when they petition the court for a *gugat* divorce. What they need to do instead is to comply with court litigation procedures and support their *gugat* claims with strong arguments, convincing evidence and reliable witnesses. It sometimes occurs, however, that female plaintiffs seeking divorce are considered by judges to be disobedient (*nushūz*), thus making them ineligible for post-divorce maintenance from their husbands when their divorce petitions are granted. Put differently, petitioning for *gugat* may dissolve women's rights to alimony if doing so is viewed as analogous to rebellion against their husbands. However, for the majority of female plaintiffs in Lombok, the risk of loss of entitlement to alimony does not necessarily discourage them from seeking divorce when they find their union is unbearable. This is because when their husband abandon them and fail to support them, as is not uncommon in Lombok, they can still sustain themselves since many of them earn extra income or can rely on their natal family to support them and their children (if any) when they divorce.[15] Moreover, they can still file a claim for a

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Courts and Cultural Politics in Malaysia (Princeton: Princeton University Press, 2002) and Erin E. Stiles, *An Islamic Court in Context: An Ethnographic Study of Judicial Reasoning* (New York: Palgrave Macmillan, 2009).

[15] These resources, namely economic independence and support from the natal family, also explain why women as plaintiffs rarely file claims on spousal maintenance or back support (*nafqa al-māḍi* or *nafkah lampau*) in

share of joint property and win it, as divorce case No. 4 in Chapter Two shows. This is another point to demonstrate that *gugat* is the best form of judicial divorce for Muslim women.

Furthermore, through *gugat*, a wife can initiate a divorce if she feels uncomfortable with her marital union. I found one example of *gugat* divorce in Praya where a young female plaintiff asked for divorce because she felt bored (*pendak* in the local Sasak language) with her marriage.[16] Of course, she had provided evidence and documents to support her claim, but this reason does not really fit into the categories of divorce causes sanctioned by the law. Despite such an uncommon and flimsy reason, however, the judge still considered her claim appropriate and thus approved it due to her strong insistence on divorce. In the eyes of the judge, there was no point in trying to mend a marriage when the spouses no longer got along due to irreconcilable spousal conflicts (*tidak cocok lagi karena terus menerus berselisih*). The same can occurs when one of the spouses insists on separation or when the objectives of marriage can no longer be acheived, as divorce case No. 6 in Chapter Two demonstrates. This is an important finding of this study. The Indonesian cases of *gugat* divorce observed in this study suggest that Islamic law can empower Indonesian Muslim women in ways that the laws in other Muslim countries and the Islamic family law reforms in these countries do not. While judicial *talak* divorce in the religious courts is now more complicated procedurally because it needs two separate kinds of hearing, *gugat* divorce requires only one type of hearing. However, due to the fundamental shift of

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Lombok. I only found one female plaintiff claimed her past maintenance (*nafkah lampau*) from her husband when she filed *gugat* divorce (Case Two in Chapter Four). Compare with Iran, Morocco, Malaysia and Zanzibar. In Iran and Morocco, the majority case (182 of the 394 total legal cases) filed by women to the courts were concerned with maintenance (*nafaqa*). See Mir-Hosseini, *Marriage on Trial*, p. 42. Spousal maintenance claimed by women was also the majority cases in Islamic courts in Malaysia and Zanzibar. See Peletz, *Islamic Modern*, 156-159 and Stiles, *An Islamic Court*, p. 28-29.

[16] This was the first word that the female plaintiff expressed when the judge asked her why she wanted to divorce. She was a college student whose husband was always mad when she wants to study. The judge granted her claim in *verstek* because her husband never appeared in the court after being summoned properly. Fieldwork and courtroom observation in the religious court of Praya in December 22, 2011.

divorce cases from the traditional norms of Islamic law, conflicts still occur in Islamic family legal practices in Lombok.

In Lombok, the codification of Islamic law corroborates one major view expressed in the global scholarly discourses about the incorporation of Shari'a into modern family codes, which is that such incorporation distorts the Shari'a, as Joseph Schacht, Abdullahi An-Na'im, and Wael B. Hallaq argue.[17] Shari'a is seen as God's law and as such, a correct application of it and its meaning can only be effected through a valid methodology conducted by learned independent scholars and jurists. Because the state does not possess such qualities since it is a political institution, the application of Islamic law by the state can threaten Islamic law. Lombok is a place where traditional Islamic law is preserved through Islamic schools. Run by local *'ulamā'* known as *tuan guru*, these institutions teach the *fiqh* through which knowledge about God's law can be accessed. When conflict arises between a judge and *tuan guru* in a court, this means that Islamic authority has become contested between the state and the *tuan guru.* This conflict reveals the existence of a conceptual boundary of authority between the state and the *'ulamā'* in Islamic law and suggests that the religious court marks the demarcation of such a boundary.

However, rather than reflecting the demise of Shari'a in the eras of modern nation-state, as Wael Hallaq argues,[18] the incident in the circuit court described in this study illustrates a historic continuity of the division of authority between the state and jurists in Muslim-majority countries. Knut Vikør notes that the establishment of new territory by Muslim rulers in the past did not necessarily abolish the existence of other forms of Islamic authority outside the state, like

[17] Joseph Schacht, "Problems of Modern Islamic Legislation," *Studia Islamica,* 12 (1960): 108, Abdullahi Ahmed An-Na'im, *Islam and the Secular State: Negotiating the Future of Shari'a* (Cambridge, MA: Harvard University Press, 2008) and Wael B. Hallaq, "Juristic Authority vs State Power: The Legal Crises of Modern Islam," *Journal of Law and Religion*, 19:2 (2003/2004): 243-258.

[18] Wael B. Hallaq, "Can Shari'a be Restored?" in Yvonne Y. Haddad and Barbara Stowasser (eds.), *Islamic Law and the Challenges of Modernity* (New York: Altamira Press, 2004), 21-53.

the *'ulamā'*. Traditional Islamic authority continues to operate in its own domain, independent of the state.[19] This seems to be the case in Lombok, where there exist a number of *pesantren*, in which traditional Islamic law is preserved. This situation creates two different domains: the religious courts belong to the state's domain while *pesantrens* belong to the *tuan gurus'* domain. Once this boundary is violated, tension may occur, like in the circuit court incident.

The responses given to triple extrajudicial divorce by judges, litigants and Islamic scholars illustrate the different interpretations of the proper boundary between Islamic law and state law in Lombok. As Chapter Three has demonstrated, although judges approach triple extrajudicial divorce differently, most of them, as well as their colleagues in the office of marriage registration, would contend that this type of divorce is not valid. However, for Muslims in Lombok, extrajudicial divorce remains valid according to Islamic law; consequently, the resolution for this must comply with local convention and *fiqh*. However, litigants who are involved in disputes over triple extrajudicial divorce might opt to follow either *fiqh* or state law or even another mechanism, a choice based on which mechanism they believe will resolve their disputes most conveniently. This means that the existence of legal pluralism can benefit Muslims in particular ways, and that the religious courts provide an arena for contestation over various issues among litigants, who may use law and legal institutions to achieve their respective interests.

In this study, I approach Islamic law not as a set of doctrine encapsulating Muslim religious law, but as practice and discourse. Hence, I do not perceive Islamic law a theoretical essence of Muslim religious law independent from its daily uses and practices but rather as its actual implementation in the religious courts and beyond. According to Baudouin Dupret, our

[19] Knut S. Vikør, *Between God and the Sultan: A History of Islamic Law* (Oxford: Oxford University Press, 2005), p. 186-187.

understanding of what Islamic law is should be based on actual observation of the operation of the law and how legal actors orient themselves to the law to achieve their goals.[20] This approach will enable researchers to give a full attention to what happens in the courtroom when judges and litigants engage in settling disputes over household and family issues. As Baudouin Dupret and Maaike Voorhoeve remind us, "Focusing on the theme of Islamic law, researchers forget to consider that the law is a daily and ordinary activity, with litigants trying to settle their problems and professionals carrying out their jobs."[21] Instead of detailing the Islamic rules of divorce, I have looked at how they work in practice and who contests them. I focused on how legal actors, such as judges, court clerks and litigants, orient themselves to the law when they deal with divorce and other disputes. My analysis of the litigants' strategies and the judges' responses to legal cases brought before them reflect this theoretical orientation.

Following Jørgen Nielsen and Lisbet Christoffersen,[22] I perceive Islamic law as a set of discursive Muslim legal practices that include norms, codes, (re)interpretation, courtroom debates and practices. Islamic law consists of layers of discourses rather than a single discourse. In the words of Peter Madsen, "Shari'a may be said to comprise not only rulings and settled norms or law (*fiqh*), but also the interchange of interpretation behind rulings and law. In this sense, Shari'a is rather a historical process and an interaction between institutions and spheres of communication rather than a fixed set of rules, and this process is further not just a series of interpretation and application of sacred sources but a continuous interaction between religion,

[20] Baudouin Dupret, "What is Islamic Law? A Praxiological Answer and an Egyptian Case Study," *Theory, Culture and Society*, 24: 2 (2007): 79-100.

[21] Baudouin Dupret and Maaike Voorhoeve, "Introduction," in Maaike Voorhoeve (ed.), *Family Law in Islam: Divorce, Marriage and Women in the Muslim World* (London and New York: I.B. Tauris, 2012), p. 2.

[22] Jørgen S. Nielsen and Lisbet Christoffersen (eds.), *Sharia as Discourse: Legal Tradition and the Encounter with Europe* (Burlington: Asghate, 2010).

law, politics and social life."[23] The discourses of Islamic law in Lombok involve reinterpretation of and debates over Muslim marriage and divorce laws by the state, judges, litigants and *tuan gurus*. This re-interpretation is broadly based, and considers principles, sources, methodology and application of Islamic law that involve different agents and institutions such as the court and Islamic schools. Judges' responses to various types of legal cases reveal that they work from certain basic principles, such as public good (*maṣlaḥa*) and justice over law. The circuit court incident between the judge and the *tuan guru* revolved around the issues of sources and application of Islamic law between modern Islamic family legislation and *fiqh* and between the state and the *'ulamā'*.

Islamic law is debated in the courtroom and in the village office as well as in the daily lives of Muslim communities as well as by communities of scholars. While in the courtroom debates are conducted by judges and litigants; in village offices the debates may involve judges and other state officials with individual Muslims. In *pesantren*, students of Islamic law and their teachers discuss divorce and Islamic family legal problems from a quite different point of view from that of state law. Although these discourses take place in different sites and are conducted by different agents, all point to the idea of how to best interpret and apply Islamic law. All these reflect layers of discourses of Islamic law in Lombok. Traditional Islamic legal norms, local convention and customary law, debates and contestations over the application of Muslim family codes in the courtroom and beyond the courtroom are all revealed in Muslim divorce in Lombok. In this ethnographic study of Islamic law, I have remained attentive to the normative aspect of Islamic law in my discussion of the development of the substance of Islamic legal reform because these are an inseparable part of these discourses.

[23] Peter Madsen, "Rebellious Women-Discourse and Text: Shari'a, Civil Right and Penal Law," in Nielsen and Christoffersen (eds.), *Shari'a as Discourse*, p. 222.

By doing so, I hope my study has contributed to the textual, normative and historical approaches to Islamic law. I have sought to respond to Talal Asad's call when he analyzes Islamic law in the context of modern state legal systems. He writes:

> When the Shari'a is structured essentially as a set of legal rules defining personal status, it is radically transformed. This is not because Shari'a, by being confined to the private domain, is thereby deprived of political authority, something that advocates of an Islamic state argue should be restored. On the contrary, what happens to the Shari'a is best described not as curtailment but as transmutation. It is rendered into a subdivision of legal norms (*fiqh*) that are authorized and maintained by the centralizing state.[24]

As Asad notes, Islamic law changes when it is transformed into state law. But he does not explain how such changes occur. He calls for empirical studies to examine how and to what extent such transformation occurs on the ground and how Muslims themselves respond to such changes.

By looking closely at the practice of judicial divorce through an empirical investigation of the local religious court in Central Lombok, I have shown that the rising rate of female-initiated divorce is linked to the reinterpretation of Islamic law and its integration into the state legal and judicial system. This has changed Muslim family relations, and such transformation is related to social changes, such as an increase in legal consciousness, court reforms and gender and power relations in Lombok. I submit to An-Na'im's call for exploration of this topic since "we know little of the ways in which Shari'a-based family law, this so-called last bastion of the

[24] Talal Asad, *Formations of the Secular: Christianity, Islam and Modernity* (Stanford: Stanford University Press, 2003), p. 227.

Islamic ideal and identity on social relations, operates in today's world."[25] Looking at the ways in which Islamic law is employed, reinterpreted and contested by the state, judges, and litigants will enrich our insight about this heated but insufficiently explored topic.

This approach helps scholars understand the social significance and meaning of Islamic law for Muslim family life. As Dupret proposes, the question of "What is Islamic law?" should be replaced with "What do people do when referring to Islamic law?" This is because "the use of the same word in different times" (and places too, I would add) does not necessarily "mean that the word refers to the same meaning and technical definition."[26] My findings reveal that for the state, judges, litigants and Muslims in Lombok, Islamic law means different things. Muslims in Lombok, who follow their traditional religious leaders, hold that classical *fiqh*, especially the Shafi'i school, is "the real" Islamic law.[27] To the state in Indonesia, Islamic law cannot be applied entirely because the state is not an Islamic state. The state does not follow entirely the Muslim traditionalists', the modernists' or Muslim women activists' Islamic legal discourses but instead applies its own interpretation of Islamic law in accordance with the state's own agenda of legal reform and unification. Religious court judges, as state officials, must follow the version of Islamic law that the state endorses. To them, modern Islamic family codification is the ideal form of Shari'a law, and the majority of female plaintiffs in Lombok, who have found the state codification of Islamic law and especially *gugat* liberating, would likely agree.

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[25] Abdullahi Ahmed An-Na'im, "Shari'a and Islamic Family Law: Transition and Transformation", in Abdullahi Ahmed An-Na'im (ed.), *Islamic Family Law in A Changing World: A Global Resource Book* (London and New York: Zed Books, 2002), p. 19.

[26] Dupret, "What is Islamic Law," p. 81.

[27] The largest Islamic organization in Lombok is *Nahdhatul Watan* (NW) that officially declare as the follower of the Shīfi'ī school. Any application of Islamic law regarding marriage, divorce and inheritance for the majority Sasak Muslims must therefore confirm to the classical-medieval doctrines of the Shāfi'ī's Islamic legal school.

GLOSSARY

Adat : Customary law

Awiq-awiq : Village-based convention in Lombok

Badilag : Religious Court Body of the Supreme Court

Farā'iḍ : Islamic law of inheritance

Fasakh : Marriage annulment by court

Fatwa : Islamic legal responses

Fiqh : Islamic jurisprudence

Ghaib : Unknown

Gono-gini : Marital joint property

Gugat : Female-initiated divorce lawsuit

Hadanah : Child custody

Hadith : Report of the Prophet Muḥammad's deeds

Haji : The fifth pillar of Islamic faith or a title (abbreviated by H.) of a male Muslim who has performed pilgrimage to Mecca (*Hajjah,* written as Hj., for a female Muslim)

Hakam : Mediator

Hakim : Judge

Iddah : A waiting period of a female divorcee (three menstrual cycles) before she can either reconcile with her husband or marry another man

Isbat Nikah : Legalization of unofficial marriage

Kadus : Hamlet head

Kawin Sirri : Unregistered marriage

Khuluk : Divorce sought by women where they compensate their husbands or return *mahar*

Madrasa : Islamic schooling

Mahar : Bridal gift (cash or valued items) given by the bridegroom to the bride as personal property

Majelis : A committee of judges that consists of one leading judge and two member judges

Mataram : The Capital of West Nusa Tenggara Province, located at the west coast of Lombok

Maulid : The Prophet Muḥammad's birthday celebration

Merarik/Selarian : Marital elopement

Mufti : Fatwa giver

Mut'ah : Consolation payment (or Shi'i temporary marriage)

Nafkah : Spousal support or maintenance

Nusyuz : Spousal disobedience

Panitera : Court clerks

Pekka : Female-headed household

Penghulu : A village religious official

Permohonan : Petition

Pesantren : Islamic boarding school

Pisuka : Bride-price paid by the bridegroom to the bride's family

Praya : The Capital of Central Lombok

Prodeo : Free legal service

Rujuk : Reconciliation of a divorced couple

Sasak : Indigenous ethnic group of Lombok. It is also the name of the local language for this group

Shafi'i : Founder of Sunni Islamic legal school

Staatblad : Dutch law

Syiqaq : Judicial divorce on the basis of spousal irreconcilable conflicts

Taklik Talak : Conditional divorce. Judicial divorce sought by women on the grounds of breach of the marriage contract by husband

Tafsir : Qur'anic exegeses

Talak : Male repudiation

Talak Bain : Irreconcilable divorce except through a renewal of the marriage contract

Talak Tiga : Triple divorce that causes permanent separation between spouses

Tuan guru : Islamic religious scholars of Lombok

Ulama : Muslim religious scholars (singular *Alim*)

Ustadz : A teacher of an Islamic school

Verstek : Court decisions given without the presence of defendants

Wakaf : Religious endowment

Waktu Lima : Orthodox Islam in Lombok

Wali : Guardian

Waris : Inheritance or estate

Wetu Telu : Vernacular Islam in Lombok

BIBLIOGRAPHY

Religious Courts and Government Archives:

Badan Peradilan Agama (Badilag), Mahkamah Agung, *Laporan Tahunan Perkara 2010* [2010 Annual Report] (Jakarta: Badilag, 2011).

Badan Peradilan Agama Islam, *Law Report Putusan/Penetapan Pengadilan Agama tahun 1979* [Law Report on Religious Courts Decisions/Decrees 1979] (Jakarta: Badan Peradilan Agama Islam, Departemen Agama Republik Indonesia, 1980).

Badan Peradilan Agama, *Himpunan Putusan/Penetapan Pengadilan Agama* [Collections of the Religious Court Decisions and Decrees] (Jakarta: Proyek Pembinaan Badan Peradilan Agama, Departemen Agama, 1976).

Badan Pusat Statistik (BPS) Nusa Tenggara Barat (NTB), *Nusa Tenggara Barat dalam Angka 2010* [The 2010 Profile of the Province of West Nusa Tenggara] (Mataram: BPS, 2010).

Badan Pusat Statistik Lombok Tengah, *Lombok Tengah dalam Angka 2010* [The 2010 Profile of Central Lombok District] (Praya: BPS Praya 2011).

Direktorat Badan Peradilan Agama, *Standarisasi Pengadilan Agama dan Pengadilan Tinggi Agama* [Standardization of Religious Courts of First Instance and Appellate Religious Courts] (Jakarta: Direktorat Badan Peradilan Agama, Departemen Agama, 1983).

Direktorat Jenderal Badan Peradilan Agama Mahkamah Agung, *Pedoman Pelaksanaan Tugas dan Administrasi Peradilan Agama Buku II Edisi Revisi* [Job Discription and Administrative Work Guides for Religious Courts, second and revised edition (Jakarta: 2010).

Direktorat Jenderal Bimbingan Masyarakat Islam, *Putusan/Penetapan Pengadilan Agama Seluruh Indonesia setelah Berlakunya UU No. 1/1974* [Religious Courts Decisions and Decrees upon the Enactment of the Marriage Law No. 1/1974] (Jakarta: Ditjen Bimas Islam, Departemen Agama, 1977).

Direktorat Pembinaan Badan Peradilan Agama, *Analisis Faktor Penyebab Terjadinya Perceraian* [Analyses of the Causes of Divorce] (Jakarta: Departemen Agama, 1990).

Pengadilan Agama Praya, *Profile Pengadilan Agama Praya* [The Profile of the Religious Court of Praya] (Praya: PA Praya, 2008).

Pengadilan Tinggi Agama Mataram, *Laporan Tahunan Pengadilan Tinggi Agama Mataram* [Annual Report of the Religious Appellate Court of Mataram] (Mataram: PTA, 2007).

Proyek Pembinaan Badan Peradilan Agama, *Pengadilan Tinggi Agama Mataram dan Pengadilan Agama dalam Wilayah Hukumnya* [Mataram Appellate Religious Court and its Jurisdiction] (Mataram: Proyek Pembinaan Badan Peradilan Agama, Departemen Agama, 1983/1984).

Academic Sources:

Abdurrahman, *Kompilasi Hukum Islam* [Compilation of Islamic Law] (Jakarta: Akademika Pressindo, 1992).

Agmon, Iris, "Muslim Women in Court According to the *Sijjil* of Late Ottoman Jaffa and Haifa," in Amira El Azhary Sonbol (ed.), *Women, the Family and Divorce Laws in Islamic History* (New York: Syracuse University, 1996), p. 126-140.

Agmon, Iris, *Family and Court: Legal Culture and Modernity in Late Ottoman Palestine* (New York: Syracuse University Press, 2006).

Ahmed, Leila, *Women and Gender in Islam: Historical Roots of a Modern Debate* (New Haven: Yale University Press, 1992).

Akbarzadeh, Sharam and Abdullah Saeed, "Islam and Politics," in Sharam Akbarzadeh and Abdullah Saeed (eds.), *Islam and Political Legitimacy* (London and New York: RoutledgeCurzon, 2003), p. 1-14.

Ali, Kecia, "Marriage in Classical Islamic Jurisprudence: A Survey of Doctrines," in Asifa Quraishi and Frank E. Vogel (eds.), *The Islamic Marriage Contract: Case Studies in Islamic Family Law* (Cambridge, MA: Islamic Legal Studies Program, Harvard Law School, 2008), p. 11-45.

Ali, Kecia, *Marriage and Slavery in Early Islam* (Cambridge, MA: Harvard University Press, 2010).

An-Na'im, Abdullahi Ahmed, "Shari'a and Islamic Family Law: Transition and Transformation," in Abdullahi Ahmed An-Na'im (ed.), *Islamic Family Law in A Changing World: A Global Resource Book* (London and New York: Zed Books, 2002), p. 1-22.

An-Na'im, Abdullahi Ahmed, "Shari'a in the Secular State: A Paradox of Separation and Conflation," in Peri Bearman, Wolfhart Heinrichs and Bernard G. Weiss (eds.), *The Law Applied: Contextualizing the Islamic Shari'a* (London and New York: I.B. Tauris, 2008), p. 321-341.

An-Na'im, Abdullahi Ahmed, *Islam and the Secular State: Negotiating the Future of Shari'a* (Cambridge, MA: Harvard University Press, 2008).

Antoun, Richard, "Litigant Strategies in an Islamic Court in Jordan," in Daisy Hilse Dwyer (ed.), *Law and Islam in the Middle East* (New York: Bergin and Garvey, 1990), p. 35-60.

Arabi, Oussama, "The Dawning of Third Millennium on Shari'a: Egypt's Law No. 1 of 2000, or Women May Divorce at Will," *Arab Law Quarterly,* 16 (2001): 2-21.

Arabi, Oussama, *Studies in Modern Islamic Law and Jurisprudence* (The Hague: Kluwer International Law, 2001), p. 194-195.

Asad, Talal, *Formations of the Secular: Christianity, Islam and Modernity* (Stanford: Stanford University Press, 2003).

Asnawi, *Kematian Bayi Antara Takdir dan Kesalahan Asuh: Menyingkap Pola Perawatan Bayi di Nusa Tenggara Barat* [Infant Mortality between God's Destiny and Mistreatment: The Patterns of Infant Care in West Nusa Tenggara] (Mataram: Pustaka Irvani, 2005).

Atkinson, Jane Monning, "Religions in Dialogue: The Construction of an Indonesian Minority Religion," in Rita Smith Kipp and Susan Rodgers (eds.), *Indonesian Religions in Transition* (Tucson: The University of Arizona Press, 1987), p. 171-186.

Avonius, Leena, "Reforming *Wetu Telu*: Islam, *Adat* and the Promises of Regionalism in Post-New Order Lombok," *PhD Dissertation* (Leiden: Leiden University Press, 2004).

Azra, Azyumardi, Dina Afrianti and Robert W. Hefner, "*Pesantren* and *Madrasa*: Muslim Schools and National Ideals in Indonesia," in Robert W. Hefner and Muhammad Qasim Zaman (eds.), *Schooling Islam: The Culture and Politics of Modern Muslim Education* (Princeton: Princeton University Press, 2007), p. 172-198.

Azra, Azyumardi, Kees van Dijk and Nico Kaptein (eds.), *Varieties of Religious Authority: Changes and Challenges in 20th Century Indonesian Islam* (The Netherlands and Singapore: IIAS and ISEAS, 2010).

Ball, John, *Indonesian Legal History 1602-1848* (Sydney: Oughtershaw Press 1982).

Barlas, Asma, *Believing Women in Islam: Unreading Patriarchal Interpretation of the Qur'an* (Austin: Texas University Press, 2002).

Beazley, Harriot, "The 'Malaysian Orphan' of Lombok: Children and Young People's Livelihood Response to Out-Migration in Eastern Indonesia," in Ruth Panelli, Samantha Punch and Elizabeth Robson (eds.), *Global Perspectives on Rural Childhood and Youth: Young Rural Lives* (New York and London: Routledge, 2007), p. 107-120.

Bedner, Adriaan and Stijn van Huis, "Plurality of Marriage Law and Marriage Registration for Muslims in Indonesia: A Plea of Pragmatism," *Utrecth Law Review,* 6:2 (June, 2010): 175-91.

Benda, Harry J., *The Crescent and the Rising Sun: Indonesian Islam under the Japanese Occupation* (The Hague and Bandung: van Hoeve, 1958).

Benda-Beckmann, Franz von and Keebet von Benda-Beckmann, "Beyond the Law and Religion Divide: Law and Religion in West Sumatra," in Thomas G. Kirsch and Bertram Turner (eds.), *Permutation of Order: Religion and Law as Contested Sovereign* (Burlington: Asghate, 2009), p. 227-246.

Bennet, Linda Rae, *Women, Islam and Modernity: Single Women, Sexuality and Reproductive Health in Contemporary Indonesia* (London: RoutledgeCurzon, 2005).

Borthomolev, John Ryan, "Alif Lam Mim: Reconciling Islam, Modernity and Tradition in an Indonesian Kampung," *PhD Dissertation* (Cambridge, MA: Harvard University, 1999).

Bowen, John R., *Islam, Law and Equality in Indonesia: An Anthropology of Public Reasoning* (Cambridge, UK: Cambridge University Press, 2003).

Bowen, John R., "Fairness and Law in an Indonesian Court," R. Michael Feener and Mark E. Cammack (eds.), *Islamic law in contemporary Indonesia: Ideas and Institutions* (Cambridge: Harvard University Press, 2007), p. 170-192.

Bruinessen, Martin van, "*Kitab Kuning*: Books in Arabic Scripts Used in the Pesantren Miliue," in *Bijdragen tot de Taal, Land-en Volkenkunde*, No. 146 Vol. 2/3 (1990): 226-269.

Bruinessen, Martin van, "Shari'a Court, *Tarekat* and *Pesantren* and Religious Institutions in the Banten Sultanate," *Archipel* 50 (1995): 165-200.

Budiwanti, Erni, *Islam Sasak: Wetu Telu versus Waktu Lima* [Islam Sasak: Wetu Telu versus Waktu Lima] (Yogyakarta: LKiS, 1999).

Bush, Robin, "Regional 'Shari'a' Regulation in Indonesia: Anomaly or Symptom," in Greg Fealy and Sally While (eds.), *Expressing Islam: Religious Life and Politics in Indonesia* (Singapore: ISEAS, 2008), p. 174-191.

Busken, Leon, "Tales According or the Book: Professional Witnesses ('*udul*) as Cultural Brokers in Morocco," in Baudouin Dupret, Barbara Drieskins and Annelies Moors (eds.), *Narratives of Truth in Islamic Law* (London and New York: I.B. Tauris 2008), p. 143-160.

Butt, Simon, "Polygamy and Mixed Marriage in Indonesia: Islam and the Marriage Law in the Courts," in Timothy Lindsey (ed.), *Indonesia: Law and Society* (The Federation Press, 2008), p. 266-287.

Cammack, Mark E., "Indonesia's 1989 Religious Judicature Act: Islamization of Indonesia or Indonesianization of Islam?" in Arskal Salim and Azyumardi Azra (eds.), *Shari'a and Politics in Modern Indonesia* (Singapore: ISEAS, 2003), p. 76-95.

Cammack, Mark E., "The Indonesian Islamic Judiciary," in R. Michael Feener and Mark E. Cammack (eds.), *Islamic Law in Contemporary Indonesia: Ideas and Institutions* (Cambridge, MA: Islamic Legal Studies Program, Harvard Law School, 2007), p. 146-169.

Cammack, Mark E., Helen Donovan and Tim B. Young "Islamic Divorce Law and Practice in Indonesia," in R. Michael Feener and Mark E. Cammack (eds.), *Islamic Law in Contemporary Indonesia: Ideas and Institutions* (Cambridge, MA: Harvard Law School, 2007), p. 99-127.

Cammack, Mark E., Lawrence A. Young and Tim Heaton, "Legislating Social Change in an Islamic Society: Indonesia's Marriage Law," in Tim Lindsey (ed.), *Indonesia: Law and Society* (New South Wales: Federation Press, 2008), p. 288-312.

Cammack, Mark E., Lawrence A. Young and Tim B. Heaton, "The State, Religion, and the Family in Indonesia: The Case of Divorce Reform," in Sharon K. Houseknecht and Jerry

G. Pankhurst (eds.), *Family, Religion and Social Change in Diverse Societies* (New York and Oxford: Oxford University Press, 2010), p. 175-204.

Cammack, Mark E. and Tim Heaton, "Explaining the Recent Upturn in Divorce in Indonesia: Developmental Idealism and the Effects of Political Changes," *Asian Journal of Social Science*, 39 (2011): 776-796.

Cederroth, Sven, *The Spell of the Ancestors and the Power of Mekkah: A Sasak Community on Lombok* (Göteborg, Sweden: Vasastadens Bokbinderl, 1981).

Cederroth, Sven, "Islam and Adat: Some Recent Changes in the Social Position of Women Among Sasak in Lombok," in Bo Utas (ed.), *Women in Islamic Societies: Social Attitudes and Historical Perspectives* (London: Curzon, 1983), p. 160-171.

Cederroth, Sven, "Perceptions of Sasak Identity," in Michael Hitchcock and Victor T. King (eds.), *Images of Malay-Indonesian Identity* (Kuala Lumpur: Oxford University Press, 1997), p 161-175.

Cribb, Robert, *The Indonesian Killings of 1965-1966: Studies from Java and Bali* (Clayton: Monash University, 1990).

David S. Power, "Four Cases Relating to Women and Divorce in Andalus and Maghrib, 1100-1500," in Muhammad Khalid Mas'ud, Rudolph Peter and David S. Power, *Dispensing Justice in Islam: Qadis and their Judgements* (Leiden: Brill, 2006), p. 383-410.

Davidson, Jamie S. and David Henley (eds.), *The Revival of Tradition in Indonesian Politics: The Deployment of Adat from Colonialism to Indigenism* (London and New York: Routledge, 2007).

Dhofier, Zamakshyari, *The Pesantren Tradition: The Role of Kyai in the Maintenance of Traditional Islam in Java* (Tempe: Arizona State University, 1999).

Djamil, Fathurrahman, "Program Akademik Fakultas Syariah dan Peningkatan Kualitas Calon Hakim pasca UU No. 7/1989" [Islamic Law School Academic Programs and Quality Improvement for Candidates of Judges upon the Enactment of the Law 7/19898], in Cik Hasan Bisri (ed.), *Peradilan Islam di Indonesia: Bunga Rampai* [Anthology of Islamic Courts in Indonesia] (Bandung: Ulul Albab Press, 1997), p. 231-238.

Djamour, Judith, *The Muslim Matrimonial Court in Singapore* (London: Athlone, 1966).

Dnes, Antony W. and Robert Rowthorn (eds.), *The Law and Economics of Marriage and Divorce* (Cambridge: Cambridge University Press, 2002).

Dommaraju, Premchand and Gavin Jones, "Divorce Trends in Asia," *Asian Journal of Social Science*, 39 (2011), p. 725-750.

Dupret, Baudouin, "The Practice of Judging: The Egyptian Judiciary at Work in a Personal Status Law," in Khalid Muhammad Mas'ud, Rudolph Peters and David S. Power (eds.), *Dispensing Justice in Islam: Qadis and their Judgments* (Leiden: E.J. Brill, 2006), p. 143-68.

Dupret, Baudouin, "What is Islamic Law? A Praxiological Answer and an Egyptian Case Study," *Theory, Culture and Society*, 24: 2 (2007): 79-100.

Dupret, Baudouin and Barbara Driesken, "Introduction," in Baudoiun Dupret, Barbara Drieskens and Annelies Moors (eds.), *Narratives of Truth in Islamic Law* (London and New York: I.B. Tauris, 2008), p. 9-22.

Dupret, Baudouin and Maaike Voorhoeve, "Introduction," in Baudouin Dupret and Maaike Voorhoeve (eds.), *Family Law in Islam: Divorce, Marriage and Women in the Muslim World* (London and New York: I.B. Tauris, 2012), p. 1-10.

Ecklund, Judith F., "Marriage, Seaworms, and Song: Ritualized Responses to Cultural Change in Sasak Life," *PhD Dissertation* (Cornell: Cornel University, 1977).

Effendi, Bahtiar, *Islam and State in Indonesia* (Singapore: ISEAS, 2003).

Eickelman, Dale F. and James P. Piscatory, *Muslim Politics* (Princeton: Princeton University Press, 1996).

Eijk, Esther van, "Divorce Practices in Muslim and Christian Courts in Syria," in Maaike Voorhoeve (ed.), *Family Law in Islam: Divorce, Marriage and Women in the Muslim World* (London and New York: I.B. Tauris, 2012), p. 147-170.

El Fadl, Khaled Abou, *And God Knows His Soldiers: The Authoritative and Authoritarian in Islamic Discourse* (Lanham: University Press of America, 2001).

El Fadl, Khaled Abou, *Speaking in God's Name: Islamic Law, Authority and Women* (Oxford: Oneworld, 2001).

Ending, Muhammad Saleh and Muslihun,"Arah Pergeseran Peran dan Fungsi Tuan Guru di Lombok Tengah" [The Changes of Tuan Guru's Social and Religious Roles and Functions in Central Lombok], *Jurnal Penelitian Keislaman*, Research Center of IAIN Mataram, Vol. 5 (2), June 2009): 289-315.

Esposito, John L., *Women in Muslim Family Law* (New York: Syracuse University Press, 2001).

Ewick, Patricia and Susan S. Silbey, *The Common Place of Law* (Chicago: The University of Chicago Press, 1998).

Feener, R. Michael, *Muslim Legal Thought in Modern Indonesia* (Cambridge: Cambridge University Press, 2007).

Feener, R. Michael, *Muslim Legal Thought in Modern Indonesia* (Cambridge: Cambridge University Press, 2007).

Franz and Keebet von Benda-Beckmann, "Beyond the Law and Religion Divide: Law and Religion in West Sumatra," in Thomas G. Kirsch and Bertram Turner (ed.), *Permutation of Order: Religion and Law as Contested Sovereign* (Burlington: Asghate, 2009), p. 227-246.

Geertz, Hildred, *The Javanese Family: A Study of Kinship and Socialization* (New York: The Free Press, 1961).

Gerber, Haim, *State, Society and Law in Islam: Ottoman Law in Comparative Perspectives* (Albany: State University of New York Press, 1994).

Ghazali, Abd. Moqsith et. al., *Kumpulan Referensi Standar Evaluasi Hakim dalam Menerapkan Sensitivitas Jender di Mahkamah Syar'iyah Aceh* [Compilation of Standard Evaluation Reference for Judges in Applying the Principles of Gender Sensitivity in Islamic Courts in Aceh] (Jakarta: Badilag, World Bank and Asia Foundation, 2009).

Goody, Jack and Stanley Jeyaraja Tambiah, *Bridewealth and Dowry* (Cambridge: Cambridge University Press, 1973).

Grace, Jocelyn, "Sasak Women Negotiating Marriage, Polygyny and Divorce in Rural East Lombok," *Intersection: Gender, History and Culture in the Asian Context,* Issue 10, (August, 2004): 1-19.

Griffel, Frank, "Introduction," in Abbas Amanat and Frank Griffel (eds.), *Shari'a: Islamic Law in the Contemporary Context* (Standford: Standford University Press, 2007), p. 1-13.

Guest, Philip, "Marital Dissolution and Development in Indonesia," *Journal of Comparative Family Studies*, 23:1 (Spring, 1992): 95-113.

Haddad, Yvonne Yazbeck and Barbara Freyer Stowasser, "Introduction," in Yvonne Yazbeck Haddad and Barbara Freyer Stowasser (eds.), *Islamic Law and the Challenges of Modernity* (New York: Altamira Press, 2004), p. 1-17.

Hägerdal, Han, *Hindu Rulers, Muslim Subjects: Lombok and Bali in the Seventeenth and Eighteenth Century* (Bangkok, Thailand: White Lotus Press, 2001).

Hallaq, Wael B., "Can Shari'a be Restored?" in Yvonne Y. Haddad and Barbara Stowasser (eds.), *Islamic Law and the Challenges of Modernity* (New York: Altamira Press, 2004), 21-53.

Hallaq, Wael B., "Juristic Authority vs State Power: The Legal Crises of Modern Islam," *Journal of Law and Religion*, 19:2 (2003/2004): 243-258.

Hallaq, Wael B., *Shari'a: Theory, Practice and Transformation* (Cambridge, UK: Cambridge University Press, 2009).

Hamedah, Najla, "Islamic Family Legislation: The Authoritarian Discourse of Silence," in May Yamani and Andrew Allen (eds.), *Feminism and Islam: Legal and Literary Perspectives* (New York: New York University Press), p. 331-346.

Harnish, David D., *Bridges to the Ancestors: Music, Myth and Cultural Politics at an Indonesian Festival* (Honolulu: Hawaii University Press, 2010).

Harwati, Tuti, Mohamad Abdun Nasir, Nikmatullah and Nurul Khaerani, *Tradisi dan Transformasi Pemikiran Hukum Keluarga Islam di Lombok* [Tradition and Transformation of Islamic Family Legal Thoughts in Lombok] (Mataram: Pusat Studi Wanita IAIN Mataram, 2007).

Hay, M. Cameron, *Remembering to Live: Illness at the Intersection of Anxiety and Knowledge in Rural Indonesia* (Ann Arbor: The University of Michigan Press, 2002).

Hay, M. Cameron, "Women Standing between Life and Death: Fate, Agency, and the Healers in Lombok," in Lyn Parker (ed.), *The Agencies of Women in Asia* (Singapore: Marshall Cavendish International, 2004), p. 26-61.

Heaton, Tim B., Mark R. Cammack and Larry Young, "Why is the Divorce Rate Declining in Indonesia?" *Journal of Marriage and Family*, 63 (May, 2001): 480-90.

Hefner, Robert W. (ed.), *Shari'a Politics: Islamic Law and Society in the Modern World* (Bloomington: Indiana University Press, 2011).

Hernandez-Coss, Raul *et. al*., "The Malaysia-Indonesia Remittance Corridor: Making Formal Transfers the Best Option for Women and Undocumented Migrant," *World Bank Working Paper*, No. 149 (2008).

Hirsch, Susan F., "Kadhi's Courts as Complex Sites of Resistance: The State, Islam and Gender in Postcolonial Kenya," in Mindies Lazarus-Black and Susan F. Hirsch (eds.), *Contested States: Law, Hegemony and Resistance* (New York: Routledge, 1994), p. 207-230.

Hirsch, Susan F., *Pronouncing and Persevering: Gender and the Discourses of Disputing in an African Islamic Court* (Chicago: Chicago University Press, 1998).

Hirschman, Charles and Bussarawan Teerawichitchainan, "Cultural and Socioeconomic Influences on Divorce during Modernization: Southeast Asia, 1940s to 1960s," *Population and Development Review* 29 (2003): 215–254.

Hisyam, Muhammad, *Caught between Three Fires: Penghulu under the Dutch Political Administration 1882-1942* (Jakarta: INIS, 2001).

Hodkinson, Keith, *Muslim Family Law: A Sourcebook* (London: Croom Helm, 1984).

Hooker, M.B., *Indonesian Islam: Social Change through Contemporary Fatāwā* (Honolulu: Hawaii University Press, 2003).

Hooker, M.B., *Indonesian Syariah: Defining a National School of Islamic Law* (Singapore: ISEAS, 2008).

Hosen, Nadirsyah, *Shari'a and Constitutional Reform in Indonesia* (Singapore: ISEAS, 2007).

Iqbal, Safia, *Women and Islamic Law* (New Delhi: Adam Publishers, 2004).

Irianto, Sulistyowati, "Competition between State Law and Customary Law in the Courtroom: A Study of Inheritance Cases in Indonesia," *Journal of Legal Pluralism and Unofficial Law*, 91 (2004): 91-112.

Johansen, Baber, *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim Fiqh* (Leiden: Brill, 1999).

Jones, Gavin W., *Marriage and Divorce in Islamic South-east Asia* (Kuala Lumpur: Oxford University Press, 1994).

Jones, Gavin W., Yahya Asari and Tuti Djuartika, "Divorce in West Java," *Journal of Comparative Family Studies*, 24:3 (Autumn, 1994): 395-412.

Jones-Pauly, Christina with Abir Dajani Tuqon, *Women Under Islam: Gender, Justice and the Politics of Islamic Law* (London and New York: I.B. Tauris, 2011).

Ka'bah, Rifyal, "Islamic Law in Court Decision and Fatwa Institutions in Indonesia," in R. Michael Feener and Mark E. Cammack (eds.), *Islamic Law in Contemporary Indonesia:*

Ideas and Institutions (Cambridge, MA: Islamic Legal Studies Program, Harvard Law School, 2007), p. 83-98.

Kamali, Mohammad Hashim, *Shari'a Law: An Introduction* (Oxford: One World, 2008).

Kaptein, Nico, "Fatwas as a Uniting Factor in Indonesian History", in Johan H. Meuleman (ed.), *Islam in the Era of Globalization: Muslim Attitudes toward Modernity and Identity* (London and New York: RoutledgeCurzon, 2002), p. 72-79.

Katz, June S. and Ronald S. Katz, "The New Indonesian Marriage Law: A Mirror of Indonesia's Political, Cultural, and Legal Systems," *American Journal of Comparative Law* , Vol. 23, No. 24 (1974): p. 653-681.

Kingsley, Jeremy K., "*Tuan Guru*, Community and Conflict in Lombok, Indonesia," *PhD Dissertation* (Melbourne: Melbourne University, 2010).

Klinken, Gerry van and Joshua Barker (eds.), *State of Authority: The State in Society in Indonesia* (Ithaca: Cornell University Press, 2009).

Kodir, Faqihuddin Abdul and Ummu Azizah Mukarnawati, *Referensi bagi Hakim Peradilan Agama tentang Kekerasan dalam Rumah Tangga* [Religious Court Judge's References for Domestic Violence] (Jakarta: Komnas Perempuan, 2008).

Konig, Juliette *et. al*., *Women and Households in Indonesia: Cultural Notions and Social Practices* (Richmond: Curzon, 2000).

Kraan, Alfons van der, *Lombok: Conquest, Colonization and Underdevelopment 1870-1940* (Singapore: Heinemann, 1980).

Kramer, Gudrun and Sabine Schmidtke (eds.), *Speaking for Islam: Religious Authorities in Muslim Societies* (Leiden: Brill, 2006).

Krulfeld, Ruth, "Sasak Attitudes towards Polygamy and the Changing Position of Women in Sasak Peasants Villages," in L. Dulse, E. Leacock and S. Ardemer (eds.), *Visilocality and Power* (New Delhi: Oxford University Press, 196), p. 194-208.

Layish, Aharon, *Divorce in the Libyan Family: A Study based on the Sijjils of the Shari'a Courts of Ajdabiyaa and Kufra* (New York: New York University Press, 1991).

Lazarus-Black, Mindie and Susan F. Hirsch (eds.), *Contested States: Law, Hegemony and Resistance* (London and New York: Routledge, 1994).

Lev, Daniel S. *Islamic Courts in Indonesia*: *A Study in the Political Bases of Legal Institutions* (Berkeley: University of California Press, 1972).

Lev, Daniel S., *Legal Evolution and Political Authority in Indonesia* (The Hague: Kluwer International Law, 2002).

Lindsey, Tim and Jeremy Kingsley, "Talking in Code: Legal Islamization in Indonesia and the MMI Shari'a Criminal Law," in Peri Bearman, Wolfhart Heinrichs and Bernard G. Weiss (eds.), *The Law Applied: Contextualizing the Islamic Shari'a* (London and New York: I.B. Tauris, 2008), p. 295-320.

Lindsey, Timothy (ed.), *Indonesia: Law and Society* (New South Wales: Federation Press, 2008).

Lindsey, Tim and Mas Achmad Santosa, "The Trajectory of Law Reform in Indonesia: A Short Overview of Legal Systems and Change in Indonesia," in Tim Lindsey (ed.), *Indonesia: Law and Society, 2n Edition* (News South Wales, Australia: The Federation Press, 2008), p. 2-22.

Lindsey, Tim, *Islam, Law and the State in Southeast Asia Vol. I Indonesia* (London and New York: I.B. Tauris, 2013).

Lombardi, Clark B., *State Law as Islamic Law in Modern Egypt: The Incorporation of the Sharī'a into Egyptian Constitutional Law* (Leiden: Brill, 2006).

Lubis, Nur Ahmad Fadil, "Islamic Justice in Transition: A Socio-Legal Study of the *Agama* Court Judges in Indonesia," *PhD Dissertation* (Los Angeles: University of California, 1994).

Lukito, Ratno, *Islamic Law and Adat Encounter: The Experience of Indonesia* (Jakarta: Logos, 2001).

Lukito, Ratno, "Law and Politics in Post-Independence Indonesia: A Case Study of Religious and Adat Court," in Arskal Salim and Azyumardi Azra (eds.), *Shari'a and Politics in Modern Indonesia* (Singapore: ISEAS, 2003), p. 17-32.

Lukito, Ratno, *Legal Pluralism in Indonesia: Bridging the Unbridgeable* (London and New York: Routledge, 2013).

Lukman, Lalu, *Tata Budaya Adat Sasak Lombok* [Sasak Custom and Culture of Lombok] (Mataram: 2003).

Lydon, Ghislaini, "Obtaining Freedom at Muslim Tribunal: Colonial Kadijustiz and Women's Divorce Litigation," in Shamil Jeppie, Ebrahim Moosa and Richard Robert (eds.), *Muslim Family Law in Sub-Saharan Africa: Colonial Legacies and Post-Colonial Challenges* (Amsterdam: Amsterdam University Press, 2010), p. 135-164.

Madsen, Peter, "Rebellious Women-Discourse and Text: Shari'a, Civil Right and Penal Law," Nielsen, Jorgen S. and Lisbet Christoffersen (eds.), *Sharia as Discourse: Legal Tradition and the Encounter with Europe* (Burlington: Asghate, 2010), p. 217-235.

Mallat, Sibli (ed.), *Islamic Family Law* (London: Graham and Trotman 1990).

Mandaville, Peter, "Globalization and the Politics of Religious Knowledge: Pluralizing Authority in the Muslim World," *Theory, Culture & Society*, 24 (2), 2007: 101-115.

Mas'ud, Muhammad Khalid, Rudolph Peters and David S. Power (eds.), *Dispensing Justice in Islam: Qadis and their Judgments* (Leiden: Brill, 2006).

Mawardi, Imam Ahmad, "The Political Backdrop of the Enactment of the Compilation of Islamic Laws in Indonesia," in Arskal Salim and Azyumardi Azra (eds.), *Shari'a and Politics in Modern Indonesia* (Singapore: ISEAS, 2003), p. 125-147.

Mayer, Ann Elizabeth, "The Shari'a: A Methodology or a Body of Substantive Rules," in Nicholas Herr (ed.), *Islamic Law and Jurisprudence* (Seattle: University of Washington Press, 1990), p. 177-198.

Mehdi, Rubya, Werner Menski and Jørgen S. Nielsen (eds.), *Interpreting Divorce Law in Islam* (Copenhagen: DJØF Publishing, 2012).

Mernissi, Fatima, *The Veil and the Male Elite: A Feminist Interpretation of Women's Rights in Islam* (Massachusetts: Addison-Wesley Publication: 1991).

Merry, Sally Engle, *Getting Justice and Getting Even: Legal Consciousness among Working Class Americans* (Chicago: The University of Chicago Press, 1990).

Milner, A.C., "Islam and the Muslim State," in M.B. Hooker (ed.), *Islam in Southeast Asia* (Leiden: Brill, 1983), p. 23-49.

Mir-Hosseini, Ziba, *Marriage on Trial: A Study of Islamic Family Law Iran and Morocco Compared* (London: I.B. Tauris, 1993).

Mir-Hosseini, Ziba, "A Woman's Right to Terminate the Marriage Contract: The Case of Iran," in Asifa Quraishi and Frank E. Vogel (eds.), *The Islamic Marriage Contract: Case Studies in Islamic Family Law* (Cambridge, MA: Harvard Law School, 2008), p. 215-230.

More, Erin P., "Law's Patriarchy in India," in Mindie Lazarus-Black and Susan F. Hirsch (eds, *Contested States: Law, Hegemony and Resistance* (London and New York: Routledge, 1994), p. 89-117.

Mulia, Siti Musdah and Mark E. Cammack, "Toward a Just Marriage Law: Empowering Indonesian Women through a Counter of Legal Draft to the Compilation of Islamic Law," in R. Michael Feener and Mark E. Cammack (eds.), *Islamic Law in Contemporary Indonesia: Ideas and Institutions* (Cambridge, MA: Islamic Legal Studies Program, Harvard Law School, 2007), p. 128-145.

Muqoddas, Djazimah, *Kontroversi Hakim Perempuan pada Peradilan Islam di Negara-negara Muslim* [Controversies over Female Judges of Islamic Courts in Muslim Countries] (Yogyakarta: LKiS, 2011).

Nakamura, Hisako, "Conditional Divorce in Indonesia," *Occasional Publications No. 7*, Islamic Legal Studies Program, Harvard Law School (2006).

Nakamura, Hisako, *Divorce in Java: A Study of the Dissolution of Marriage among Javanese Muslims* (Yogyakarta: Gadjah Mada University Press, 1993).

Nasir, Jamal J. Ahmad, *The Status of Women under Islamic Law and Modern Islamic Legislation*, The Third Edition (Leiden: Brill, 2009).

Nasir, Mohamad Abdun, Ahmad Amir Aziz and Musawar, "Polarisasi Tariqat Qadariya wa Naqsabandiya pada Pemilu 2004 di Lombok" [Polarization of the Politics of Qadariya and Naqsabandiya Sufi Order in 2004 Election in Lombok], *Istiqaro',* Indonesian Islamic Research Journal, Ministry of Religious Affair, Republic of Indonesia, 5:1 (2006): 95-114.

Nielsen, Jorgen S. and Lisbet Christoffersen (eds.), *Sharia as Discourse: Legal Tradition and the Encounter with Europe* (Burlington: Asghate, 2010).

Nik Noriani Nik Badli Shah, "Legislative Provisions and Judicial Mechanisms for the Enforcement and Termination of the Islamic Marriage Contract in Malaysia," in Asifa Quraishi and Frank E. Vogel (eds.), *The Islamic Marriage Contract: Case Studies in Islamic Family Law* (Cambridge, Mass.: Harvard Law School, 2008), p. p.183-199.

Noeh, Zaini Ahmad and Abdul Basith Adnan, *Sejarah Singkat Pengadilan Agama Islam di Indonesia* [A Short History of Religious Courts in Indonesia] (Surabaya: Bina Ilmu 1983).

Noer, Deliar, *Administration of Islam in Indonesia* (Jakarta and Kuala Lumpur: Equinox Publishing 2010).

Notosusanto, *Organisasi dan Jurisprudensi Pengadilan Agama di Indonesia* [Organization and Jurisprudence of Religious Courts in Indonesia] (Jogjakarta: Jajasan Badan Penerbit Gadjah Mada, 1963).

Notosusanto, *Peradilan Agama Islam di Jawa dan Madura* (Jogjakarta: Universitas Gadjah Mada, 1953).

Nurlaelawati, Euis, *Modernization, Tradition and Identity: The Kompilasi Hukum Islam and Legal Practice in the Indonesian Religious Courts* (Amsterdam: Amsterdam University Press, 2010).

Nurmila, Nina, *Women, Islam and Everyday Life: Renegotiating Polygamy in Indonesia* (New York and London: Routledge, 2009).

O'Shaughnessy, Kate, *Gender, State and Social Power in Contemporary Indonesia: Divorce and Marriage Law* (London and New York: Routledge, 2009).

Ong, Aihwa and Michael G. Peletz (eds.), *Bewitching Women, Pious Men: Gender and Body Politics in Southeast Asia* (Berkeley: University of California Press, 1995).

Otto, Jan Michiel, "Sharia and National Law in Indonesia," in Jan Michiel Otto (ed.), *Shari'a Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present* (Leiden: Leiden University Press, 2010), p. 433-490.

Pearl, David, *Muslim Family Law* (London: Sweet and Maxwell, 1998).

Peletz, Michael G., "Neither Reasonable nor Responsible: Contrasting Representations of Masculinity in a Malay Society," in Aihwa Ong and Michael G. Peletz (eds.), *Bewitching Women, Pious Men: Gender and Body Politics in Southeast Asia* (Berkeley: University of California Press 1995), p. 76-123.

Peletz, Michael G., *Islamic Modern: Islamic Courts and Cultural Politics in Malaysia* (Princeton: Princeton University Press, 2002).

Pierce, Leslie P., *Morality Tales: Law and Gender in the Ottoman Court of Aintab* (Berkeley: University of California Press, 2003).

Pickthall, Muhammad M., *The Meaning of the Glorious Qur'an* (Beltsville, MD: Amana Publication, 2005).

Pijper, G.F., *Fragmenta Islamica: Beberapa Studi mengenai Sejarah Islam di Indonesia Awal Abad XX* (Jakarta: Universitas Indonesia Press, 1987).

Platt, Maria, "Patriarchal Institution and Women's Agency in Indonesian Marriages: Sasak Women Navigating Dynamic Marital Continums," *PhD Dissertation* (Monash, Australia: La Trobe University, 2010).

Powers, Paul S., *Intent in Islamic Law: Motives and Meaning in Medieval Sunni Fiqh* (Leiden: Brill, 2006).

Rabb, Intisar A., "Fikih," in John L. Esposito (ed.), *The Oxford Encyclopedia of the Islamic World*, Vol. 2 (Oxford: Oxford University Press, 2009), p. 255-258.

Rajagukguk, Erman, "Pluralisme Hukum Waris: Studi Kasus Hak Wanita di Pulau Lombok Nusa Tenggara Barat" [Legal Pluralism of Inheritance: A Study of Women's Rights in Lombok, West Nusa Tenggara], *unpublished paper*, 2010.

Rapoport, Yossef, *Marriage, Money and Divorce in Medieval Islamic Society* (Cambridge: Cambridge University Press, 2005).

Robinson, Katherine, "Muslim's Women Struggle for Marriage Law Reform in Contemporary Indonesia," in Amanda Whiting and Carolyn Evans (eds.), *Mixed Blessings: Laws, Religions and Women's Rights in the Asia-Pacific Region* (Leiden: Martinus Nijhoff, 2006), p. 183-210.

Rosen, Lawrence, "Equity and Discretion in a Modern Islamic Legal System," *Law and Society Review,* 5 (1980-1): 217-245.

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

Rosen, Lawrence, *The Justice of Islam: Comparative Perspective on Islamic Law and Society* (Oxford: Oxford University Press, 2002).

Salim, Arskal and Azyumardi Azra, "Introduction: The State and Shari'a in the Perspective of Indonesian Legal Politics," in Arskal Salim and Azyumardi Azra (eds.), *Shari'a and Politics in Modern Indonesia* (Singapore: ISEAS, 2003), p. 1-16.

Salim, Arskal, *Challenging the Secular State: The Islamization of Law in Modern Indonesia* (Honolulu: University of Hawaii Press, 2008).

Schacht, Joseph, "Problems of Modern Islamic Legislation," *Studia Islamica*, 12 (1960): 108.

Schacht, Joseph, "Shari'a", in M. Th Houstma, A.J., Wensinck, T.W. Arnold, W. Heffening and E. Lévi-Provençal (eds.), *First Encyclopedia of Islam*, Vol. III (Leiden: Brill, 1987), p. 320-324.

Shaham, Ron, *Family and the Courts in Modern Egypt: A Study Based on Decisions by the Shari'a Courts 1900-1955* (Leiden: E.J. Brill, 2007).

Sharifah Zaleha Syed Hassan and Sven Cederroth, *Managing Marital Disputes in Malaysia: Islamic Mediators and Conflicts Resolution in the Syariah Courts* (Curzon, 1997).

Sharifah Zaleha Syed Hassan, "Women, Divorce and Islam in Kedah," in Joseph Chinyong Liow and Nadirsyah Hosen (eds.), *Islam in Southeast Asia: Critical Concept in Islamic Studies, Vol. I, Southeast Asian Islam: Histories, Cultures and Identities* (London and New York: Routledge, 2010), p. 231-242.

Shatzmiller, Maya, *Her Day in Court: Women's Property Rights in Fifteenth-Century Granada* (Cambridge, MA: Harvard Law School, 2007).

Shehada, Nahda, "Justice without Drama: Enacting Family Law in Gaza City Shari'a Court," *PhD Dissertation* (The Hague: Institute of Social Science, 2005).

Shehada, Nahda, "Negotiating Custody Rights in Islamic Family Law," in Thomas G. Kirsch and Bertram Turner (eds.), *Permutation of Order: Religion and Law as Contested Sovereign* (Burlington: Asghate, 2009), p. 247-262.

Shukri, Ahmed, *Muslim Law of Marriage and Divorce* (Piscataway, NJ: Gorgias Press, 2009).

Singarimbun, Masri and Chris Manning, "Marriage and Divorce in Mojolama," *Indonesia*, 17 (April, 1974): 67-82.

Skovgaard-Petersen, Jakob, "A Typology of State Muftis," in Yvonne Yazbeck Haddad and Barbara Freyer Stowasser (eds.), *Islamic Law and the Challenges of Modernity* (California: Altamira Press, 2004), p. 81-97.

Smith, Bianca J. "Stealing Women, Stealing Men: Co-creating Cultures of Polygamy in a *Pesantren* Community in Eastern Indonesia," *Journal of International Women's Studies,* Vol. 11, No. 1 (November 2009): 189-207.

Sonbol, Amira El Azhari, "A History of Marriage Contract in Egypt," in Asifa Quraishi and Frank E. Vogel (ed.), *The Islamic marriage Contract: Case Studies in Islamic Family Law* (Cambridge, MA: Harvard Law School, 2008), p. 87-122.

Sonbol, Amira El Azhary (ed.), *Women, the Family and Divorce Laws in Islamic History* (New York: Syracuse University Press, 1996).

Sonneveld, Nadia, *Khul' Divorce in Egypt: Public Debates, Judicial Practices and Everyday Life* (Cairo and New York: The American University in Cairo Press, 2012).

Spectorsky, Susan A., *Women in Classical Islamic Law: A Survey of the Sources* (Leiden: Brill, 2010).

Spectorsky, Susan A., *Chapter on Marriage and Divorce: Responses of Ibn Ḥanbal and Ibn Rahwayh* (Texas: Austin University Press, 1993).

Spies, O., "Mahr", in C.E. Bosworth, E. van Donzel, B. Lewis and CH. Pellat, The Encyclopedia of Islam, New Edition (Leiden: Brill, 1991), p. 78-79.

Starr, June and Jane F. Collier (eds.), *History and Power in the Study of Law: New Directions in Legal Anthropology* (Ithaca and London: Cornell University Press, 1989).

Stiles, Erin E., *An Islamic Court in Context: An Ethnographic Study of Judicial Reasoning* (New York: Palgrave Macmillan, 2009).

Stowasser, Barbara Freyer and Zaynab Abul-Magd, "*Tahlil* Marriage in Shari'a, Legal Code and the Contemporary Fatwa Literature," in Yvonne Hazbeck Haddad and Barbara Freyer Stowasser (eds.), *Islamic Law and the Challenges of Modernity* (Walnut Creek, CA: Alta Mira Press, 2004), p. 161-181.

Strange, Heather, *Rural Malay Women in Tradition and Transition* (New York: Preager, 1981).

Sumner, Cate and Tim Lindsay, *Courting Reform: Indonesia's Islamic Courts and Justice for the Poor* (New South Wales, Australia: Lowy Institute of International Policy, 2010).

Sumner, Cate and Tim Lindsey, *Courting Reform: Indonesia's Islamic Courts and Justice for the Poor* (Sydney: Lowy Institute, 2010).

Sumner, Cate, *Memberi Keadilan bagi Para Pencari Keadilan: Sebuah Laporan tentang Pengadilan Agama di Indonesia Penelitian tahun 2007 tentang Akses dan Kesetaraan* [Dispensing Justice for Justice Seekers: A Report about Access and Equality in Indonesian Religious Courts in 2007] (Jakarta: Mahkamah Agung dan AUSAIDS, 2007).

Syarifuddin, *Perlawanan Perempuan Sasak: Perspektif Feminisme* [Sasak Women's Resistance: A Feminist Perspective] (Mataram: Universitas Mataram Press, 2006).

Tamtiari, Wini, *Awig-Awig:, Melindungi Perempuan dari Kekerasan dalam Rumah Tangga* [Customary Rules: Guarding Women from Domestic Violence]. (Yogyakarta: Ford Foundation and Universitas Gadjah Mada, 2005).

Tielmann, Jörn,"Book Review Baudouin Dupret: Au nom de quell droit. Répertoires juridiques at reference religieuse dans la société égyptienne musulmane contemporaraine," *Die Welt des Islams,* 46 (2006): 90-95.

Tucker, Judith E., *In the House of the Law: Gender and Islamic Law in Ottoman Syria and Palestine* (Berkeley: University of California Press, 1998).

Tucker, Judith E., *Women, Family and Gender in Islamic Law* (Cambridge, UK: Cambridge University Press, 2009).

Turner, Bryan S., "The Crisis of Religious Authority: Education, Information and Technology," in Anthony Reid and Michael Gilsenan (eds.), *Islamic Legitimacy in Plural Asia* (London and New York: Routledge, 2007), p. 53-70.

Vikør, Knut S., "The Shari'a and the Nation State: Who Can Codify the Divine Law," in Bjøn Olav Utvik and Knut S. Vikør (eds.), *The Middle East in A Globalized World: Papers from the Fourth Nordic Conference on Middle Eastern Studies* (London: C. Hurst and Co Ltd., 2000), p. 220-250.

Vikør, Knut S., *Between God and the Sultan: A History of Islamic Law* (Oxford: Oxford University Press, 2005).

Volpi, Frederic and Bryan S. Turner, "Introduction: Making Islamic Authority Matter," *Theory, Culture & Society*, 24 (2), 2007: p. 1-19.

Voorhoeve, Maaike, "Judicial Discretion in Tunisian Personal Status Law," in Maaike Voorhoeve (ed.), *Family Law in Islam: Divorce, Marriage and Women in the Muslim World* (London and New York: I.B. Tauris, 2012), p. 199-230.

Wadud, Amina, *Qur'an and Women: Reading the Sacred Text from Women's Perspective* (New York: Oxford University Press, 1999).

Wardatun, Atun et. al., *Jejak Jender pada Budaya Mbojo, Samawa dan Sasak di Nusa Tenggara Barat* [Gender in Mbojo, Samawa and Sasak Cultures of West Nusa Tenggara] (Mataram: Pusat Studi Wanita IAIN Mataram, 2009).

Weiss, Bernard G., *The Search for God's Law: Islamic Jurisprudence in the Writing of Saif al-Dīn al-Āmidī* (Salt Lake and Herndon: University of Utah Press and International Institute of Islamic Thought, 2010).

Welchman, Lynn, *Beyond the Code: Muslim Family Law and the Shari'a Judiciary in the Palestinian West Bank* (The Hague: Kluwer International Law, 2000).

Welchman, Lynn, *Women's Right and Islamic Family Law: Perspectives on Reform* (London and New York: Zed Books, 2004).

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

Wurth, Anna, "The Normativity of the Factual: On the Everyday Construction of Shari'a in a Yemeni Court," in Abbas Amanat and Frank Griffel (eds.), *Shari'a: Islamic Law in the Contemporary Context* (Stanford: Stanford University Press, 2007), p. 165-177.

Whiting, Amanda and Carolyn Evans (eds.), *Mixed Blessing: Laws, Religions and Women's Rights in Asia Pacific Regions* (The Hague: Martinus Nijhoff, 2006).

Yasin, M. Nur, *Hukum Perkawinan Islam Sasak* [Sasak Islamic Marriage Law] (Malang: UIN Press, 2008).

Yefet, Karin Carmit, "The Constitution and Female-Initiated Divorce in Pakistan: Western Liberalism in Islamic Garb," *Harvard Journal of Law and Gender*, Vol. 34 (2011): 553-615.

Zakaria, Fath, *Geger Gerakan 30 September 1965: Rakyat NTB Melawan Bahaya Merah* [30 September 1965 Movement: The People's of West Nusa Tenggara's Resistance against the Red Threat] (Mataram: Sumur Mas, 2001).

Zaman, Muhammad Qasim, *The 'Ulama in Contemporary Islam: Custodian of Change* (Princeton: Princeton University Press, 2002).

Zarinebaf-Shahr, Fariba, "Women, Law, and Imperial Justice in Ottoman Istanbul in the Late Seventeenth Century," in Amira El Azhari Sonbol (ed.), *Women, the Family, and Divorce in Islamic History* (New York: Syracuse University Press, 1996), p. 81-95.

Zubaida, Sami, *Law and Power in the Islamic World* (London and New York: I.B. Tauris, 2003).