Journal of Law and Religion 34, no. 3 (2019): 356–382 © Center for the Study of Law and Religion at Emory University
doi:10.1017/jlr.2019.41

ARTICLE SYMPOSIUM

THE STATUS OF CHILDREN BORN OUT OF WEDLOCK AND ADOPTED CHILDREN IN INDONESIA: INTERACTIONS BETWEEN ISLAMIC, *ADAT*, AND HUMAN RIGHTS NORMS

EUIS NURLAELAWATI AND STIJN CORNELIS VAN HUIS
Professor, Faculty of Sharia and Law, State Islamic University Sunan Kalijaga
Senior Lecturer, Department of Law, Bina Nusantara University

ABSTRACT

This article examines the cases of children born out of wedlock and adopted children with the aim of depicting the mechanisms through which the concepts of biological fatherhood, derived from the human-rights framework, and adoption, derived from the customary law framework, have been adopted into Indonesian Islamic family law. We argue that the introduction of external concepts into family law pertaining to Muslims requires an adaptation process in which the relation between these external concepts and core Islamic family law concepts is determined. In the case of children born out of wedlock, this adaptation to core Islamic norms means that biological fatherhood does not lead to a full legal father-child relationship, despite a 2012 Constitutional Court ruling establishing that children born out of wedlock have a civil relationship with their biological father. In the case of adoption, it means that there is no full adoption, despite recognition of customary adoptions under Indonesian law. We argue that in a context of strong support for a religion-based family law, reforms tend to take the form of conditions or exceptions to core religious concepts, as replacing these concepts altogether would be perceived as jeopardizing the religious character of the law. While attempts to replace core Islamic family law concepts will inevitably meet strong resistance, there is much more tolerance for introducing family law reforms that aim at changing the way that Islamic concepts are applied in practice.

KEYWORDS: Islamic law, parentless children, adoption, family law, judicial practices, the best interests of the child, *adat*, Indonesia

INTRODUCTION

Indonesian family law pertaining to Muslims is in large part religious law. Therefore, it came as quite a shock to Indonesia's legal and religious establishment when the Indonesian Constitutional Court took a radical position on the legal status of children born out of wedlock. In 2012, the Constitutional Court issued a ruling that children born out of wedlock are legally

https://doi.org/10.1017/jlr.2019.41 Published online by Cambridge University Press

related to their biological father if medical technology can convincingly prove biological paternity.[1] Referring to the best interests of the child, the court took the position that it is not fair and proper that children born out of wedlock have a legal relationship with only their mothers, yet men are free from financial or custodial responsibilities for their biological children after a sexual relationship has led to pregnancy. The biological-father ruling stirred up the legal and religious establishment in Indonesia and resulted in heated debates about the status of children born outside marriage and the consequent legal responsibilities of biological fathers.

Prior to the 2012 ruling, the legal relationship between father and child was exclusively linked to the legal status of the child. Article 43 of the 1974 Indonesian Marriage Law (which the 2012 Constitutional Court ruling amended) established that a full father-child legal relationship arises exclusively from a child's being born into the father's marriage. Consequently, the 2012 Constitutional Court ruling gave the impression that Indonesia has added biological parenthood to marital parenthood as a basis for its family law. As our examination of the relevant laws, court cases, and views of legal scholars makes evident, the legal effects of the 2012 ruling have been much more limited than assumed, as proof of biological fatherhood does not establish a full parent-child relationship.

Comparison with the adoption case demonstrates that, in fact, the father-child relationship established through biological fatherhood far more closely resembles the legal relationship between a parent and an adopted child as is established through adoption. In both cases, the parent-child relationship establishes a right to financial support. "However, because there is no Islamic *nasab* (genealogical affiliation) of the marital child, there is no right of inheritance or marital guardianship." The biological father and adoption cases are interconnected in two ways: first, through the similar rights and responsibilities that arise from the parent-child relationship, and second, via the same mechanism through which the external concepts of biological fatherhood and adoption have been brought within the limits of the Islamic family law framework.

A number of works have been written on the issues of children born out of wedlock[2] and adoption[3] in the Muslim world. In Indonesia, a number of master's theses have been written on the issue

1 Constitutional Court Judgment No. 46/PUU-XII/2010.

2 Eva Schlumpf's research about illegitimate children in Morocco finds that although Morocco has made substantial reform in familial matters, illegitimate children continue to face problems that are not merely legal but instead problems that are deeply rooted in the Moroccan society. Eva Schlumpf, "The Legal Status of Children Born out of Wedlock in Morocco," *Electronic Journal of Islamic and Middle Eastern Law*, no. 4 (2016): 1–26, https://www.ejimel.uzh.ch/dam/jcr:9989e4a3-f4c9-41ea-96e3-27bdd1725968/AnnualVol42016.pdf.

3 Andrea Büchler and Eveline Schneider Kayasseh discuss the issues of fostering (*kafala*) and adoption in three Muslim countries: Morocco, Egypt, and the United Arab Emirates. They show how in these three countries full adoption is not allowed and will not result in a status equal to that of a biological child. Jamila Bargach observed how unofficial adoptions within families, as well as secret adoptions, occur alongside the formal *kafala* system in Morocco. Ella Landau-Tasseron conducted research about the practice of secret adoptions in several Arabian and Islamic societies and found how adoption involved mainly male children and found no single case of an adopted daughter. Additional comprehensive discussion on adoption is done by the Muslim Women's Shura Council, focusing on the manifestation of the notion of the best interests of the child. See Andrea Büchler and Eveline Schneider Kayasseh, "Fostering and Adoption in Islamic Law—Under Consideration of the Laws of Morocco, Egypt, and the United Arab Emirates," *Electronic Journal of Islamic and Middle Eastern Law*, no. 6 (2018): 31–56, https://www.ejimel.uzh.ch/dam/jcr:78b23c4d-c969-42e0-b17b-9d1fa1b62ab0/Vol.%206%20(2018).pdf; Jamila Bargach, *Orphans of Islam: Family, Abandonment, and Secret Adoption in Morocco* (Lanham: Rowman & Littlefield, 2002); Ella Landau-Tasseron, "Adoption, Acknowledgement of Paternity and False Genealogical Claims in Arabian and Islamic Societies," *Bulletin of the School of Oriental and African Studies* 66, no. 2 (2003): 169–92; Muslim Women's Shura Council, *Adoption and the Care of Orphan Children: Islam and the Best Interests of the Child* (New York: American Society for Muslim Advancement, 2011).

https://doi.org/10.1017/jlr.2019.41 Published online by Cambridge University Press

of the legal rights of children born out of wedlock—particularly concerning the 2012 Constitutional Court ruling, the implementation of the ruling, and the legal debate that followed.[4] Analyzing the opinions of members of two Muslim women's organizations, Muslimat NU and Aisyiyah, about the 2012 Constitutional Court ruling, Tutik Hamidah concludes that members of these organizations, as do their male counterparts, tend to consider such children illegitimate and are therefore of the opinion that they should not have the same rights as legitimate children.[5] The legal position of adopted children does figure in a number of studies about Indonesian Islamic family law and inheritance law. Ratno Lukito, for example, discusses the legal stipulation of an obligatory bequest from adoptive parents to adopted children in the context of Qur'anic verses on bequest.[6] Similarly, Syamsu Ali and Muhamad Fauzan examine Indonesian adoption rules from the perspective of Islamic doctrine.[7] Elizabeth Schröder-Butterfill discusses adoption as one of the strategies the elderly without children on Java apply in order to secure care.[8] To date, however, besides a number of bachelor and master's theses, there is no comprehensive academic work on Indonesian adoption procedure and its implementation in legal practice.

In the discussion that follows, we first provide a comprehensive legal analysis of the family law consequences that are attached to the legal status of children born out of wedlock and adopted children in Indonesia, including an analysis of legal and social practice. As stated, such a comprehensive legal analysis on these matters is lacking. We then demonstrate how in Indonesia, where Muslim family law is largely religion-based, norms related to biological fatherhood and adoption are modified in legal practice and made to fit the Islamic family law framework. Under this mechanism, external norms become a new conditionality affecting core Islamic norms. Both biological fatherhood and adoption are concepts that are at variance with the core Islamic concept of the marital child. Nonetheless, both concepts have been adopted in Indonesian Islamic family law and are applied in cases pertaining to Muslims. Through this analysis of the concepts of biological parenthood and adoption, we illustrate how external concepts may open up the Islamic family law framework by introducing changes in the application of core religious concepts—without compromising their Islamic character.

This article is based on a desk study and field research. The desk study involved a legal analysis of relevant legislation, court judgments, and other primary sources, and a review of legal literature and other relevant academic literature, including Indonesian master's theses on the subjects of the

4 Mughniatul Ilma, "Penetapan Hakim tentang Asal Usul Anak Paska Putusan Mahkamah Konstitusi. Studi Kasus di Pengadilan Agama Bantul" [Court judgments on the filiation of a child at the Islamic Court of Bantul after the Constitutional Court ruling] (master's thesis, Sunan Kalijaga State Islamic University Yogyakarta, 2016); Dinal Ahsin, *Dampak Putusan Mahkamah Konstitusi terhadap Kasus-kasus Anak Luar Nikah di Pengadilan Agama Yogyakarta tahun 2010–2014* [The impact of the Constitutional Court's ruling on children born out of wedlock cases at religious courts in Yogyakarta 2010–2014] (master's thesis, Sunan Kalijaga State Islamic University Yogyakarta, 2016). Muhamad Isna Wahyudi, "Judges' Legal Reasoning and the Prospect of the Child Right Protection: Analysis of Religious Courts' Decisions on the Case of Child Parentage," *Al-Jami'ah International Journal of Islamic Studies* 55, no. 1 (2017): 127–54.

5 Tutik Hamidah, "The Rights of Children Born out of Wedlock: Views of Muslim Women's Organizations on Constitutional Court Judgement 46/2010," in *Women and Property Rights in Indonesian Islamic Legal Contexts*, ed. John R. Bowen and Arskal Salim (Leiden: Brill, 2019), 47–68.

6 Ratno Lukito, "Sacred and Profane Law in the Indonesian Context: The Case of the Bequest Verse," in *Approaches to the Qur'an in Contemporary Indonesia*, ed. Abdullah Saeed (Oxford: Oxford University Press, 2005), 135–60.

7 Andi Syamsu Alam and Muhamad Fauzan, *Hukum Pengangkatan Anak Perspektif Islam* [Adoption of a child from an Islamic law perspective] (Jakarta: Kencana Prenada Media Group, 2008).

8 Elisabeth Schröder-Butterfill, "Adoption, Patronage and Charity: Arrangements for the Elderly without Children in East Java," in *Ageing without Children: European and Asian Perspectives*, ed. Philip Kreager and Elisabeth Schröder-Butterfill (Oxford: Berghahn Books, 2005), 106–46.

https://doi.org/10.1017/jlr.2019.41 Published online by Cambridge University Press

2012 Constitutional Court ruling and adoption in legal practice. The field research, which took place in 2016 in Yogyakarta and surroundings, entailed court observation, interviews with judges and staff members of Islamic courts, interviews with staff members of children's homes, interviews with staff of social welfare offices, and interviews with adoptive parents. The location of Yogyakarta on Java was chosen because of the prevalence of customary adoption among the Javanese and the network one of the authors had in the area, which greatly facilitated access to the relevant institutions.

We start with a description of Indonesia's legal system and the laws relevant to filiation in Indonesia so as to introduce Indonesia's pluralistic, religion-based family law system. The next sections focus on legal issues and discuss the rules and legal practice concerning the establishment of filiation, acknowledgment of children, and adoptions. In these sections we discuss the rules and procedures for establishing a filiation between father, mother, and child in relation to questions whether the child was born into, or conceived within, a registered valid marriage, an unregistered but valid marriage, an informal polygamous marriage, a void marriage, a nonmarital or extramarital relationship, adoption, or a situation of unknown parents. We also analyze how judges apply these rules. The examples show how the Indonesian legislature, in its attempt to set up a unified family law governance in accordance with religious law—especially Islamic family law—created many issues where the hierarchy between provisions aimed at organizing a national family law governance and religious norms are not clearly defined. This ambiguity of the law is especially evident in cases in which a judge must establish the filiation of a child. What has primacy: religious validity of a marriage or legal requirements and conditions imposed by the government in order to organize family law governance, such as registration requirements, minimum age of marriage, and polygamy conditions?

We then examine—in cases concerning acknowledgment or legitimation of children born out of wedlock and adoption—how Islamic court judges balance statutory laws, Islamic laws, and customary practices with the best-interests-of-the-child principle. We show how, in some of these cases, the best interests of the child principle has been applied by Islamic judges to justify a bypassing of secular family governance provisions, but almost never to justify a bypassing of core Islamic family law concepts.

INDONESIAN FAMILY LAW PERTAINING TO MUSLIMS

As the words *Indonesian* and *Muslim* in the heading above imply, multiple normative frameworks are relevant to family law in Indonesia. There are a number of general family law regulations that apply to all Indonesians, but many other family law matters are governed by regulations that apply to specific religious groups. Because a basic familiarity with the legal-pluralist make-up of Indonesia's legal system is essential to understand the later discussions, we offer first a short introduction to Indonesian family law pertaining to Muslims.

Legal Pluralism

Indonesian family law pertaining to Muslims is a blend of statutory laws concerning marriage and personal status, state-compiled Islamic law, and uncodified Islamic and customary law.[9] This legal

9 For further reading on the position of Islamic law and Islamic courts within the pluralistic legal system of Indonesia, see Daniel S. Lev, *Islamic Courts in Indonesia: A Study in the Political Bases of Legal Institutions* (Berkeley: University of California Press, 1972); Michael. B. Hooker, *Islamic Law in South-East Asia* (Singapore: Oxford University Press, 1984); John R. Bowen, *Islam, Law and Equality in Indonesia: An Anthropology of Public*

https://doi.org/10.1017/jlr.2019.41 Published online by Cambridge University Press

pluralism relates not only to the legal sources of Indonesian family law; rather the jurisdiction of courts responsible for the adjudication of family law matters is divided based on religious affiliation as well. Except for a limited number of issues for which a concurrent jurisdiction exists, national Islamic courts are responsible for the adjudication of family law cases pertaining to Muslims and general courts are responsible for family-law cases pertaining to non-Muslims. The Islamic courts are part of the national legal system under the supervision and administration of the Supreme Court. Parties can appeal judgments of a first-instance Islamic court to high Islamic courts and can appeal in cassation at the Supreme Court level. The Islamic courts are subject to national laws that regulate jurisdiction and procedure.

In terms of sources, there are four different categories of substantive family law that are applied by Indonesia's Islamic courts (and, as we discuss below, also by the general courts in some cases of concurrent jurisdiction). First, there is legislation relevant to family law that has general application in Indonesia—regardless of one's religious affiliation. This includes certain provisions of the colonial 1848 Civil Code,[10] all provisions of the 1974 Marriage Law (unless explicitly stated otherwise),[11] the 2006 Population Registration Law, the 2002 Child Protection Law, and government regulations concerning adoption procedures.

Second, there are specified family law regulations pertaining to Muslims. Following "the Islamic turn in Indonesian politics"[12] that was undertaken as part of President Suharto's New Order regime (1966–1998) in the early 1980s, the Indonesian government took the initiative of compiling family law and inheritance rules for Muslims. It is important to note that the resulting 1991 Compilation of Islamic Law did not amend the 1974 Marriage Law: the 1991 Compilation was introduced by means of Presidential Instruction and therefore lacks the status of statutory law. In fact, the 1991 Compilation consists of (1) reformulations of provisions found in the 1974 Marriage Law, (2) provisions that were formulated based on selected Islamic doctrine (*fiqh*), and (3) a limited number of provisions that have their basis in *adat* (customary) law.[13] The third source of family law pertaining to Muslims is original *fiqh*, and the fourth is *adat* law practices. Judges of Islamic courts regularly refer to *fiqh* sources in their judgments and have to consider local *adat* norms as well.[14]

Additional legal sources have their origin in international human rights law. Indonesia has ratified six core human rights instruments, including the Convention on the Elimination of All Forms of Discrimination Against Women, in 1981, and the Convention on the Rights of the

Reasoning (Cambridge: Cambridge University Press, 2003); Ratno Lukito, *Legal Pluralism in Indonesia: Bridging the Unbridgeable* (Abingdon: Routledge, 2012).

10 Many statutory law provisions have replaced individual provisions of the 1848 Civil Code, yet the Civil Code itself has never been repealed. Provisions that have not been amended or revoked still apply today. See Daniel S. Lev, "Colonial Law and the Genesis of the Indonesian State," *Indonesia*, no. 40 (1985): 57–74.

11 Even though the 1974 Marriage Law introduced a large number of unifying rules applying to all marriages in Indonesia, it simultaneously continued the pluralistic family law system in which a person's religion determines what set of rules applies. See Bowen, *Islam, Law and Equality in Indonesia*, 46–52; Adriaan Bedner and Stijn Cornelis van Huis, "Plurality of Marriage Law and Marriage Registration for Muslims in Indonesia: A Plea for Pragmatism," *Utrecht Law Review* 6, no. 2 (2010): 175–91, at 177.

12 William R. Liddle, "The Islamic Turn in Indonesia: A Political Explanation," *Journal of Asian Studies* 55, no. 3 (1996): 613–34.

13 For further reading about how the 1991 Compilation of Islamic Law came together and how it is implemented, see Euis Nurlaelawati, *Modernization, Tradition and Identity: The Kompilasi Hukum Islam and Legal Practice in the Indonesian Religious Courts* (Amsterdam: Amsterdam University Press, 2010).

14 See Bowen, *Islam, Law and Equality in Indonesia*; Nurlaelawati, *Modernization, Tradition, and Identity*.

https://doi.org/10.1017/jlr.2019.41 Published online by Cambridge University Press

Child in 1990.[15] Moreover, in the early 2000s, during the period of legal reforms following the resignation of President Suharto in 1998, four constitutional amendments enshrined human rights principles in the constitution. With the establishment of the Constitutional Court in 2003, this means that Indonesian laws can now be challenged and reviewed on the basis of the human rights provisions in Indonesia's constitution. The 2012 Constitutional Court case about the filiation of children born out of wedlock is such a case. However, the adoption of human rights does not mean that human rights are automatically applied without any contextualization. As we explain below, rulings of the Constitutional Court pertaining to the 1974 Marriage Law have to be applied by the Islamic courts. This means that these rulings are interpreted by Islamic judges who have been trained within an Islamic family law framework in which certain core Islamic concepts are considered to be unalterable. One of these core Islamic concepts is *nasab*, or Islamic descent based on the concept of the marital child, which regulates Islamic rules of filiation.

Filiation: Establishing the Legal Relationship between Parent and Child

Filiation, the legal relationship between parent and child, is referred to in Indonesia as *asal usul anak*, which denotes the origin and descent of the child. The 1848 Civil Code uses the Dutch term *afstamming* (descent) for filiation, which is translated into Indonesian with *asal keturunan anak-anak* (origin and ancestry of children). The 1991 Compilation of Islamic Law uses the Islamic term *nasab* (Islamic rules of filiation) in addition to *asal usul*, especially when underlining or specifying the consequences of filiation according to Islamic doctrine. The similarity between all these terms is that the marital child is the basis of a full parent-child filiation.

As stated, Islamic courts hold jurisdiction in family matters pertaining to Muslims, and general courts (*pengadilan negeri*) adjudicate family law matters of non-Muslims. However, as we will see, the general courts assume concurrent jurisdiction in acknowledgment and legitimization of children's cases—cases that are typically adjudicated on the basis of rules of filiation. In the context of filiation, the 1974 Marriage Law is especially important as it established that the general rules applying to marriages of all religious and ethnic groups living in Indonesia. However, the 1974 Marriage Law also stipulates that a valid marriage must be concluded in accordance with religious norms. Moreover, the 2006 Population Registration Law stipulates that both—acknowledgment of a child and legitimation of a child—must be in accordance with relevant religious norms. In addition, judges must apply the principle of the best interests of the child. In short, in filiation cases, Islamic court and general court judges must balance secular and religious norms in a way that, according to them, is in the best interests of the child.

The Best Interests of the Child

It is important to note that under the 2002 Child Protection Law the Islamic courts must give primacy to the best interests of the child—a requirement that has important consequences for filiation cases. In 2016, a special edition of the journal *Majalah Peradilan Agama*, published by the Supreme Court's Office of Islamic Courts, prominently featured the best interests of the child principle, thus

15 The other human rights instruments that Indonesia has ratified are the International Convention on the Elimination of All Forms of Racial Discrimination; Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment; International Covenant on Civil and Political Rights; and International Covenant on Economic, Social and Cultural Rights.

https://doi.org/10.1017/jlr.2019.41 Published online by Cambridge University Press

indicating that the office endorsed application of the principle in the Islamic courts.[16] The best interests of the child principle increases the discretionary powers of judges in child-related cases, including in cases in which the central question revolves around the child's filiation to the father. Imen Gallalla-Arndt has suggested that in the framework of Indonesian family law pertaining to Muslims, such increased judicial discretion may change legal practice in contradictory ways: it may lead to a rebuttal of conservative provisions grounded in Islamic legal doctrine, but it may also lead to conservative Islamic interpretations that put an emphasis on a child's interest in growing up in a conservative religious environment.[17] As we demonstrate below, the best interests of the child do play a role in Islamic court judgments involving either children who are born out of wedlock or the formalization of customary adoptions. However, in these cases Islamic court judges infrequently rebut core Islamic family law concepts; much more often they choose to apply general substantive and procedural rules derived from national statutory laws in a very flexible way.

Filiation of Children Born into a Legal Marriage

In Indonesia, a legitimate child—a child with full filiation to both its parents, is the marital child of both parents. Indonesian law presumes that a child who is born into a legal marriage is the legitimate child of the husband and wife. The general rule is that only a marital child has a filial relationship with both spouses. Hence, the 1974 Marriage Law distinguishes between a legitimate child (*anak sah*), and a child born out of wedlock (*anak yang lahir di luar perkawinan*). Article 42(1) defines a legitimate child as a child born in, or resulting from, a valid (*sah*) marriage.

A marriage is valid when it is concluded according to the religious laws and customs of both spouses (Article 2(1)). This means that the validity of the marriage primarily depends on the fulfillment of the religious requirements for marriage. In turn, this validity determines the legal status of a child. The 1974 Marriage Law and the 1991 Compilation do not regulate a timeframe in which a child must be born to be considered a marital child. According to Article 66 of the 1974 Marriage Law, an absence of regulation means that the previous relevant legal provisions still apply. The relevant provisions are Article 251 and Article 255 of the 1848 Civil Code. Article 251 states that when a child is born within 180 days of the conclusion of the marriage, the husband may deny paternity of the child,[18] except where he knew of the pregnancy at the time of marriage, where he signed the birth certificate, or where the child was born dead. Thus, if a child is born within six months of marriage, and the husband does not deny paternity of the child, the rule applies

16 See "Perlindungan Hak-Hak Anak di Peradilan Agama" [The protection of children's rights at the Islamic courts], special issue, *Majalah Peradilan Agama*, no. 9 (2016), https://badilag.mahkamahagung.go.id/majalah/publikasi/majalah/majalah-peradilan-agama-edisi-5.

17 For a thorough discussion on how Islamic judges interpret custody cases in Indonesia, see Imen Gallala-Arndt "The Impact of Religion in Interreligious Custody Disputes: Middle Eastern and Southeast Asian Approaches," *American Journal of Comparative Law* 63, no. 4 (2015): 829–58; Euis Nurlaelawati, "Indonesia," in *Parental Care and the Best Interest of the Child in Muslim Countries*, ed. Nadjma Yassari, Lena-Maria Möller, and Imen Gallala-Arndt (The Hague: Asser Press, 2017), 63–80.

18 The husband may also deny paternity of a child when he believes that the child is the result of an adulterous relationship. Article 44 of the 1974 Marriage Law states the husband is required to prove adultery before the court and to take an oath at court. For Muslims, there is an additional procedure by which the husband can deny any legal relationship with a child: called *li'an* (mutual repudiation) it is regulated by Articles 101–103 and 125–128 of the 1991 Compilation. A husband who believes that his wife has committed adultery or that her child is the result of adultery may divorce her through four *li'an* oaths in which he pronounces his allegation of her adultery. The wife, in turn, makes five oaths in which she denies the allegations. The consequences of *li'an* are that the marriage is annulled and filiation of the child is attributed to the mother's blood relatives only.

https://doi.org/10.1017/jlr.2019.41 Published online by Cambridge University Press

that the child will be presumed to be a legitimate child. Article 255 stipulates that when a child is born 300 days or more after the dissolution of the marriage it is considered born out of wedlock. Although this matter is not regulated in the 1991 Compilation of Islamic Law, according to Islamic doctrine a child who is born within six months of marriage is a premarital child.[19] Hence, application of Article 251 is controversial in the Islamic courts.

While Article 2(1) stipulates that a marriage must be concluded according to the religious requirements of marriage, Article 2(2) of the 1974 Marriage Law requires couples to register their marriage. After the issuance of the 1974 Marriage Law, a scholarly debate ensued, centering on the question whether the validity of a Muslim marriage was contingent on its registration.[20] The 1991 Compilation, which—as stated—compiled additional Islamic rules to specify the general rules of the 1974 Marriage Law and to fill in lacunas, did not resolve this debate, but the order of its articles reveals a preference for an interpretation that considers unregistered Islamic marriages as valid.[21] In 2012, the Constitutional Court articulated a similar interpretation of the registration requirement: nonregistration does not disqualify a religious marriage from being valid.[22]

A special legal issue is the filiation of children born as the result of in vitro fertilization, or IVF. The 1991 Compilation stipulates that a child who is the result of a "valid" (*sah*) extra-uterine fertilization procedure undertaken between husband and wife, and who is born from the womb of the wife, is a legitimate child (Article 99(b)). In 1979, the Indonesian Council of Ulama, an advisory body to the Indonesian government on Islamic matters, issued a fatwa on IVF. The legal opinions of Indonesian Ulama Council, while not legally binding, provide an indication of what type of IVF treatments are considered valid within the Islamic legal scholarship in Indonesia. The fatwa stated that a child born as a result of IVF is considered the legitimate child of both parents only when an egg of the wife was fertilized with the sperm of her husband and the wife herself gave birth to the child.[23]

Indonesian law makes a distinction between valid marriages and formal (registered) marriages, and between legitimate children and children born out of wedlock. This distinction becomes problematic when children are born into unregistered but religiously valid marriages. Must these children be considered as marital children and therefore legitimate children, or are they regarded as children born out of wedlock? Do the Islamic requirements for a valid marriage or the statutory regulations concerning marital registration have primacy? As we discuss below, the Indonesian government has chosen to be lenient toward marriage registration violations by introducing the option of backdated registration of religious marriages—whose retroactive effects encompass the status of children born into such marriages.

19 Ahmad Rafiq, *Hukum Islam di Indonesia* [Islamic law in Indonesia] (Jakarta: Rajawali Pers, 1998), 224.

20 Abdul Manan, *Aneka Masalah Hukum Perdata Islam di Indonesia* [A selection of Islamic private law issues in Indonesia] (Jakarta: Kencana, 2006), 48–53; Nurlaelawati, *Modernization, Tradition and Identity*, 118–119; Bowen, *Islam, Law and Equality in Indonesia*, 181–185.

21 The 1991 Compilation separated the article concerning the validity of the marriage (Article 4) from the articles concerning the obligation to register the marriage (Articles 5–7), implying that validity and registration are two different issues. See Nurlaelawati, *Modernization, Tradition and Identity*, 103.

22 Mark Cammack, Adriaan Bedner, and Stijn Cornelis van Huis, "Democracy, Human Rights, and Islamic Family Law in Post-Soeharto Indonesia," *New Middle Eastern Studies*, no. 5 (2015): 1–24, 18.

23 See Michael Barry Hooker, *Indonesian Islam: Social Change through Contemporary Fatāwā* (Honolulu: University of Hawai'i Press, 2003), 191–93.

https://doi.org/10.1017/jlr.2019.41 Published online by Cambridge University Press

The Status of Children Born into an Unregistered but Religiously Valid Marriage

In Indonesia, children born into unregistered religious marriages are given the status of born-out-of-wedlock. Article 27 of the 2006 Population Registration Law stipulates that inhabitants of Indonesia are obliged to register a child in the birth registry within sixty days of the child's birth, after which the parents will receive a birth certificate. Parents of a child born into valid but unregistered religious marriages cannot register their child as a legitimate child, since they lack an authentic marriage certificate as legal proof of their marriage.[24] Without this legal proof, the birth registry will register a child as born out of wedlock. Aside from the stigma attached to such status,[25] being born out of wedlock means that the child has no legal relationship with the father. This, in turn, carries all manner of family law consequences for matters such as legal guardianship, the father's legal responsibilities, maintenance rights of the child, and inheritance rights.

Parents in unregistered but valid religious marriages may, however, formalize their religious marriage and legalize their child afterwards. There are procedures in the 1974 Marriage Law to validate a religious marriage through Article 7 of the 1974 Marriage Law. The *isbat nikah* (marriage registration) provisions in Article 7(3) apply only to exceptional cases, with the objectives of (1) allowing for registration of valid marriages concluded before the 1974 Marriage Law came into force; (2) providing for a procedure to confirm the validity of a marriage when a marriage certificate is lost or damaged; (3) providing courts the capacity to issue a judgment about the legality of a marriage when its validity is put into doubt; and (4) enabling women to petition for a divorce out of an unregistered marriage.[26]

In 2012, the Islamic Chamber of the Supreme Court held a plenary meeting in which it articulated its conservative position that children with a born-out-of-wedlock status can be legitimized only if they were born into valid marriages and only after a court has established the validity of the religious marriage. It built on current legal practice of the *isbat nikah* procedure[27] and added a fifth legitimate objective for retroactive marriage registration to the four already mentioned: to enable the legitimization of a child born into an unregistered but valid religious marriage. Hence, even if the Islamic Chamber of the Supreme Court did not did not establish a legal

---

24 Article 52(1), (2) of Presidential Regulation number 25 of the year 2008 concerning the Requirements and Procedures of Population and Civil Registration.

25 According to the Indonesian Commission for the Protection of Children, this lack of differentiation between children born into a valid but unregistered marriage, children born outside marriage, and children born from adultery, leads to the stigmatization of children born into valid but unregistered marriages. See Ida Nurcahyani, "Illegitimate Child Rights and Its Problems in Indonesia," *Antara News*, February 29, 2012, http://www.antaranews.com/en/news/80263/illegitimate-child-rights-and-its-problems-in-indonesia.

26 For thorough analyses of the implementation of the *isbath nikah* provisions, see Nurlaelawati, *Modernization, Tradition and Identity*, 194–203; Stijn Cornelis van Huis, *Islamic Courts and Women's Divorce Rights in Indonesia: The Cases of Cianjur and Bulukumba*, (Leiden: Leiden University Press, 2015), 97; Bedner and Huis, "Plurality of Marriage," 187–90; Stijn Cornelis van Huis and Theresia Dyah Wirastri, "Muslim Marriage Registration in Indonesia: Revised Marriage Registration Laws Cannot Overcome Compliance Flaws," *Australian Journal of Asian Law* 13, no. 1 (2012): 1–17, at 13–14.

27 We analyzed statistics obtained from the old website of the Supreme Court's Office of Islamic Courts www.infoperkara.badilag.net, accessed June 7, 2017. The website is no longer accessible, and the official website of the Office of Islamic Courts has been moved to https://badilag.mahkamahagung.go.id/. The statistics demonstrate that a substantial number of *isbat nikah* cases are decided every year, and that in a large majority of those cases Islamic courts confirm the validity of the marriage. In 2016, the Islamic courts in Indonesia decided 29,849 *isbat nikah* cases, of which an overwhelming 27,252 cases, or 91 percent, were approved and only 486, or 1.5 percent, rejected. The remaining 7.5 percent were withdrawn by the petitioner or removed from the register by the Islamic courts.

https://doi.org/10.1017/jlr.2019.41 Published online by Cambridge University Press

relationship of a biological father with his child born out of wedlock, it did improve the legal possibilities for legitimation of children born into unregistered Islamic marriages. The Supreme Court refused to change the Islamic concept of the marital child based on the 2012 Constitutional Court ruling that established biological fatherhood, but the ruling did lead to agreement within the Islamic Chamber that leniency toward marriage registration requirements is preferred when this is in the best interests of the child.

Children Born into Unregistered Polygamous Marriages

The Supreme Court in its plenary meeting in 2012 agreed to be lenient toward unregistered Islamic marriages when child interests are involved. Below, we discuss the issue of the nonregistration of religious marriages as a means of evading the polygamy regulations in the 1974 Marriage Law. The 1974 Marriage Law states a preference for monogamous marriage and limits polygamy based on the satisfaction of a number of conditions. Article 4 obliges a married man who wants to marry a second, third, or fourth wife to file a petition for permission with an Islamic court. A court may grant permission only when the applicant's wife or wives are unable to perform their marital duties, the wife or wives are handicapped or chronically ill, or are unable to have children. Article 5 stipulates additional conditions: the agreement of the wife or wives; proof of the husband having sufficient capability to take care of his wives and children; and the husband's promise that he will treat his wives and their children justly (*adil*). In cases in which it is impossible to seek the wife's agreement, the court may disregard the requirement of the wife's consent.

The legal conditions set by the 1974 Marriage Law make the validity of informal polygamous marriages problematic. Although an unregistered polygamous marriage may be considered religiously valid under Article 2(1) of the 1974 Marriage Law, thereby bypassing the polygamy restrictions, yet the failure to have secured prior consent from the court renders them legally invalid.[28] The Supreme Court has issued guidelines stating that informal polygamous marriages concluded after 1974 may not be registered through the *isbat nikah* procedure, that is, the retroactive registration of religious marriages. This legal barrier to validating informal polygamous marriages has consequences for the filiation of children born into informal polygamous marriages. Until recently, all such children would be considered as being born out of wedlock, having a filial relationship with only the mother. However, the 2012 Constitutional Court ruling concerning biological fatherhood and a stronger awareness of judges about the primacy of the best interests of the child principle in the 2002 Child Protection Law, have increased the discretionary powers of the judge in filiation cases.

As a result of this increased discretion, a number of Islamic courts have judged that children born into unregistered polygamous marriages are legitimate children. In our search through the online directory of Supreme Court judgments for cases in which parents sought to legitimize a child born into an unregistered polygamous marriage, we found conflicting first-instance court judgments. In 2014, the Islamic court of Surabaya argued that a polygamous marriage requires prior court permission, and consequently children born into an informal polygamous marriage must be considered as being born out of wedlock.[29] In 2016, the Islamic court of Tanjung argued that children born into a religiously valid marriage are legitimate children and that the informal nature of the polygamous marriage does not render children born into the marriage as born out

28 See Bowen, *Islam, Law and Equality in Indonesia*, 184.

29 Judgment of the Islamic court of Surabaya No. 59/Pdt.P/2014/PA.Sby of February 27, 2014.

https://doi.org/10.1017/jlr.2019.41 Published online by Cambridge University Press

of wedlock.[30] A case decided by the Islamic court of Sidoarjo in 2011 is more complex, as the initially informal polygamous marriage performed in 1988 was followed by a new formal marriage (with court permission) in 2007. The first wife was summoned to the court and stated her agreement to the legitimation of her co-wife's child. The court established the religious marriage in 1988 as valid and declared the child born into that marriage as a legitimate child.[31]

It is difficult to draw conclusions from such a small pool of cases, but these cases show how two Islamic courts decided to be lenient toward unregistered polygamous marriages because of the interests of the children involved. In balancing an evasion of the polygamy conditions with the best interests of the child, these courts determined that the interests of the child have primacy. For these Islamic court judges, being born in a religiously valid marriage, even an unregistered polygamous one that cannot be retroactively registered, was sufficient grounds for a legitimation of a child—in its best interests.

The Status of Children Born into a Void Marriage

Another problem that may arise is that a marriage that has been registered is later declared void. Will children born into void marriages retain their status as legitimate children, or do they obtain the status of being born out of wedlock? There are two types of presumed marriages: (1) formal registered marriages that in the course of time are declared void by a court, and (2) informal unregistered marriages that are brought before the court to be validated but subsequently appear not to be in accordance with legal or religious requirements and are declared void.

To start with formally registered marriages, the 1974 Marriage Law includes a chapter regulating void and null marriages (*batalnya perkawinan*). Articles 22–24 of the 1974 Marriage Law state that on the request of lineal family members of husband and wife, the husband or wife, a marriage registrar, third parties who have an interest, or persons who are still married to one of the spouses, a court may declare a marriage void if it does not fulfill the legal requirements for marriage. Article 70 of the 1991 Compilation of Islamic Law enumerates forbidden relationships which render a Muslim marriage automatically void (*batal*). The conditions under which a marriage may be annulled (using the verb *dapat dibatalkan*) are listed in Articles 71 and 72 and include the following: the registered marriage appears to be a polygamous relationship without prior court permission; the wife was still married; the wife married during her *iddah* waiting period after divorce; the marriage violates the legal age of marriage requirements; the marriage was concluded without or by an invalid guardian (*wali*); one of the spouses was forced into marriage. Article 28 of the 1974 Marriage Law states unequivocally that the annulment of a marriage does not retroactively apply to children born into that marriage.[32] The 1991 Compilation has adopted Article 28 in its Article 75 and added Article 76, which states that a court judgment that a marriage is null and void does not end the legal relationship between a child and his parents. It is therefore safe to conclude that children born into a formal registered marriage remain legitimate children following a court judgment that declares the marriage void.

The question is whether the 1974 Marriage Law provisions concerning void marriages also apply to unregistered religious marriages. Indonesian law does not regulate this specifically, and therefore we have looked into relevant court judgments. In one case involving an invalid guardian,

30 Judgment of the Islamic court of Tanjung No. 4/Pdt.p/2016/PA.Tjg of January 18, 2016.

31 Judgment of the Islamic Court of Sidoarjo No. 67/Pdt.P/2011/PA.Sda of June 9, 2011.

32 By contrast, for the husband and wife retroactive effects of the annulment of marriage are conditional on an assessment of whether or not the spouse concerned acted in good faith.

https://doi.org/10.1017/jlr.2019.41 Published online by Cambridge University Press

the Islamic court of Sidoarjo declared the religious marriage void but the children legitimate. In this case, the parents wished to register their marriage, but it became apparent that the brother-in-law of the wife—and not a lineal blood relative, as required by Islamic law—had acted as the marriage guardian, which rendered the marriage void. In its reasoning, the court mentioned four legal bases: (1) the children's constitutional right (Article 28(2)) to grow up free from violence and discrimination; (2) the 2012 Constitutional Court judgment establishing a civil relationship between the child and his biological father; (3) a phrase from *Al-Fiqh al-Islamiyy wa Adillatuhu* by Wahbah al-Zuhayly,[33] which declares children born into unregistered (*urfi*) and defective (*fasid*) marriages as legitimate under Islamic law; and (4) Article 14 of the 2002 Child Protection Law, which stipulates the right of children to be brought up by their own parents.[34] The judgment makes no reference at all to the relevant provisions concerning void marriages in the 1974 Marriage Law or the 1991 Compilation of Islamic Law, which implies that the court concluded that these provisions do not apply to unregistered marriages.

In an informal underage marriage case,[35] the mother was fifteen years old at the time of the religious marriage (she had not asked for court permission to marry as required by law). Four months into the marriage, she gave birth to a child. The couple married formally when the mother reached sixteen years of age, the legal age of marriage for women in Indonesia. Subsequently, the couple wanted to register the child as their legitimate child, but the civil registry considered the religious marriage legally invalid and registered the child as being born out of wedlock. The couple decided to bring the case to the Islamic court and filed for a judgment on the filiation of the child. The Islamic court of Mojokerto held that the child was born into a religiously valid marriage and cited the phrase from *Al-Fiqh al-Islamiyy wa Adillatuhu* that declares children born into unregistered and defective marriages as legitimate children. The court, subsequently declared the child to be a legitimate child (*anak sah*). In two other unregistered underage marriage cases, the Islamic courts similarly corrected the determination of the civil registry, which had refused to register children born into underage marriages as legitimate children, and ruled that the underage marriages were religiously valid and the children legitimate.[36]

These cases, again, show that Islamic courts have a tendency to declare marriages valid in the best interests of the child, based on the rationale that underage marriages are still in accordance with religious requirements even if they violate the minimum age requirement of the 1974 Marriage Law as adopted by the 1991 Compilation of Islamic Law. In these cases, the judges decided to give more weight to the interests of children in the particular cases they adjudicated, than the formal requirements for marriage—including the marriage age requirement and its purpose of protecting all children from child marriage.

---

33 The court refers to Wahbah al-Zuhayly, *Al-Fiqh al-Islamiyy wa Adillatuhu* [Islamic jurisprudence and its proofs] (Damascus: Dar al Fikr, 1984), 690. The Arabic phrase in the judgment is translated into Indonesian. In English, the text reads as follows: "Marriage, both legal and defective (*fasid*), is a cause for the establishment of paternity (*nasab*) and the means to determine the lineage. So if there has been a clear occurrence of marriage, be it defective (broken) or done by custom, or is in accordance with a certain (traditional) contract and be it unregistered in the marriage registration office, the born child from that marriage has the lineage to both man and woman" (our translation).

34 Judgment of the Islamic Court of Sidoarjo No. 56/Pdt.P/2016/PA.Sda of March 28, 2016.

35 Judgment of the Islamic Court of Mojokerto No. 18/Pdt.P/2016/PA.Mr of February 3, 2016.

36 See Judgment of the Islamic Court of Malang No. 121/Pdt.P./2012/PA.Mlg of July 24, 2012, in a case concerning the status of two children born into the unregistered underage marriage of a girl who was thirteen years old upon marriage; Judgment of the Islamic Court of Banjarmasin No. 180/Pdt.P/2016/PA.Bjm of May 24, 2016, in a case concerning the filiation of a child born into the unregistered underage marriage of a fifteen-year-old girl.

https://doi.org/10.1017/jlr.2019.41 Published online by Cambridge University Press

The Concept of the Marital Child after the 2012 Constitutional Court Ruling

As stated, filiation in Indonesia is based on the concept of the marital child. In principle, only marital children obtain the status of legitimate children. In classical Islamic legal texts, the term *walad al-zinā* (illegitimate child) is bestowed not only to those born out of wedlock but also to those conceived before marriage and delivered less than six months after the marriage of their parents. However, the 1991 Compilation of Islamic Law has not adopted this Islamic definition of a legitimate child. As noted earlier, Article 99 of the 1991 Compilation of Islamic Law states only that a legitimate child is a child born into a marital relationship or born from a marital bond. Moreover, Article 53 of the Compilation of Islamic Law allows pregnant women to marry.[37] After such a marriage, Article 99 applies and the child is legitimate.[38] Because the child is considered a legitimate child, the presumed father is assigned guardianship and the child has full rights of inheritance.[39] The rule has been criticized by conservative Muslim scholars who accuse the state of having legalized premarital sexual relationships.[40]

Children born prior to a marriage between the parents (premarital children) have a different status from children born from adultery and their status can be changed into that of a legitimate child. The 1848 Civil Code is the only piece of legislation that specifies procedures for legitimation of premarital children and mentions the possibility of legitimizing a child who was born prior to the marriage (Article 272). Legitimation of a premarital child will proceed through a procedure in which the presumed father, within thirty days of the registration of the marriage, acknowledges the child at the birth registry and requests that the child be registered as legitimate. Recently, this provision of the 1848 Civil Code has been made conditional to religious norms. Article 50(2) of the 2006 Population Registration Law stipulates that legitimation of a child must be in accordance with existing religious norms concerning legitimate children. These religious norms are not specified and are subject to interpretation of birth registrars and courts.

As a result, legal practice regarding the legitimation of premarital children is different for Muslims and non-Muslims. When the registry refuses to legitimize a premarital child, non-Muslims parents may initiate a procedure at a general court; Muslim parents do so at an Islamic court or a general court (general courts assume a concurrent jurisdiction). Non-Muslims can legitimize a premarital child based on the 1848 Civil Code. However, married Muslim couples will have difficulties having their premarital child legitimized on the basis of Article 272 of the 1848

37 However, Islamic schools differ on the issue of who is allowed to marry a pregnant woman. The Maliki and Hanbali schools of law hold the view that a pregnant woman can marry only the man who made her pregnant. Meanwhile, the Shafiʿi and Hanafi school of law also allow a pregnant woman to marry someone else on the condition that he does not have sexual intercourse with her during the pregnancy. The view that the six-month period defines the legal paternity of a child born into a marriage is based on the opinion of the majority of ulama that the minimum duration of pregnancy is six months. This is based on verse 15 of Luqman and verse 233 of Al-Baqarah, which state that the period from conception until the end of feeding of an infant must take a minimum of thirty months. Because it also mentions that a mother should feed her baby for a period of twenty-four months, it is inferred that the minimum duration of a pregnancy is six months. Al-Zuhayly, *Al-Fiqh al-Islamiyy wa Adillatuhu*, 148.

38 For a detailed discussion on this subject, see Asep Saepudin Jahar, Euis Nurlaelawati, and Jaenal Aripin, *Hukum Keluarga, Pidana & Bisnis: Kajian Perundang-undangan Indonesia, Fikih, dan Hukum Internasional* [Family law, criminal law, and business law: Indonesian legislation, *fiqh*, and international law], ed. Jamhari Makruf, Tim Lindsey (Jakarta: Kencana, 2013).

39 Article 53 of the 1991 Compilation of Islamic Law.

40 This criticism has been voiced on a number of occasions, including the 2005 workshop on the development of the Compilation and the upgrading of its legal status to law. See Nurlaelawati, *Modernization, Tradition and Identity*, 126–27.

https://doi.org/10.1017/jlr.2019.41 Published online by Cambridge University Press

Civil Code, as legitimization of a Muslim premarital child would clearly contravene religious norms as set out in Article 50(2) of the 2006 Population Registration Law.

Article 43 of the 1974 Marriage Law originally stipulated that a child born out of wedlock has a legal relationship with only the mother and the family of the mother. During the formal elaboration of the text of the 1991 Compilation of Islamic Law, the majority of the ulama in Indonesia agreed with this rule as they argued that it is essential to the established Islamic norms of the marital child and blood-relationships (*nasab*). Article 100 of the 1991 Compilation adopted Article 43(1), but it replaced the term *hubungan perdata* (civil relationship) with *nasab*, which is a more specific term as it implies Islamic rules of genealogical affiliation and the attached Islamic inheritance rights.

The 2012 Constitutional Court ruling on the status of a child born out of wedlock has challenged this rule. In the case, which was brought by a mother and her child, the court admitted DNA-test results as legal proof of a blood relationship between the biological father and the child that had been born out of wedlock—in this case an unregistered polygamous marriage.[41] In its landmark decision the Constitutional Court's amended Article 43(1) of the 1974 Marriage Law and changed its wording to "a child born out of wedlock has a civil relationship with the mother and her family, and besides that a civil relationship with the man as her father [only] after a blood relationship has been proven by technological means, and/or other legal proof." In a press conference, the Constitutional Court underlined that the decision aims to protect children born into non-marital and extramarital relationships—not to legalize such relationships.[42]

Although the Constitutional Court decision was welcomed by a number of parties—including the Child Protection Commission, which considered it an appropriate solution for children neglected by their biological fathers[43]—strong criticism arose in Muslim circles. The critics opposed any reading of the Constitutional Court ruling that legitimized nonmarital children and sought to limit its applicability to children born into unregistered Muslim marriages. The Indonesian Ulama Council also expressed its concerns as the 2012 Constitutional Court ruling seemed to legalize non-marital sexual relationships and make applicable to Muslims a legalization of premarital children that was based on articles found in the 1848 Civil Code.[44] In response, it issued a fatwa on the issue, which denied that a proven biological relationship could automatically establish a *nasab* relationship between father and child, as this clearly contradicts the marital child concept in Islamic doctrine. Hence, it came rather as a surprise that the fatwa did not reject the 2012 Constitutional Court ruling altogether. The fatwa maintained that the court is allowed to impose certain obligations on the biological father as part of the government's duty to protect children and as a form of penalty (*hukuman ta'zir*) for the father's actions. The fatwa suggests the possibility

41 The background of the judicial proceeding was the refusal of the Islamic court to confirm the validity of the mother's unregistered polygamous marriage with a high-ranking state official, which in turn rendered the son resulting from that marriage as illegitimate. After having gained support from a number of activists and on the advice of her legal consultant, Dr. Nurul Irfan, the mother, submitted the petition for judicial review pursuant to Article 43 Marriage Law. After several hearings, the Constitutional Court issued a decision partly approving her petition. Interview with Dr. Nurul Irfan, June 2012, Jakarta.

42 "Putusan MK Semata Lindungi Anak Luar Kawin" [The Constitutional Court judgment aims at protecting children born out of wedlock], *Hukumonline*, March 7, 2012, accessed December 9, 2019, http://www.hukumonline.com/berita/baca/lt4f573e2151497/putusan-mk-semata-lindungi-anak-luar-kawin.

43 "MK Sahkan Anak Lahir di Luar Nikah Resmi" [The Constitutional Court legalizes children born out of formal marriages], *Kompas.com*, February 19, 2012, accessed July 11, 2012. The item has since been removed from the site.

44 "Keputusan MK Kebablasan" [The Constitutional Court ruling goes too far], *Kompas.com*, April 9, 2012, accessed July 23, 2012. The item has since been removed from the site.

https://doi.org/10.1017/jlr.2019.41 Published online by Cambridge University Press

for the court to impose the obligation for the father to provide maintenance for the child and to make an obligatory bequest (*wasiat wajibah*).[45]

September 2012, the Islamic Chamber of the Supreme Court discussed the legal consequences of the Constitutional Court's 2012 ruling in a plenary meeting and decided that a judge still has to first establish the validity of the existing marriage before a child can be legitimized.[46] The legal implication is that a child born into a nonmarital or adulterous relationship cannot be registered as a legitimate child of the father even after a court has legally established that he is the biological father. While the 2012 Constitutional Court decision recognizes the existence of a civil relationship between a biological father and his biological child, it is clear that the Supreme Court considers that in cases pertaining to Muslims the core Islamic family law norm of the marital child still applies. In practice, this means that the civil relationship that biological fatherhood establishes is essentially different from the relation between a father and his legitimate child: It does not constitute an Islamic *nasab* relationship, but it may involve child support responsibilities for the father, and even the right of the child to receive an obligatory bequest. At this point, however, the exact nature of the relationship and its legal consequences remain unclear.

Acknowledgment and Legitimization of Children Born out of Wedlock

Above we have described how children born into unregistered Muslim marriages can be legitimized following the validation of the marriage by the judge. Another way of establishing a father-child relationship is through acknowledgment of the child by the father. The difference with legitimization is that acknowledgment does not necessarily make a child a marital child; a father can also acknowledge a child born out of wedlock.

Acknowledgment of the child is regulated neither in the 1974 Marriage Law nor the 1991 Compilation of Islamic Law. Article 49 of the 2006 Population Registration Law mentions the possibility of acknowledgment of a child but does not regulate it in any detail. It only provides that acknowledgment of a child must be in accordance with religious norms. This means that Articles 280–88 of the 1848 Civil Code regarding acknowledgment of extra-marital children still apply as long as their application is considered appropriate in view of the religious background of the family concerned. According to the 1848 Civil Code, the father may acknowledge (*erkennen*) a child only with permission of the mother.

Acknowledgment of a child does not automatically result in the legitimation (*wettiging*) of the child. The 1848 Civil Code differentiates between premarital children, children born from adultery, and children born from an incestuous relationship. Article 272 stipulates that a premarital child can be legitimized following a marriage by the father and mother and the acknowledgment of the father, but a child born from adultery and a child born from incestuous relationships cannot. Thus, children born from adultery or from incestuous relationships will retain the status of a child born out of wedlock even after the acknowledgment of the father.

The consensus appears to be that a civil relationship between the presumed father and his premarital child can be established through the acknowledgment of the child upon marriage. The

45 Cammack, Bedner, and van Huis, "Democracy, Human Rights," 18–19.

46 Surat Edaran Mahkamah Agung No. 7 Tahun 2012 tentang Rumusan Hukum Hasil Rapat Pleno Kamar MA sebagai Pedoman Pelaksanaan Tugas bagi Pengadilan [Circular of the Supreme Court, number 7 of the year 2012 concerning legal conclusions resulting from the plenary meeting of the Chambers of the Supreme Court as implementing guidelines for the courts], accessed December 9, 2019, https://bawas.mahkamahagung.go.id/bawas_doc/doc/sema_07_2012.pdf.

https://doi.org/10.1017/jlr.2019.41 Published online by Cambridge University Press

question is whether acknowledgment of a premarital child creates an identical relationship to that of a father with a child born into a marriage. The Islamic courts are undecided on the matter. From our sample of forty recent filiation judgments issued by Islamic courts, we have identified five premarital child cases. In one case the Islamic court of Banjarmasin considered the child born out of wedlock and judged that Islamic doctrine does not allow an acknowledgment of the child with the objective of legitimizing the child, and it therefore rejected the acknowledgment altogether.[47] In the second of the five judgments, the child was considered a legitimate child. The Islamic court of Ciamis based its judgment[48] mainly on the opinion of the contemporary Indonesian Islamic scholar Quraish Shihab and linked three *fiqh* opinions: (1) the opinion acknowledged by Hanafi and Al-Shāfiʿī and attributed to Ibn ʿAbbās, the companion of the prophet, which mentions that marriage transforms an unlawful (*haram*) premarital sexual relationship into a legitimate (*halal*) one; (2) the possibility under Islamic law for a father to acknowledge a foundling as his own child; and (3) the opinion of Ibn Taimīya (1263–1328), the renowned Islamic scholar of the Hanbali school of law (Indonesia is traditionally Shafiʿi) who argued that premarital children may be ascribed a blood relationship (*nasab*) to their father through his acknowledgment. In the three other judgments the court considered that under Islamic doctrine the acknowledgment of the child by the father cannot lead to legitimation (*pengesahan*), yet that there is no Islamic norm prohibiting the acknowledgment of a child in general. These three courts declared the child a biological child (*anak biologis*) of the father instead of a legitimate child (*anak sah*).

The recognition of a father's acknowledgment of a biological child indicates that Islamic courts have accepted the new legal category of biological fatherhood, whose definition is still developing. In the third case, the Islamic court of South Jakarta[49] argued that it allowed the acknowledgment of the child by both parents but that this did not create a *nasab* relationship. The court established, via Articles 3(1) and 7(1) Convention on the Rights of the Child and Article 7(1) of the 2002 Child Protection Law, that a child has the right to know his parents and to be brought up by them. The court reasoned that in cases in which both parents acknowledge the child, the child has the right to be registered as the child of both parents. Seemingly in order to avoid confusion about the child's *nasab*, the court decided to declare the child a natural child (*anak kandung*) of the mother and a biological child (*anak biologis*) of the father. In the fourth case, also a judgment of the Islamic court of South Jakarta,[50] the court established that "it is not appropriate for a man who has impregnated a woman to refrain from his responsibilities for the born child" (albeit without specifying these responsibilities) and declared the child the biological child of the father. In the fifth case, the Islamic court of Banjarmasin mentioned in its legal considerations the responsibility of a biological father "to nurture, care and educate the child of the mother as if it were his own."[51] These words imply that even though a biological relationship between father and child

47 Judgment of the Islamic Court of Banjarmasin No. 120/Pdt.P/2016/PA.Bjm of March 29, 2016.

48 Judgment of the Islamic Court of Ciamis No. 247/Pdt.P/2010/PA.Cms of January 19, 2011. This judgment dates prior to the 2012 Constitutional Court judgment and the ensuing debate about the filial relationship between a biological child and his father. It is important to note that because the legal invention of the category of biological child by the Constitutional Court had yet to occur, the choice of the court was still limited to legitimate and illegitimate children.

49 Judgment of the Islamic Court of South Jakarta No. 96/Pdt.P/2016/PA.JS of April 20, 2016. The case has another legal dimension because the child was born from a Christian mother and a Muslim father, which in the Indonesian legal context means that marriage is not possible. The mother of the child converted to Islam, following which she married the father.

50 Judgment of the Islamic Court of South Jakarta No. 13/Pdt.P/2013/PA.JS of March, 2013.

51 Judgment of the Islamic Court of Banjarmasin No. 403/Pdt.P/2014/PA.Bjm of January 7, 2015.

https://doi.org/10.1017/jlr.2019.41 Published online by Cambridge University Press

does not create a *nasab* relationship, meaning that the child has no full filial relationship with his father's family nor any rights to inherit from his father, it does establish responsibilities for the father to take care of the child.

In acknowledgment and legitimation cases concerning Muslim children, general courts assume concurrent jurisdiction alongside the Islamic courts.[52] A search in the online database of the Supreme Court reveals that a number of general courts still hear overdue registration matters pertaining to Muslims, including the overdue registration of legitimate children, acknowledgement of children, and legitimization of customary adoptions.[53] As a result, general courts and Islamic courts both assume jurisdiction in cases in which the civil registry has declined to register a Muslim child as a legitimate child on the grounds that the child's origin or the validity of the parents' marriage is in doubt.

In analyzing judgments regarding the acknowledgment of premarital children by general courts and comparing them with Islamic court judgments, with the objective of uncovering whether and in what ways judgments by these courts differ, we also identified five premarital children cases: three with a Christian background,[54] one with a Hindu background,[55] and one with a Muslim background.[56] In all the cases, the general courts ordered the legitimation of the premarital children following acknowledgment of the child by the father. The legal grounds mentioned in these cases are Article 272 of the 1848 Civil Code and Article 49 (acknowledgment) and Article 50 (legitimation) of the 2006 Population Registration Law. Apparently, in acknowledgment cases brought by non-Muslim parents with the objective of legitimizing premarital children, the general courts find that legitimation is not contrary to religious norms. That is significantly different from Islamic court judges who tend to judge a legitimation of a premarital child as being contrary to Islamic norms.

The cases above indicate that both religious and general courts allow for acknowledgment of children by the father and that they consider this to be the result of some sort of biological parental relationship that may be registered in the birth certificate of the child. From the small sample of cases, we infer that general courts tend to allow for legitimation of non-Muslim children born prior to the marriage, whereas Islamic courts do not allow this for Muslim children, as that is considered to be in conflict with core Islamic concepts. While acknowledgment of a non-Muslim premarital child by the father may result in the child's legitimation by the general court, acknowledgment of a Muslim child by the Muslim father will most probably only establish a biological parental relationship between the child and the father.

52 The reason is that Article 49(2) of the 1974 Marriage Law lists acknowledgment of a child as one of the matters falling under the powers of the Islamic courts when it concerns Muslims, while Article 32(2) of the 2006 Population Registration Law required a judgment by a general court in civil registration matters that are more than a year overdue.

53 We did a search of the keyword *pengesahan anak* in the online database of the Supreme Court, https://putusan.mahkamahagung.go.id, and collected the first forty results, which can be divided into thirty-three judgments by the general courts and seven by the Islamic courts. Nineteen of the thirty-three cases filed at general courts were filed by Muslim parents. Only in one of those nineteen general court cases did the court deem itself incompetent and refer the parties to the local Islamic court.

54 Judgment of the General Court of Cilacap No. 29/Pdt.P/2011/PN.Clp of April 21, 2011; Judgment of the General Court of East Jakarta No. 55/Pdt.P/2014/PN.Jkt.Tim of March 20, 2014; Judgment of the General Court of Mungkid No. 55/Pdt.P/2014/PN.Mkd of September 2, 2014.

55 Judgment of the General Court of Denpasar No. 174/Pdt.P/2015/PN.Dps of May 27, 2015.

56 Judgment of the General Court of Batam No. 90/Pdt.P/2014/PN.Batam of March 26, 2014.

https://doi.org/10.1017/jlr.2019.41 Published online by Cambridge University Press

THE STATUS OF ADOPTED CHILDREN UNDER INDONESIAN LAW

As explained above in the introduction, it is appropriate to compare the case of children born out of wedlock with that of adopted children as there are indications that the relationship between a biological father and his child (and the responsibilities and rights attached to this relationship) are approximating the relationship as that between an adopted child and his adoptive parents. Below we provide a thorough legal analysis of adoption in Indonesia and examine the way courts take into consideration customary and social practices regarding adoption. As is the case in unregistered marriages, courts have shown leniency toward customary practices of adoption in the best interests of the child—thereby sidestepping formal adoption procedures.

Homes for Children

One of the ways the government attempts to protect children of missing and unknown parents is the establishment of children's homes where their basic needs are taken care of. In Indonesia there are an estimated 3.2 million children without appropriate caretakers (*anak yatim*).[57] Children who are brought to homes are most commonly children born from extramarital pregnancies. Many of these so-called illegitimate children were left by their mothers in a hospital, or on the street, in the hope and expectation that others would take care of them. When found, these children come into the care of local social welfare institutions and, following an adoption or fostering procedure, may be put in the care of a family desiring a child.

In Indonesia, there are more than 8,000 homes that take care of foundlings, orphans, and children without appropriate caretakers.[58] In 2007, the Ministry of Social Affairs and UNICEF reported that more than 225,000 children lived in such homes.[59] There are also an unknown number of children's homes that are unlicensed but take care of children and at least provide for basic needs—including education. Licensed homes will house the children, meet their basic needs, educate them, and may return children to their biological parents when they and their parents desire and the local social welfare office agrees. Licensed homes may offer adoption services after having obtained formal permission to do so in accordance with Article 1(5) of the 2007 Government Regulation on the Implementation of Adoption.

In Yogyakarta, where we did field research on the issue of adoption, there are about 110 children's homes. Only four of them have legal permission to provide adoption services. These include Yayasan Sayap Ibu, Yayasan Gotong Royong, Balai Rehabilitasi Sosial dan Panti Asuhan, and Panti Asuhan Srimpi. The latest to obtain formal permission to offer adoption services did so only in 2016.[60] Since its establishment, Sayap Ibu has received hundreds of proposals for adoption. As it is not a religiously affiliated institution, it houses children of any religion and receives proposals from Muslim and non-Muslim parents. From 2001 to 2017, Yayasan Sayap Ibu processed 172 adoption proposals. In 2016, it received fifteen adoption proposals, and it received only one

57 Data of 2012 by the foundation "Yatim Mandiri" as quoted by Antara News, "Berapa Jumlah Anak Yatim di Indonesia?" [How many children in Indonesia live in orphanages?], Antara News, April 1, 2013, http://www.antaranews.com/berita/366329/berapa-jumlah-anak-yatim-di-indonesia-.

58 Antara News, "Berapa Jumlah Anak Yatim."

59 "*Someone That Matters": The Quality of Care in Children's Institutions in Indonesia* (Jakarta: Save the Children, Ministry of Social Affairs [Indonesia], and UNICEF, 2007), https://resourcecentre.savethechildren.net/node/2988/pdf/2988.pdf.

60 Interview with members of the adoption evaluation team, Social Welfare Office, Yogyakarta Province, Yogyakarta, May 4, 2017.

https://doi.org/10.1017/jlr.2019.41 Published online by Cambridge University Press

proposal in 2017 (as of May 2017). All these adoptions of Muslim and non-Muslim children were finalized by court decision of the general court of Sleman—not the Islamic courts.[61]

Adoption in Indonesian Legislation

In Indonesia, adoption has been practiced for centuries and is traditionally a socially accepted practice, including on Java and Bali. Indonesia has chosen to allow customary practices of adoption,[62] and, in the case of Muslim adoption, has reinterpreted Islamic doctrines that prohibit *tabanni* (taking care of children of other families and naming them as biological children). Indonesia has regulated adoption and stressed the rights of adopted children, particularly their rights of inheritance. Article 109 of the Compilation of Islamic Law stipulates that an adopted child (*anak angkat*) has the right to an obligatory bequest (*wasiat wajibah*) when one (father or mother) of the adoptive parent dies without having left a will. The adoptive parents also have the right to a share from the property left by adoptive children.[63]

As stated above, two courts are competent to hear adoption cases: the general courts and Islamic courts.[64] Before 2006, only general courts heard adoption cases. However, the 2006 Amendment of the 1989 Law on the Islamic Courts changed this as it explicitly awards Islamic courts jurisdiction to hear adoption cases petitioned by Muslims. However, in practice general courts continue to hear adoption cases pertaining to Muslims as well.

The 1974 Marriage Law and the 1991 Compilation of Islamic Law contain no single article regarding the mechanism and procedure of adoption. Adoption is regulated in a number of other pieces of legislation, namely the 2002 Child Protection Law, the 2007 Government Regulation on the Implementation of Adoption, and Ministerial Regulation No. 110/2009 on the Requirements for Adoption, all of which have general application regardless of the religion of the persons involved.[65] Articles 37–41 of the 2002 Child Protection Law regulate two main issues of child protection: care and adoption. Article 37 regulates that legislatively regulated childcare is aimed at those children whose parents cannot perform the task of rearing their children mentally, spiritually, and socially. In such cases the caretaking can be assumed by an authorized institution. An institution with a religious perspective may only house children who have the same religious affiliation, while institutions that are not religion-based are obliged to give religious instruction according to the child's religion. Article 38 stresses that childcare includes counseling, care, education, dwelling, and other basic needs to help the children grow in normal and optimal ways. No intervention may be made by the caretaker as regards the child's religion and faith.[66]

61 Statistical data issued by Yayasan Sayap Ibu in 2017, covering cases from 2000 to 2017. Irwan Fauzi, board member of Yayasan Sayap Ibu, interview by the authors, Yogyakarta, April 27, 2017.

62 Raihan Abdul Rasyid, "Pengganti Ahli Waris Dan Wasiat Wajibah" [Representation of heirs and obligatory bequest], *Mimbar Hukum* 23, no. 6 (1995): 54–67; Euis Nurlaelawati, "Debate on Muslim Family Law Reforms in Indonesia: The Cases of Representation of Heirs and Obligatory Bequest," *Al-Jami'ah, International Journal of Islamic Studies* 41, no. 2 (2003): 243–75.

63 See Raihan Abdul Rasyid, "Pengganti Ahli Waris"; Nurlaelawati, "Debate on Family Law Reforms."

64 See Syamsu Alam and Fauzan, *Hukum Pengangkatan Anak*; Yahya Harahap, *Hukum Acara Perdata* [Indonesian civil procedure law] (Jakarta: Sinar Grafika, 2008).

65 More detailed regulations on adoption are provided in the Regulation of the Ministry of Social Affairs No. 110/2009 and the Regulation of the Director-General of Social Rehabilitation No. 2/2012. They mainly concern the requirements and format of the documents that must be submitted by the adoptive parents and their family' members and the detailed procedures of an adoption done in a manner different than mentioned above. All the regulations refer to the best interests of the child.

66 Article 38 of the 2002 Child Protection Law.

https://doi.org/10.1017/jlr.2019.41 Published online by Cambridge University Press

For the most part the 2002 Child Protection Law focuses on adoption mechanisms and procedures. Article 39 states that adoption can only be practiced in the best interests of the child and must be based on local customs and in accordance with existing legal regulations. It warns that the practice of adoption may not abolish the relationship of adoptive children with their biological parents. And as to prevent intercountry adoption, adoption may be done only as a last resort and with the aim of protecting a child without affiliation and permanent caretakers.[67] To ensure the continuity of the relationship of the adoptive children with their original parents, Article 40 requires adoptive parents to inform the adopted child about his/her origins and biological parents.

These general rules in the 2002 Child Protection Law are further elaborated upon and specified in the 2007 Governmental Regulation on the Implementation of Adoption. For instance, the 2007 Government Regulation regulates the qualifications and conditions to be met by both adoptive children and adoptive parents. As for adoptive children, Article 12 of the Regulation specifies that they must be under the age of eighteen and neglected or abandoned by their parents. Article 12 stipulates further that children under the age of six are prioritized and that those above twelve will be eligible only when the social welfare office has established that they need special treatment and care. Adoptive parents must also meet a number of conditions. Article 13 stipulates adoptive parents must be physically and mentally fit and between thirty and fifty-five years of age. They must have been married for at least five years, have fertility issues, have a maximum of one child, and have the same religion as the adoptive child. In the procedure to legally adopt a child, adoptive parents must fulfill the following requirements: have obtained a letter of agreement from the original parents of the child which includes a declaration by the parents that the adoption is in the best interest of the child, have cared for (fostered) the child for at least six months, and have obtained formal approval from the Ministry of Social Affairs through the local social welfare offices.[68]

After all the documents are received, a special social welfare team within the social welfare office will examine the living conditions of the prospective adoptive parents. Following the approval of the team the prospective adoptive parents need to finalize the adoption by obtaining a court decree.[69] When the decree has been granted, the adoptive parents must report the decree and the legal act of adoption to the civil registry, which will issue a birth certificate. The details of the adoption will be included as marginal note (*catatan pinggir*) in the birth certificate.[70]

The above-mentioned procedures and mechanisms apply to formal adoptions. Articles 8, 9, and 10 of the Government Regulation, however, also recognize customary adoption as a separate

---

67 Department of Economic and Social Affairs 2009. For a good accounting of intercountry adoption, see Becca McBride, *The Globalization of Adoption: Individuals, States, and Agencies across Borders* (Cambridge: Cambridge University Press, 2016).

68 As regards intercountry adoption, the Law incorporates a number of further rules. Foreigners are allowed to adopt Indonesian children. To be eligible for formal and legal adoption they must first have obtained permission from their country of origin as well as permission from the Indonesian Ministry of Social Affairs. The adoptive children must be those under the care of a licensed children's home that is authorized to arrange adoptions. Article 17 specifies the requirements for foreigners who want to adopt Indonesian children. They must have resided in Indonesia for at least two years, and they must agree to report to the social welfare office on the growth and development of the adoptive child.

69 For a more detailed discussion on the role of the Social Welfare Office in formal adoption procedures, see Novi Kartiningrum, "Implementasi Pelaksanaan Adopsi dalam Perspektif Perlindungan Anak: Studi di Semarang dan Surakarta" [The implementation of adoption rules from the perspective of child protection: Cases of Semarang and Surakarta] (master's thesis, Diponegoro University, 2008), 208. See also Dessy Balaati, "Prosedur dan Penetapan Anak Angkat di Indonesia" [Adoption procedures and adoption judgments in Indonesia], *Lex Privatum* 1, no. 1 (2013): 138–45.

70 Article 47 of Law No. 23/2006 concerning Population Registration.

https://doi.org/10.1017/jlr.2019.41 Published online by Cambridge University Press

category. The 2007 Government Regulation does not in any way regulate the procedures to be followed in customary adoptions. Therefore, it remains unclear whether or the extent to which the above-mentioned provisions concerning formal adoptions also apply. As discussed below, the courts show considerable leniency toward traditional practices of adoption.

Formal, Customary and Private Adoptions

As stated, Indonesian law distinguishes between formal adoptions and customary adoptions. In practice, however, adoption is practiced in three ways, resulting in customary, private, and formal adoptions. Use of the term *customary* to characterize adoption often relates to the reasons for adoption and the traditional ceremonies held during the adoption process.[71] Meanwhile, the term *private* is very much related to the connection between the adoptive parents and the biological parents —it mostly concerns adoptions within extended families.

Customary and private adoptions become legal adoptions when the adoption is legitimized afterwards by court judgment, whereas formal adoptions are legal from the start. According to judges we interviewed, in practice most customary adoptions are never brought before a court as the adoptive parents do not consider a formal status to be necessary or find other means to register an adopted child as their own.[72] Still, others do opt for the process of legalizing an adoption, through which customary and private adoptions obtain a formal status. In the legalization process courts may require the adoptive parents to adhere partly with the procedures for formal adoptions as covered in the 2007 Government Regulation. Thus, parents who intend to formalize a customary or private adoption are still subject to formal adoption procedures to the extent required by a judge. However, as discussed below, in practice courts are often very lenient in legalization of customary adoption cases and allow parents to bypass the most basic adoption procedures—except those concerning religion.

Adoption in Social Practice

Below we discuss a number of customary adoption cases in the special administrative region of Yogyakarta, on the island of Java, and the reasons parents reported for the adoption. This reason is not always a combination of an unfulfilled child wish and a wish to help a neglected or abandoned child. For example, a couple who had three children of their own had adopted a fourth child and came to the Islamic court of Sleman to formalize the adoption. Their reason to adopt another child was not presented at the court session, but the fact that they already had three children led us to inquire as to why they adopted another child. It appeared that they had adopted the child because they believed that the child would improve the family's fortunes. By coming to the court, the couple demonstrated their expectation that a customary adoption on such grounds would be judged as legitimate—regardless of their already having three children of their own, and that the couple was unaware of the formal requirements of parents to be infertile and not having more than one child already under their care.[73] Another example of a customary adoption

71 See Muhammad Budiarto, *Pengangkatan Anak Ditinjau Dari Segi Hukum* [Adoption from a legal perspective], (Jakarta: Aka Press, 1991); Djaja Sembiring Meliala, *Pengangkatan Anak di Indonesia* [Adoption in Indonesia] (Bandung: Tarsito, 1982).

72 Interview with six judges from the Islamic courts of Bantul, Sleman, and Kota Yogyakarta, June 2017. Where names of interviewees have been withheld or are presented only as initials, it is done so to protect their confidentiality.

73 Observation in Sleman Court, June 2017.

https://doi.org/10.1017/jlr.2019.41 Published online by Cambridge University Press

involved the parents of twins of different sex. According to local beliefs, the birth of twins of different sex is a bad omen, and therefore they should be separated to remove the threat to the family. As a solution, one of the twins was symbolically adopted by a family member but in fact remained under the care of the biological parents.[74] Clearly, formal adoption procedures do not recognize these traditional beliefs as grounds for adoption.

Private adoption, adoptions which take place without a customary ceremony in which the adoption is made public, is also popular and is mostly done without the intervention of the court. Adoptive parents usually approach the parent of a child privately and express their wish to take care of the child. This may involve parties with familial ties and those without familial ties. First, we will describe a case of the first type. A couple who were married for seven years and remained childless despite desiring a child, decided to adopt a child. In 2008 they went to a number of children's homes to observe children appropriate for them to care for. They did not have any success. In 2010 one of their friends told them that there was a pregnant divorced mother of two children who did not want to care for another child. The couple went to meet her directly and discussed the possibility of their adopting the child. The parties agreed, and on the day of the birth the couple came to the clinic and stated their readiness to accept the baby regardless of its appearance. The child was not breastfed by the mother to prevent bonding. With the approval of the clinic where the baby was delivered the baby was directly taken to the adoptive parents' house. No *adat* adoption ceremony was held.[75]

The next example is a private adoption by family members. In this case the husband had married a second wife secretly without informing his first wife. The second wife, who had two children from her first marriage, became pregnant and delivered a girl. Two years after the birth of the daughter, the first wife discovered to her strong dissatisfaction that her husband had a second family. She demanded that her husband terminate communications with his second wife and began harassing the second wife. When the first wife threatened that she would take her daughter, the second wife decided to place her daughter under the care of her uncle and aunt, who happened to have no children. After having taken care of the child for one year, they proposed to adopt the child. They formalized the adoption by Islamic court decision.[76]

It is interesting to note that there are alternative ways in which adoptive parents attempt to legitimize their adopted child. The official way is by formalizing the adoption through court. Both a court process and an adoption involving a customary ceremony have the often-unwanted effect that the child's status as adopted child becomes public. Hence, parents turn to manipulation of identity documents in order to be able to register the adopted child as a biological child. As described above, this was what the adoptive parents in the first case decided to do. The biological mother and adoptive mother asked the nurse who assisted with the birth process to write down the adoptive parent's name as the mother on the birth registration document in the clinic. This document was then used in arranging the birth certificate and the family card. Thus, the baby was registered as their own biological and, consequently, legitimate child. Of course, this mechanism is illegal and a clear violation of the law. The adoptive parents themselves, however, said that it was in the best interests of the child to treat the child as a marital child and keep the adoption secret.[77]

74 Interview with LD, Yogyakarta, May 22, 2017.

75 Interview with YRY, Jakarta, May 12, 2017.

76 Interview with AS, Yogyakarta, May 24, 2017.

77 Interview with YRY, May 12, 2017. On one occasion, they were confronted with an uncomfortable situation when they sought medical treatment for their baby and truthfully revealed to the—disapproving—hospital staff the child's background.

https://doi.org/10.1017/jlr.2019.41 Published online by Cambridge University Press

Above we have shown how in Indonesia social practices of adoption often differ from formal adoption procedures and requirements. Below we will turn to the general and Islamic courts and the ways these courts apply the law in view of these practices.

Adoption in the Legal Practice of General Courts and Islamic Courts

As noted above, since 2006 both Islamic courts and general courts hear adoption cases. In practice it appears that Islamic courts mainly hear customary adoption cases and general courts hear both formal and customary adoption cases. In customary adoptions cases Islamic court judges only partly follow the procedures of formal adoptions and use their discretion in determining whether or not adoption is in the child's interests. We will show that Islamic court judges tend to be more flexible in applying adoption procedures than the general courts. General courts, when hearing formal adoption cases through children's homes, will apply the procedures and substantive rules very strictly, which means that adoptions have to go through social welfare offices. This strict application of adoption requirements is particularly clear in the following two cases that concern the age and religion of adoptive parents.

In the first case the Social Welfare Office of Yogyakarta strictly enforced the rule that the age of the adoptive parents when applying for formal adoption not be greater than fifty-five and declined to recommend that a couple formalize their customary adoption of the now ten-year-old child as the adoptive parents were over sixty years old. Although the parents argued that when they privately adopted the child they were still in their early fifties, the Office refused to issue a letter of recommendation. As a result, the general court refused to agree to the adoption.[78] The second case shows how judges of the General Court of Sleman did not allow a Buddhist couple to formally adopt a child born from a Muslim couple. The child's biological mother was a Muslim woman who worked for the Buddhist couple and who was divorced. The child was neglected by the emotionally distressed mother and given into the care of the Buddhist family. After eleven years of care they decided to go to the General Court of Sleman to formally adopt the child. Based on the grounds that the adopting parent and the adopted child had different religious backgrounds, the general court denied the application.[79]

The decision of the court not to allow the Buddhist couple to formally adopt a Muslim child reflects a core Islamic principle regarding the necessity to protect the Muslim community from conversion to another religion.[80] The Social Welfare Office even stated that—to protect the religion of the child concerned—the Office had recommended that the child be taken from the caretakers it had considered as parents and put it in a children's home. The Office asserted that this was in the best interests of the child to be brought up in his own religious background. This shows how the best interests of the child is vaguely defined[81] and open to varying interpretations dependent on local discourse.

As stated, general and Islamic courts adjudicate different types of cases. Although, in our view, Islamic courts formally have competence in all adoptions pertaining to Muslims—the 2006

78 Interview with a staff member of the Central Social Welfare Office, Yogyakarta, May 14, 2017.

79 Interview with a staff member of the Sleman Social Welfare Office, Yogyakarta, May 14, 2017.

80 See Melissa Crouch, *Law and Religion in Indonesia: Conflict and the Courts in West Java* (London: Routledge, 2014), 3–6.

81 This is also very clear in the case of custody. See Euis Nurlaelawati, "The Legal Fate of Muslim Women in Indonesia: Divorce and Child Custody," in *Religion, Law and Intolerance in Indonesia*, ed. Tim Lindsey and Helen Pausacker (New York: Routledge, 2016), 353–68.

https://doi.org/10.1017/jlr.2019.41 Published online by Cambridge University Press

Amendment on the 1989 Law on the Islamic Courts specifically names adoption as one of the family law matters (listed under Article 49) for which Islamic courts are competent—children's homes mainly process formal adoptions of Muslim children through the general courts. The Islamic courts in Yogyakarta almost exclusively hear petitions for the legitimization of customary adoptions. Only the Bantul Islamic Court told us that it had handled a number of legal adoptions through children's homes in the past. Judges of the Islamic courts of Sleman, Kota Yogyakarta, and Gunung Kidul stated that they exclusively hear cases on the formalization of customary adoptions.

Ibu Siti, the director of the children's home Yayasan Sayap Ibu, explained why she preferred the general courts for processing adoption requests. First, Yayasan Sayap Ibu has a long-established collaboration with the general court. Second, and related to the legal status of the adopted child, she believed that the general courts are more inclined to follow the procedures for adoption strictly and recognize traditional customary rights of adopted children.[82] She feared that Islamic courts would not give an adopted child customary rights to inheritance.[83] Thirdly, she found that the general courts are more knowledgeable and familiar with adoption cases. When asked about the applicability of the 1991 Compilation of Islamic Law to Muslims in family law matters, she said that she had deviated from Islamic law in the best interests of the child. Supported by her assistant,[84] she also argued that what her children's home does is still within the scope of law; she pointed out that although Islamic courts have been awarded the competency to hear adoption cases, this does not mean that general courts have lost their legal basis to hear adoption cases brought by Muslims.[85]

A similar view was articulated by staff members of social welfare offices. An official of the Social Welfare Office of the Yogyakarta province stated that most adoption cases originating from children's homes that involve Muslim children are indeed heard by the general courts. According to this official, this does not violate the law. Another staff member suggested that Muslims seldom adopt children through children's homes anyway. She stated that adoptions by Muslims are mostly customary adoptions that seldom involve social welfare offices.[86] She explained that while adoption regulations clearly stipulate that all adoption applications should involve social welfare institutions, the Islamic courts argue that this does not apply to customary adoptions, and that Islamic courts are known to decide on their own whether an adoption is in the best interests of the child or not. All the judges we interviewed in the different Islamic courts of Yogyakarta confirmed this observation.[87] A telling example is a case in which the Islamic court judges had warned the petitioners that the relevant documents needed to be presented in the next hearing. The petitioners failed to do so, but the court decided to approve of the customary adoption anyway.[88]

It appears that just as we have described at the outset of the article as regards formal marriage registration requirements, Islamic judges are lenient with regard to formal adoption requirements as well. They tend to decide customary adoptions as being valid, and not demanding that all legal requirements for a formal adoption be met, as long as the adoptions do not contravene Islamic norms.

---

82 Ibu Siti, director of Yayasan Sayap Ibu, interview by the authors, Yogyakarta, April 27, 2017.

83 This can be attributed in part to her ignorance of Islamic law. When asked, it appeared that she was unaware of an adopted child's right to an obligatory bequest under the 1991 Compilation of Islamic Law.

84 Irwan, assistant to the director of Yayasan Sayap Ibu, interview by the authors, Yogyakarta, April 27, 2017.

85 Ibu Siti, interview, Yogyakarta, May 7, 2017.

86 Interview with a member of the adoption evaluation team, Yogyakarta, May 18, 2017.

87 Ibu YH, judge, Islamic Court, Yogyakarta, interview by the authors, June 9, 2017.

88 Notes on the hearings of two cases in Kota Yogyakarta Islamic court, May 26, 2017. See also the judgment of the Islamic Court of Sleman in case No. 0086/Pdt.P/2014/PA.Smn.

https://doi.org/10.1017/jlr.2019.41 Published online by Cambridge University Press

Children Born out of Wedlock and Adopted Children: Similar Trajectories?

Interpretations by judges of the 2012 Constitutional Court ruling that established a legal father-child relationship between a child born out of wedlock and his or her biological father has resulted in the creation of the new legal concept of a biological father. This conception of a new legal concept clearly demonstrates how Indonesian family law pertaining to Muslims is not static and is still very much developing. The acceptance of international principles such as the best interests of the child principle has increased the discretion of judges both substantively and procedurally, thereby facilitating interpretations that they believe will benefit the development of the child.

On a side note, as appears from recent studies that have examined the concrete applicability of the 2012 Constitutional Court's ruling, it must be stressed that the introduction of a biological father seems not to have changed much regarding the situation of children who have the legal status of being born out of wedlock.[89] These studies investigated whether court judgments based on the 2012 Constitutional Court ruling have been implemented by Indonesia's bureaucracy. It appears that it is not possible to register children born out of wedlock in the family card (*kartu keluarga*). Other studies have found that after a child is legitimized, bureaucrats are often still suspicious about the status of a child.[90] Most studies have found that the 2012 Constitutional Court decision has had mixed effects and that in legal and social practice many children born into unregistered marriages are still considered to be born out of wedlock, with no legal relationship to their father. In social practice, the majority of born-out-of-wedlock children do not become formally registered biological children of their fathers, which means that they lack family law rights.

If we look at legal practice in the courts, a more positive picture occurs. Generally speaking, Islamic judges have accepted biological paternity with enthusiasm. At the same time, they also remain ambiguous about the legal consequences of biological paternity as they remain tied to classical Islamic legal doctrine. As a result, the legal consequences and responsibilities attached to biological paternity are still developing, as is reflected in rulings that recognize the biological relationship of a father and his responsibility to care for his child, but that also state that the legal impact of the decree does not extend to inheritance or rights based on *nasab*—marital guardianship in particular.[91] The children of biological fathers are entitled only to rights of custody and financial support.[92] In other words, the legal relationship with the biological father does not encompass the full rights of a child; children of biological fathers are not equal to the legitimate children. A number of Islamic judges have indeed stated that the awarding of legality to these children is merely an administrative act.[93] A small number of Islamic judges have awarded biological children's rights to property. The judges that did so referred to the Indonesian Ulama Council's

89 See Mughniatul Ilma, "Penetapan Hakim tentang Asal Usul Anak Paska Putusan Mahkamah Konstitusi 46/PUU-VIII/2010. Studi Kasus di Pengadilan Agama Bantul" [Court judgments on the filiation of a child after constitutional court ruling No. 46/PUU-VIII/2010. The case of Bantul] (master's thesis Sunan Kalijaga State Islamic University Yogyakarta, 2016); Dinal Ahsin, *Dampak Putusan Mahkamah Konstitusi*; Wahyudi, "Judges' Legal Reasoning."

90 Ilma, *Penetapan Hakim*. See also Sheila Fakhria, "Reformasi Hukum Islam dan Otoritas Fikih: Praktek Kawin Hamil dan Penentuan Wali Nikah Anak Hasil Nikah Hamil di KUA Kediri" [Islamic law reforms and *fiqh*'s authority: The cases of pregnant brides and establishing the marriage guardian of daughters born from pregnant brides at the Kediri Office of Religious Affairs] (master's thesis Sunan Kalijaga State Islamic University Yogyakarta, 2016).

91 Ahsin, *Dampak Putusan Mahkamah Konstitusi*; Wahyudi, "Judges' Legal Reasoning"; Fakhira, *Reformasi Hukum Islam*.

92 Judgment of the Islamic Court of Magetan No. 0078/Pdt.P/2014/PA.Mgt of August 28, 2014.

93 Interview with Islamic judges of Sleman, Syamsiyatun, Zuhri, and Lilik, June 15, 2017.

https://doi.org/10.1017/jlr.2019.41 Published online by Cambridge University Press

fatwa, more specifically, to the right of children born out of wedlock to an obligatory bequest. The fatwa is, however, not legislation. In Indonesia's legal system a fatwa is legal opinion and has no legal force.[94]

Thus, while it initially appeared that the 2012 Constitutional Court ruling had the purpose of awarding full family law rights to children based on the biological relationship with their fathers, judges award biological children only limited rights, that is, financial support and the right to know and be brought up by their biological parents. Although current legal practice may not treat them as equal to legitimate children—nor has the discrimination and social stigma attached to their legal status been removed—the state has at least recognized the existence of biological fathers and their children's rights to be taken care of by them.

Unlike the issue of the recognition of biological fathers of children born out of wedlock, which reaped the criticism of Islamic scholars and Islamic judges, the regulations on adoption appear to be well accepted. This, we think, is due to the fact that whereas the introduction of the biological father principle clearly diverges from classical Islamic doctrine, the regulation of adoption was in fact a step in the direction of Islamic law: by giving adopted children rights to an obligatory bequest, the state corrected common customary adoption practices in which adopted children were treated equally to marital children, particularly with regard to their inheritance rights. While the traditional practice of adoption contradicts Islamic doctrine—as it allows adoptive parties to inherit from each other as parents and marital children, the drafters of the 1991 Compilation of Islamic Law preferred to attempt to change the established practice rather than to abolish it.[95] As one of the authors has discussed in her previous work, the drafters of the 1991 Compilation attempted to modify the legal consequences of adoption in a manner that it would fall within the limits of Qur'anic doctrine. Hence, they sought to end the practice of treating the estates of adopted children and adoptive parents as if those constituted an ordinary inheritance between natural parents and children. Following intensive debates about Islamic legal views on the issue, the ulama found a solution in the concept of an obligatory bequest (*wasiat wajibah*)—a similar solution as the Indonesian Ulama Council developed for biological children. The ulama legitimized the applicability of the concept of an obligatory bequest to adoptive parties by expressing the opinion that "the relationship between an adoptive child and his or her adoptive parent is so intimate that it is interpreted by adoptive parties as to constitute close relatives [*al-aqrabūn*]."[96] Hence, they bypassed the established *fiqh* principle that a *nasab* relationship is the only valid basis for the distribution of the deceased's estate to his or her heirs.

The case of adoption shows us how Indonesia managed in the past to reconcile customary adoption norms allowing adoption with Islamic norms prohibiting it. The solution found was to deny adopted children inheritance rights while giving them the right to an obligatory bequest. Hence, formally, an adoption is not a full adoption, as it does not involve rights reserved for a *nasab* relationship. From an Islamic perspective the adopted child can be considered a foster child, with an added legal responsibility for parents to leave a bequest. We have seen a similar response to the 2012 Constitutional Court ruling on children born out of wedlock. The concept of biological fatherhood is in conflict with the Islamic concept of the marital child. The way to bring biological fatherhood within the limits of the Islamic family law framework is by regulating that

94 Judgment of the Islamic Court of South Jakarta No. 0156/Pdt.P/2013/PA.JS of October 8, 2013.

95 See Nurlaelawati, *Modernization, Tradition and Identity*, 111–16.

96 See Hilman Hadikusuma, *Hukum Waris Indonesia Menurut Perundangan, Hukum Adat, Hukum Agama Hindu, Islam* [Inheritance law in Indonesia according to national law, *adat* law, Hindu law, and Islamic law] (Bandung: P. T. Citra Aditya Bakti, 1991).

https://doi.org/10.1017/jlr.2019.41 Published online by Cambridge University Press

the biological father-child relationship does not result in the same status as accorded to a legitimate child. Or, in Islamic terms, the father-child relationship must be essentially different from a *nasab* relationship. Once again, the solution was found by denying a biological child inheritance rights—while encouraging a future introduction of the concept of obligatory bequest.

CONCLUSION

In Indonesian family law pertaining to Muslims, legal concepts operate in an environment of legal pluralism in which statutory norms, Islamic norms, and *adat* norms apply. While the limits of all these different legal traditions are very fluid and overlap, core Islamic family law concepts can be extremely rigid. As a result, legal family law change in Indonesia will generally stay within the limits of the Islamic legal framework. Through the examples of children born out of wedlock and adoption, we have demonstrated how the universal principle of the best interests of the child simultaneously transforms and is transformed by the Islamic framework in which it is applied. Statutory family law, especially procedural marriage law provisions with the objectives of regulating matters such as marriage and adoption, appear to be the most affected by lenient interpretations of the best interests of the child. Islamic court judges in Indonesia tend to be lenient in legitimizing children born into unregistered religious marriages on the basis of the best interests of the child—while setting aside legal provisions regulating marriage registration, polygamy conditions, and marriage age in the process. Islamic core norms, however, are almost never set aside on the grounds of the best interests of the child.

The 2012 Constitutional Court case has demonstrated how in Indonesian family law pertaining to Muslims, core Islamic family law norms can be made subject to other regulations, but seldom will be replaced. The concept of the biological child conflicts with the Islamic principle of the marital child, but in Indonesia this has not led to a situation in which Islamic judges and Islamic scholars reject the concept of the biological child altogether. The concept is considered to be applicable in the Islamic courts as long as it does not challenge the Islamic concepts of the marital child and *nasab*. Islamic courts have recognized that a legal relationship exists between a nonmarital child and his biological father, and have recognized the child's right to the father's care.

The result is (at least if the recent court judgments are followed more regularly and are accepted throughout Indonesia's bureaucracy) that children born from nonmarital relationships have a better legal position than they had before, as they now have rights to their father's care and support. If the fatwa of the Indonesian Ulama Council is more commonly followed by the Islamic courts—only few do so now—biological children may also have a right to an obligatory bequest. In this scenario, the position of biological children will be very similar to that of adopted children under the 1991 Compilation of Islamic Law. Whether this scenario will unfold is uncertain, but the case of adoption shows that when an external legal concept that is contrary to core Islamic concepts is modified with the objective of bringing it within the limits of Indonesia's Islamic legal framework, such concept can achieve an almost general acceptance.

ACKNOWLEDGMENTS

We thank Dr. Dörthe Engelcke, Dr. Lena-Maria Möller, and Dr. Nadjma Yassari for their comments on earlier versions of this article and Michael Friedman for his language editing. Thanks to the staff of the Journal of Law and Religion *for their excellent editing assistance.*

https://doi.org/10.1017/jlr.2019.41 Published online by Cambridge University Press