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Cianjur's Islamic court and women's divorce and post-divorce matters

[...] Effective family law systems aim to provide outcomes that reduce the incidence of children and former spouses living in poverty following divorce. Whether the poor are able to access formal family law systems in the first place is therefore a key element in determining whether such systems can contribute to the alleviation of poverty. (Sumner 2008: 8)

We should keep in mind however, that dissolution of marriage does not result in so-called 'broken homes' in the Western sense, because the divorced wife and her children can always return to her family. For a Sundanese woman there is no stigma attached to being a divorcee, nor to having married several times. On the contrary, this is an asset, because it indicates that she is a desirable woman.' (Tan et al. 1970: 32)

6.1 INTRODUCTION

In this chapter I leave behind the history of the Islamic courts in Indonesia and West Java, and turn to the present-day Islamic court of Cianjur. Based on empirical research conducted in Cianjur between November 2008 and June 2009, I assess the role that the Islamic court of Cianjur plays in realizing women's legal divorce and post-divorce rights. Chapter 4 discussed the introduction of similar divorce grounds for men and women and the legal obligation for all citizens to divorce before the Islamic courts, which were legal reforms that not only strongly limited the absolute right of men to divorce their wife by pronouncing the *talak*, but also formally made the Islamic courts central in divorce matters at the expense of KUAs and local *ulamas*. This chapter assesses the extent to which divorce practices in Cianjur reflect the substance and purposes of those legal reforms.

The second focus of this chapter is on the legal consequences of a divorce and, more specifically, three post-divorce rights for women and children: firstly, spousal support for the wife during her three-month waiting period before a *talak* divorce is final, which includes maintenance (*nafkah iddah*) housing (*maskan*) and clothing (*kiswah*); secondly, child support (*nafkah anak*), and, thirdly, the wife's right to her share of the joint marital property (*harta bersama*).

As I have argued in Chapter 1, a legal analysis of court judgments alone does not suffice to assess the position of the Islamic court in society; such

assessment requires empirical research into the practice of divorce in the pre-trial, trial and post-trial phases (Benda Beckmann, K. 1984). Therefore this chapter looks beyond the specific cases and trial phase alone. Based on an access-to-justice approach (Bedner and Vel 2010), it examines the factors which have influenced women's behaviour pertaining to divorce matters and the Islamic court.

6.1.1 A short description of the Islamic court of Cianjur

An important part of my research consisted of courtroom observations. This not only enabled me to observe what happened in the courtroom, but also gave me a reason and opportunity to spend time in and around the court which facilitated contact with court personnel and court clients. The impression of the Islamic court of Cianjur I give below, is an impression of the court in the years 2008-2009. Much has changed since, as in 2010 the court has moved from the small office described below, to a large and standard court building.

At the time of my fieldwork, the Islamic court of Cianjur was located along the busy road to Bandung, on the complex of the district branch of the Ministry of Religious Affairs. After entering the complex one found the Islamic Court on the left-hand side a small office-like building with a small porch, half of which was used as parking area for motorcycles and half of which was arranged as a provisionally covered waiting area for court clients. Two larger buildings housing the District Office of the Ministry of Religious Affairs, the office of the district branch of the Indonesian *Ulama* Council (MUI) and a mosque were also situated on the complex .

Every morning before the start of the court sessions twenty to thirty persons, the majority of whom were women, would gather on the wooden benches on the porch in front of the small court building, waiting to be called in for a court session or to register their case. There was much interaction between the assistant clerks and the court clients, since both the main entrance of the court building and the separate entrance of the registration office led to the waiting area. Occasionally an assistant clerk would help a court client filling in forms on the porch, but usually registration was taken care of in the registration office.

From time to time, an assistant clerk would call a person who had approached the court with the intention to file a case and ask him or her to take a seat at his or her desk. Subsequently, the assistant clerk registered the personal details of the court client as well as the broad outline of the divorce case that he or she wanted to bring before the court, and whether he or she wanted to petition any additional post-divorce claims. In the vast majority of cases people were unrepresented by a lawyer, and had come to the court themselves or accompanied by a family member. In a number of cases the vicinity head (*kepala RT*), or a village official assisted the clients. In the lion's

share of the cases the assistant clerk would informally advise the clients how to fill in the documents, and more importantly what claims to make and how to frame them. This kind of assistance by staff of the court is prone to solicit 'voluntary gifts', or 'cigarette money', but from a court client's perspective the amount of money involved, if any, is very small compared to a lawyer's fee. Moreover, the assistant clerks undeniably filled in the need for legal assistance from the perspective of the typically unrepresented court clients. Their legal advices have a potentially strong impact on court clients' claiming behavior.

The registration office was small, approximately five by six meters, a smoky room consisting of five wooden desks facing each other. Three desks belonged to assistant clerks (*panitera muda*) responsible for the registration of cases, one desk to the assistant clerk responsible for the intake and release of marriage and divorce certificates and one to the assistant clerk responsible for the filing and storage of court files. These files were stored in two cabinets in a small area at the back of the registration office – the most recent ones at least, as the files dating back more than three years were stored in boxes in another building due to a lack of space. Court clients, judges, assistant clerks and myself walked in and out of the room for professional reasons, but in the afternoon, when the 10 to 12 court hearings had been dealt with, the registration office also was the place where court personnel would gather to chit chat, smoke, and have a coffee or *bakso* soup. This gave the office a very informal character. Behind the registration room was another space reserved for the assistant clerks, a room with three or four white tables where they could work more privately.

The private office of the chief court clerk (*panitera sekretaris*, *Pansek*) was located between the registration office and the main entrance. The office could be accessed through the corridor that led from the backdoor of the registration office to the main entrance. The *Pansek* is in charge of all administrative affairs including the enforcement of court decisions. In accordance with his status, the *Pansek's* office was suitably decorated with leather couches, fitting to receive official guests. Left of the main entrance, at the end of the corridor one found the small treasurer's office. I had been introduced to the Islamic Court via the brother-in-law of the current treasurer, who was also a member of a well-respected family of *kyais* and *ulamas* from the sub-district Karangtengah in Cianjur. Court clients did not have to pay the court fees directly to the treasurer, since they had to make an advance payment of anticipated costs to a special bank account. If the advance payment exceeded the actual court fees, clients should turn to the treasurer to reclaim their share.

Facing the main entrance was the door leading to the single courtroom. The court clerk on duty would call in court clients and witnesses through the intercom and an assistant-clerk behind a small desk in front of the courtroom was responsible for letting them in and out. Entering the courtroom one would walk towards the platform bench with the three judges and the clerk con-

veniently placed between two large air-conditioning machines. The plaintiff would sit on a chair on the right in front of the judges, and the defendant on a chair to the left. Behind these chairs five rows of wooden benches were available for the public. In divorce cases they remained empty during the court hearings as these are closed.¹ Only the reading of the judgment is public, but most commonly only the plaintiff and his or her representative (if any) and the defendant, if present at all, would attend the public sessions.

During my field work, every day of the week saw a different panel of three judges, one acting as chair, and a clerk, handling all the court hearings of that day. I noticed that their style differed considerably, especially the way they interacted with the court clients. Some judges were very formal, showing their authority by lecturing the court clients about how to behave in court – for instance, by remarking on inappropriate clothing, or telling them to sit up straight – while other panels had a very informal approach, making jokes with the clients, ‘to make them feel comfortable’ as one judge told me. The language used in court was Indonesian, the national language, but usually both clients and judges switched regularly to Sundanese. The four non-Sundanese judges, all but one from a Javanese background, had therefore clearly mastered some Sundanese during their stay in Cianjur. Although according to the judicial rotation scheme judges are replaced once in every three to five years, this meant that in Cianjur about two-thirds of the judges were Sundanese, indicating that much rotation takes place within the jurisdiction of the Islamic high court of West Java.² Since the lower-level clerks typically are also recruited within Cianjur, the majority of the court staff has the same ethnic background as most court clients.

The Islamic court of Cianjur employed twelve judges, three of whom were women. Two female judges acted regularly as chair of a court panel. On Tuesdays, the panel of judges was female-dominated, consisting of a female chair, a female judge, a female clerk and a single male judge. In contrast, on Wednesdays there was an all male panel, which, perhaps by chance, was chaired in a rather formal way. The male judge of the Tuesday female dominated panel of judges was also a member of the Wednesday male dominated panel. The composition of the bench clearly had an influence on his behavior, as on Tuesdays he would be informal, joking around with court clients, while on Wednesdays he behaved formally, much like the chair of that day. Based on these observations it could be tempting to make generalizations about different styles of approaching court clients between male and female judges.

1 The head of the Islamic court of Cianjur, Dr. Abdul Muin, had given me and my assistant Syaiful Rijal Al-Fikri permission to attend all closed sessions of the court on the condition that both the plaintiff and the defendant did not object. In practice no one ever objected, which considerably facilitated the courtroom observation part of the research.

2 In Bulukumba, the same trend is visible as three-quarters of the judges were originally from South Sulawesi.

Yet as the third female judge – the chair of a Monday panel with two male judges and a male clerk – had a rather formal approach, such generalization would be premature.

6.2 DIVORCE IN CIANJUR

In this section I will focus first on plain divorce cases, by which I mean divorce cases without any post-divorce claims, before proceeding with post-divorce matters. I take as a starting point the idea that in such cases the Islamic court has a dual function: firstly, the judicial function of a court that provides final judgments regarding marriage and divorce matters, and, secondly, the important role of divorce registrars in Muslim population registration.

6.2.1 Divorce procedures

As mentioned in Chapter 4, ever since the enactment of the Marriage Law in 1974, Muslims in Indonesia must bring their divorce before the Islamic court, in order to have it legally recognized by the state. When filing a divorce case, the plaintiff must include one of the legal grounds of the Marriage Law in the subject matter of the petition. An analysis of the nature of the divorce grounds in the administration of justice of the Islamic court will be provided in Chapter 9, and therefore it is not discussed any further here.

The divorce process at the Islamic court involves at least five trips to the court. The plaintiff must go to the court in person to file a divorce. After filing the divorce, the plaintiff will have to appear at least three times before the presiding judge until the court comes to judgment. In addition, in order to give a judgment on whether the case meets the grounds for divorce, the court is under the legal obligation to try to reconcile the couple at every stage of the court process. However, in many cases the defending party chooses not to appear before the court. This not only means that no reconciliation attempt can take place, but if the plaintiff had not notified the court beforehand, this will mean two extra visits to the court before it will proceed with the case in absence of the defending party, a so-called *verstek* case.³

In divorces petitioned by women, the divorce takes effect the moment the presiding judge reads the verdict. However, when the husband is the petitioner (*cerai talak*) he has to come to the court once again to pronounce the *talak* before the judge in order to effectuate the divorce. Finally, the former spouses must go once again to the Islamic court to collect the divorce certificate. I underline the number of trips to the court, because apart from court fees, travel costs

3 *Herziene Indonesisch Reglement*, Article 125. *Perkara verstek* is the term generally used in the Indonesians courts for cases conducted in the absence of the defendant.

form a substantial part of the costs of a divorce (A.C. Nielsen & World Bank 2006).

6.2.2 Divorce statistics

The starting point for an analysis of divorce in Cianjur are statistics in the annual reports of the Islamic court of Cianjur from the years 2006-2008, which are subsequently placed in local historical, social and cultural contexts. This contextualization of divorce statistics will give a nuanced view about a number of changes in divorce statistics that took place in Cianjur's recent history. If we look at the statistics for the Islamic court of Cianjur, the court registered 465 divorces in 2006, 445 in 2007, and 549 in 2008 (see Table 2). Judges and clerks of the Islamic court most commonly considered this to be a large number of divorces. They explained the frequency of divorces to me in terms of the moral degradation of society. According to them, this had materialized in either 'women becoming more materialistic', which resulted in a tendency to divorce their husband in times of economic hardship, or the other way around, in men who 'treated women as milking cows' (*sapi perah*). I was told that there were plenty of cases in which the husband sent his wife to the Middle East to become a domestic worker,⁴ in the meantime married a second wife without the first wife's knowing, while enjoying the money the first wife sent home. Not surprisingly, many of those cases ended in a divorce suit petitioned by the first wife.⁵

If one looks at the number of divorces in Cianjur between 2006-2008 in a national or local historical perspective a very different picture emerges, very much contrasting the image of a recent rise of divorces. If we divide the number of divorces a year by the number of marriages, we can calculate the divorce to marriage ratio, an approximate divorce rate, for lack of a more accurate one. For the year 2007, 21,744 couples in Cianjur registered their marriages and 445 filed for divorce, which means a divorce rate of two percent.⁶ This figure is much lower than the ten percent national divorce to

4 In 2007, an estimated 540 thousand Indonesian female migrant workers worked abroad, mainly as domestic workers. Cianjur is one of the main districts where recruiters are active. See Novirianti 2010. Despite a moratorium some 30,000 women in Cianjur (of a total of approximately 500 thousand women in the age group 21-59 years) worked abroad in 2012. Source: Radar Sukabumi, 'Minat TKI Cianjur Masih Tinggi' [Interest in becoming a female migrant worker is still high in Cianjur], www.radarsukabuki.com, accessed 5-12-2012.

5 I heard many stories about these kind of practices during my stay in Cianjur. In court, too, I have observed a number of divorce cases involving female domestic workers. Those cases will be discussed in Chapter 9.

6 *Laporan Tahunan 2007 Pengadilan Agama Cianjur* [Annual Report 2007 of the Islamic Court of Cianjur].

marriage ratio of 2007.⁷ Furthermore, compared to Cianjur's divorce rate in 1981, when 696 divorces and 11,520 marriages were registered (corresponding with a divorce rate of six percent), one can only conclude that the divorce rate of 2008 is three times lower than in the early 1980s (*Kantor Statistik Kabupaten Cianjur* 1982). Thus, although official statistics may indicate a rise in the divorce rate after the fall of Suharto in 1998 (see Cammack & Heaton 2011), it is still much lower than in the period 1978-1981 (Table 3), let alone than in the period from the 1940s to 1960s when West Java had an estimated divorce rate of more than 40 percent (Jones, G.W. 1994). Hence, if divorce rate negatively corresponds with social morality, the present-day state of morality in Cianjur could be said to be much higher than in the early 1980s and in most of its modern history.

A second remarkable outcome of the comparison of the divorce figures of 2006-2008 with those of 1978-1981, is the huge difference in the proportion of *talak* divorces. In the years 2006-2008 the percentage of *talak* divorces decreased from 23 percent in 2006 to 14 in 2008, while from 1978-1981 the percentage of *talak* divorce accounted for a staggering 95 to 98 percent. Compared to the national figures (Table 4), the percentage of women initiated divorces (*gugat cerai*) in Cianjur is also high. In 2008 *gugat cerai* in Cianjur accounted for 87 percent of the divorce cases, while the national figure in 2008 was 65 percent.

Table 2: Divorce figures for the Islamic court of Cianjur 2006-2008

	2006		2007		2008	
<i>Gugat cerai</i>	356	77%	373	84%	478	87%
<i>Cerai talak</i>	104	23%	72	16%	71	13%
Total	460	100%	445	100%	549	100%

Table 3: Divorce figures for the Islamic court of Cianjur 1978-1981

	1978		1979		1980		1981	
<i>Gugat cerai</i>	19	2.4 %	20	2.6%	32	4.7%	12	1.7%
<i>Cerai talak</i>	785	97.6 %	750	97.4%	650	95.3%	684	98.3%
Total	804	100%	770	100%	682	100%	696	100%

Table 4: National divorce figures for the Islamic court, 2008 (Badilag 2009)

Gugat cerai		Cerai Talak		Total	
126,065	65.2%	67,124	34.8%	193,189	100%

7 Figure retrieved from the website of the Islamic chamber of the Islamic court, www.badilag.net, accessed 12-06-2012.

These statistics seem to signify that Muslim divorce in Cianjur has undergone a remarkable transformation, which has turned divorce initiatives from a mainly male practice into a primarily female one. The divorce survey that was part of my field work confirms that many women in Cianjur no longer consider divorce an absolute male right, but it does not at all point toward a total transformation of Muslim divorce. Respondents to the divorce survey consisted of 120 women in Cianjur who considered themselves divorced, and included women who divorced informally out of court, or religiously as they call it. The respondents were asked to indicate the extent to which they agreed with a number of statements concerning divorce and gender. Regarding the statement 'divorce is only the husband's right' (*hak cerai hanya ada pada suami*) 69 (57.5 percent) of the 120 women agreed, while 44 (36.7 percent) disagreed, of which 2 (1.7 percent) strongly disagreed. On the reverse statement 'women have the right to divorce their husband' (*Istri memiliki hak untuk menceraikan suami*) 58 (48.3 percent) of the 120 women agreed of which six (five percent) strongly agreed. 42 (35 percent) women did not agree while 17 women (14.2 percent) did not have an opinion and three women did not want to answer the question. Thus, the divorce survey indicates that although half of the women in Cianjur indeed agree they have the right to divorce their husband, more than half of them still consider divorce to be primarily a male right.

How then can we explain the high number of *gugat cerai* cases? If we look at the research by Nakamura in Central Java, it becomes clear that part of the answer can be found in changes in the way divorces are registered (Nakamura 1983). Before the 1989 Islamic Judiciary Law, standardized registration of divorces as either petitioned by the wife or the husband, many Islamic courts in Indonesia did not only register the *talak* repudiations by the husband as *talak* divorce, but also most of those initiated by the wife: *taklik al-talak*, *syiqaq* and *khul* divorces that technically still require a proclamation of *talak* by the husband (see Chapter 3). In case of *taklik al-talak*, the conditional *talak* is pronounced by the husband in advance as part of the marriage ceremony, whereas in *khul* divorce the wife negotiates a *talak* by her husband. As a consequence, only *fasakh* divorces were effected without the husband's *talak*, by the judgment of the Islamic court and only the latter *fasakh* divorces were subsequently registered as *cerai* cases (see Table 5). In contrast, the 1989 Islamic Judiciary Law only differentiates between the sex of the person who files the divorce: when a man files for a divorce, it is registered as a *talak* divorce (*cerai talak*) and if a woman files a divorce it is a *gugat cerai*.

Table 5: Marriage dissolution in Islamic doctrine⁸

<i>Traditional means of marriage dissolution</i>	<i>Intervention of the judge</i>	<i>Final action</i>
<i>Talak</i> <i>Khul</i>	Without intervention	Marriage is dissolved by proclamation of divorce by husband
<i>Talak</i> through <i>syiqaq</i> <i>Khul</i> through <i>syiqaq</i> <i>Taklik al-talak</i>	With intervention	Marriage is dissolved by proclamation of divorce by husband
<i>Fasakh</i> <i>Fasakh</i> through <i>syiqaq</i> *	With intervention	Marriage is terminated by judge

* This form of *syiqaq* is not included in Nakamura's table. I added it, regardless its controversial character, because the *penghulu* courts on Java did apply a *syiqaq* procedure in which the judge dissolved the marriage if the arbiters (*hakam*) considered the marriage irreconcilable, but the husband did not pronounce the *talak*.

Hence, one must realize that before the reforms in the Marriage Law, a substantial part of divorces registered as *talak* were actually petitioned by the wife. Nakamura has analyzed the *talak* divorce registers of Kotagede, Central Java, from 1964-1971 and found that of the 537 *talak* divorces, 37 percent were petitioned by the husband, 33 by husband and wife together, and 29 percent by the wife alone. Those numbers indicate that at least 29 percent of those divorces concerned divorces based on the *khul*, *syiqaq* or *taklik al-talak* procedures, but probably much more because 62 percent of the *talak* divorces were petitioned by both husband and wife (Nakamura 1983: 40). In present day Indonesia all cases based on these three divorce procedures would have been registered as *gugat cerai*, since they would be petitioned by the wife. In short, a significant part of the decrease in the percentage of *talak* divorce statistics since the 1970s can be attributed to changes in divorce registration: a large number of female-petitioned divorces which used to be registered as male *talak* divorces, are registered as female *gugat cerai* divorces today.

A second explanation is that nowadays almost all divorces at the Islamic court of Cianjur are registered according to the formal divorce grounds of the Marriage Law and, as we will see in Chapter 9, are mostly based on the grounds of 'continuous marital strife' and 'broken marriage',⁹ meaning that the terms *khul*, *taklik al-talak* and *syiqaq* become increasingly rare in Islamic courts' judgments. The Islamic court requires women in Cianjur to frame their divorce according to the formal divorce grounds in the Marriage Law, and

8 Taken from Nakamura 1983, pp. 40.

9 'Broken marriage' is not a formal divorce ground in the Marriage Law but as Chapter 9 demonstrates, in most cases based on the divorce ground GR 45/1975 Article 19 (f) 'continuous marital strife,' the judge in fact argues that the marriage has been 'broken.'

as a consequence traditional Muslim procedures hardly ever play a role in the courtroom.

An example of how the Islamic court places Marriage Law norms above the traditional Islamic norms, is a case in which the husband demanded Rp 50 million from his wife as compensation for the divorce she had filed. Although such negotiations are very common in a traditional *khul* divorce, the court argued that this divorce suit had been solely based on the divorce ground 'continuous strife' in the Marriage Law, and was not a *khul* divorce. Therefore the court rejected the husband's counterclaim of Rp 50 million in compensation.¹⁰

Besides the administrative and legal changes with regard to divorce, another factor that may explain the high number of *gugat cerai* divorces relates to the fact that the legal changes are not fully accepted within society and as a consequence many men in Cianjur still feel that they have the religious right to divorce their wife without involvement of the Islamic court. Various informants in Cianjur indeed have told me that in Sundanese culture it is customary that if a husband wishes to divorce his wife, he returns (*nyerahken*) her to the parents and proclaims the *talak*. I have observed in the courtroom that many women who petitioned a *gugat cerai* divorce had actually already been divorced by their husband out of court. For example, in one *gugat cerai* case the wife had been returned to the parents by her husband and been divorced with three *talak* in a row, thereby making a reconciliation (*rujuk*) impossible. The social divorce in this case was the *talak* pronounced by the husband, but the formal divorce, and the registered divorce, is the court divorce petitioned by the wife.¹¹

Nurlaelawati has made a very similar observation about divorce practices in West Java and Banten. A divorce at the Islamic court often is merely considered an administrative matter that may be postponed until the moment someone needs a clear marital status for administrative reasons (Nurlaelawati 2010: 223-224). Many of the same out of court divorces that before the 1974 Marriage Law simply would have been registered at the KUA as *talak* divorces petitioned by the husband nowadays are informal divorces that still require a formal divorce process at the Islamic courts. Hence, if a woman in such a case seeks to formalize her *de facto* social status of divorcee at the relevant Islamic court, in the process the social male *talak* divorce transforms into a female *cerai gugat* divorce, and this is how the divorce will be registered by the Islamic courts.

10 Case 554/Pdt.G/2008/PA Cianjur, judgment on 13-01-2009, of which I attended three court hearings, including the judgment.

11 Case 564/Pdt.Ag/2008/Cjr, of which I attended the last court hearing and the reading of the judgment that took place on the same day, 23-12-2008. This case is for other reasons interesting as according to one of the witnesses, the real cause for the divorce was actually the difference in opinion between the spouses concerning how to raise their children religiously, whether this should be according to the rituals of the *Muhammadiyah* or NU.

6.2.3 Out-of-court divorce

As I emphasized in the previous section and elsewhere (Huis 2010), many couples do not divorce at the Islamic court, but decide to divorce out of court or 'religiously' (*secara agama*), thereby violating the Marriage Law and the 1989 Islamic Judiciary Law. Cammack et al. (2007), based on comparison of divorce statistics of the Office of the Religious Court (*Badilag*) and BPS, have calculated that in the 1980s, informal divorces made up around 50 percent of all Muslim divorces in Indonesia. The divorce survey indicates that the number of informal divorces in Cianjur is much higher. Of the 120 respondents only seventeen (14 percent) were divorced by the Islamic court. That means that 86 percent of the women interviewed had divorced out of court.

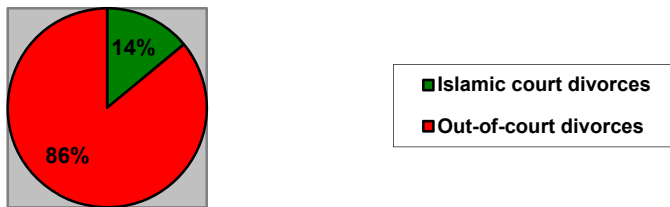


Figure 1: Percentage out-of-court divorces in Cianjur (Divorce Survey; N=120)

The divorce survey assessed possible reasons why people in Cianjur do not go to the Islamic court to divorce. One of the obvious reasons can be that many couples do not register their marriage and thus do not have the possibility to divorce formally. However, this is not the case, as many couples who had registered their marriage at the KUA do not go to the Islamic court to divorce. The 20 percent of all respondents who according to the divorce survey had not registered their marriage,¹² can not explain the 86 percent of out-of-court divorces. Moreover, it appears that 73 percent of the respondents who divorced out of court had registered their marriage at the KUA. Moreover, the larger number of informal divorces as compared to informal marriages indicate that many couples can register their remarriage despite their informal divorce and, thus, that the sub-district KUAs facilitate the out-of-court divorce practice. Because many remarriages after an out-of-court divorce are registered by the KUAs, but the out-of-court divorces themselves are obviously not registered by the Islamic court, the divorce to marriage ratio decreases and does not reflect local divorce practices. In other words, the divorce rate in Cianjur becomes much higher when out-of-court divorces are taken into account.

The young age of marriage may also explain the prevalence of informal divorces. Jones has demonstrated that divorces usually take place shortly after

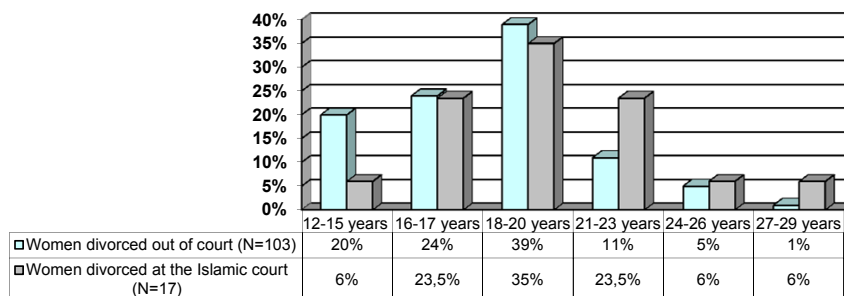
¹² Five percent of the respondents did not answer this question.

the marriage (Jones, G.W. 2001). Young marriage is one of the main predictors of a short marriage, also in Indonesia (Guest 1992: 95). The marriage age of Sundanese women traditionally has been among the youngest in Indonesia. According to data of *Komnas Perempuan*, the average first marriage age in Cianjur is 18.3 years,¹³ while the 2005 Social Economic Survey (*Survei Sosial Ekonomi Daerah*, Suseda) establishes the average age of first marriage in Cianjur at 17, the youngest in West Java.¹⁴ The respondents in the divorce survey were on average married at the age of 18, which confirms *Komnas Perempuan's* findings.

An explanation for young marriage is that parents traditionally encourage their daughters to marry young, in order to prevent extramarital pregnancy and sin (Smith-Hefner 2005). Hence, even though marriage in West Java is nowadays ideally based on romantic love and often preceded by courtship (*pacaran*), even in some Islamic boarding schools in West Java (Kholifah 2005; Jones, G.W. 1994), young marriage is still very common in Cianjur.¹⁵

An average age of first marriage at 17 or 18 indicates that many marriages take place under the legal age of 16. According to the *Suseda* 2005 almost 30 percent of the first marriages of women in Cianjur took place before they had reached the legal age. The divorce survey shows a lower percentage of marriages below the legal age. Of the 103 respondents in the divorce survey who had divorced out of court, 20 percent were married below the legal age of 16 and 44 percent were married before they were 18 years old, whereas only six percent of the women divorced at the Islamic court had been first married at an age below 16 and 29.5 percent at 18 (see Figure 2). One can conclude that the differences between the two groups with regard to young marriages are too small to explain the total of 86 percent of out-of-court divorces. The practice of young marriages cannot provide a satisfactory explanation for the high proportion of out-of-court divorce in Cianjur.

Figure 2: Age at first marriage



13 Komnas Perempuan 2009.

14 *Survei Sosial Ekonomi Daerah 2005 Jawa Barat*. Source: http://www.bapeda-jabar.go.id/docs/publikasi_data/20080408_163140.pdf

15 Although an 'Islamic' marriage without prior courtship seems to be emerging as a new trend among some university students. See Smith-Hefner 2005.

6.2.4 Strong competition from other Islamic institutions

The 86 percent of out-of-court divorces is so high that it is unlikely that all of these couples did not know about the judicial divorce requirement. The most sensible explanation is that religious divorces, without Islamic court involvement, are simply socially accepted in Cianjur. As I have explained in the previous chapter, the Islamic courts in West Java meet strong competition in family law matters by KUAs, *ulamas* and *kyais*, and those competitors are willing to arrange remarriages after informal divorces despite the fact that this is against the law (see also Huis & Wirastri 2012). Alternatives to the Islamic court are thus available and for many those alternatives are closer to home and can be arranged more easily.

As already mentioned in the previous chapter, some local religious actors have a personal interest in arranging informal marriages and divorces and overstate the fees of the Islamic court in order to scare off its potential clients. In an interview, a local KUA official (*amil*) in the sub-district Sayang in Cianjur stated that the divorce fees 'of Rp 1.2 million' were too high for many people and he admitted that he sometimes concluded out-of-court divorces for lower prices.¹⁶ The official court fees at that time, however, were about Rp 400 thousand. Judge Dedeh Saida complained to me about similar practices. She said that some local actors deliberately spread rumors in the villages about high court fees and subsequently offer their help while charging those high prices, paying the much lower court fees and keeping the rest.¹⁷

Pak Agus Yaspiain, assistant clerk of the Islamic court, made clear that assistant marriage registrars (*amils*) and other officials of a number of KUAs in Cianjur, are involved in arranging out-of-court divorces and subsequent remarriages. He illustrated their unwillingness to promote a formal divorce at the Islamic court with the following example: a staff member of the Islamic court had placed a poster on the wall of a KUA office with information about the Islamic courts' fees and procedures, but the next time he went there it had been removed. He believed this was no accident.¹⁸

Another indication of the common disregard of state legislation on Muslim family law matters in Cianjur and the strong position local religious actors have, is the prevalence of informal polygamy. The Indonesian legislator has limited polygamy, making it conditional on a number of factors, including consent of the wife and permission of the Islamic court.¹⁹ The year reports of the years 2006-2008 show that the Islamic court of Cianjur seldom receives requests for such permission, eight in total.

16 Interview with *Pak Hermansyah* an *amil* in sub-district Sayang, district of Cianjur, 22-5-2009.

17 Interview with judge Dedeh Saida, during a circuit court journey to sub-district Sindangbarang, district of Cianjur, 25-11-2008.

18 Personal communication from *Pak Agus Yaspiain*, Islamic court of Cianjur, 18-12-2008.

19 See Chapter 4

The divorce survey found, however, that more than one third (42 out of 120) of the respondents listed a polygamous marriage or a prospect of a polygamous marriage as one of the reasons for their divorce. This discrepancy suggests that most polygamous marriages were concluded informally and are a further indication that many religious authorities, in case of involvement of a KUA even state officials, promote traditional West Javanese Islamic norms, rather than state law and hence create a sort of state in a state, where men still have their *talak* and can decide by themselves to marry polygamously.

Those local religious actors are counteracted by Indonesian women's rights organizations, but also international donors like AusAid, UNDP and the World Bank. These organizations encourage women to marry and divorce according to national legislation. They do so by listing the advantages of clear personal status that a divorce at the Islamic court would provide: post-divorce rights that are enforceable through the court system, access to a formal remarriage and division of marital property. Yet, the high number of informal divorces indicates that the influence of those organizations remains limited. As the following example of W. illustrates, women may actually have heard about the supposed advantages of a formal judicial divorce, but do not feel much urgency to act upon it.

W. lived in the district capital town of Cianjur and her husband had divorced her through an out-of-court *talak* divorce. She knew about the requirement of a judicial divorce from an acquaintance who worked at the Islamic court and said that eventually she intended to file a divorce suit at the Islamic court. However, she would wait until a serious marriage candidate showed up, and there had to be a real prospect of remarriage first. When I asked her whether she encountered any problems due to the fact that she was not formally divorced by the Islamic court, she replied: 'No, according to Islam I am already divorced, all neighbors know that I am divorced.' In daily life she experienced no difficulties with her informal status and had found a job as an insurance sales representative after the divorce.²⁰

W.'s case shows how out-of-court *talak* divorce is socially accepted in Cianjur, as it is considered to be in accordance with Islamic doctrine. However, W. was also aware that such a divorce could turn into an administrative problem in case of a remarriage and she planned a future formal judicial divorce. In case of a remarriage, she intended to conform to the formal requirements of the 1974 Marriage Law.

20 Personal communication with Bu W. in the town of Cianjur, 9-2-2009.

6.2.5 Court fee waivers and circuit courts

An access-to-justice report commissioned by the Supreme Court and AusAid (Sumner 2008) argues that compliance with statutory marriage and divorce requirements, i.e. registered marriage and judicial divorce, brings many benefits to women. It argues that out-of-court divorces lead to unregistered remarriages, with the negative consequence that children born out of such second marriages cannot obtain birth certificates.²¹ Out-of-court divorce and unregistered marriage 'affects the inheritance rights of children, as well as the legal responsibility for the financial care of former spouses and any children of the marriage' (Sumner 2008: 7-8). The report concludes that the main barriers for women to access the Islamic courts are financial, combined with a lack of legal knowledge. Waiver of court fees (*pro deo*) and circuit courts (*sidang keliling*) combined with better legal knowledge provided by paralegals can tackle those problems, the report argues.

Waiver of court fees (*pro deo*) can potentially increase access to the Islamic courts for women for whom court fees are too high. To be eligible for a *pro deo* process someone requires a statement of the neighborhood and vicinity heads (*kepala RT* and *kepala RW*) that the plaintiff indeed is poor and will be formally registered as such. In the years 2007-2008 about ten percent of all cases (thus not only divorce cases) at the Islamic court of Cianjur consisted of *pro deo* cases. In 2007, 72 out of a total of 862 cases were *pro deo*, and in 2008, 96 out of a total of 914 cases. In those two years, only a single case out of 168 *pro deo* cases in total concerned a man, the other 167 were court waivers for women. Thus, it is safe to conclude that the Islamic court of Cianjur gives women precedence over men in *pro deo* cases.

The problem is that for many of the people who belong to the lower classes, but are not registered as poor, the court fees still equal their monthly income or more, making a trip to the Islamic court unattractive – especially since an out-of-court 'religious' divorce is socially acceptable. The divorce survey found that among the respondents who divorced at the Islamic court a relatively large portion had an income of more than Rp 500 thousand compared to those who had been divorced informally.

21 Sumner does not consider the possibility that remarriages after an out-of-court divorce can be registered by corrupt KUA officials anyway, which in turn means that birth certificates are accessible for the children concerned.

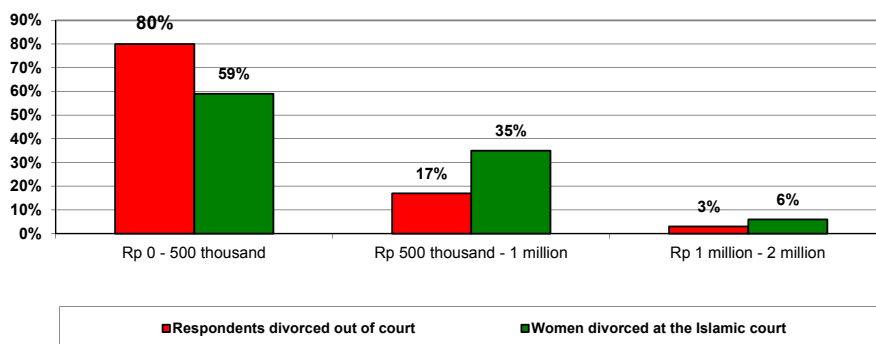


Figure 3: Respondents' monthly income

Another way to bring the court literally closer to the people is by organizing circuit courts. Distance between a person's residence and the court is certainly a practical barrier for many potential court clients. Most divorce cases in Cianjur (72 percent in 2007) involved couples who lived within 30 kilometres of the Islamic court, while only 28 percent of the cases involved couples who lived further away.²² Circuit courts were initiated to tackle this problem. In 2008, 18 circuit court sessions were held in Pagelaran and Sindangbarang, small towns in the south of the district of Cianjur a three to four hour car ride from the Islamic court. A Supreme Court budget cut in 2009 reduced the circuit court sessions to monthly sessions in Pagelaran. All in all, the circuit courts only offer some relief for court clients, since they are still required to travel to the court several times given that a single divorce case will involve at least registration, a minimum of three court hearings, and collection of the divorce certificate. Usually only a single hearing can be handled through the circuit court, and the remainder of the divorce process still requires one or several trips to the district capital Cianjur.

The Sumner report of 2008 underlines the importance of the barriers that women face in accessing the Islamic court. Better access to the Islamic court is important for women and their children in obtaining a legal family status and the rights that are attached to it. Furthermore, access to the Islamic court opens up opportunities for women to claim those rights. The role the Islamic court in Cianjur plays in post-divorce matters is assessed below.

22 My own analyses of *Laporan Tahunan Pengadilan Agama Cianjur 2007* and *Register Pengadilan Agama Cianjur 2007*.

6.3 THE ISLAMIC COURT AND POST-DIVORCE RIGHTS²³

6.3.1 Post-divorce claims hidden in the registers

We have seen that divorce at the Islamic court in Cianjur is increasingly becoming a women's affair, and the bulk of the divorces are petitioned by women. The 1989 Islamic Judiciary Law allows a party to include a claim regarding spousal support, child support or marital property in their divorce suit, or a counterclaim when the husband is the petitioner of the divorce.²⁴ For women, this has the obvious advantage of not having to pay the fee for a new court process when they intend to claim post-divorce rights.

One would expect that an increased agency of women in divorce matters would also result in a high number of post-divorce claims, as women are the ones that mostly benefit from such claims and they can be included in the divorce suit. Surprisingly, this is not the case. During my fieldwork I have counted the number of post-divorce claims that women made in both *talak* and *gugat cerai* divorces. The vast majority of post-divorce claims are indeed included in the divorce suit. They are not listed separately in court registers, as the entire case will only be listed as a divorce case petitioned by the husband (*talak*) or the wife (*gugat cerai*). As a consequence, these claims do not show up in the statistics and annual reports of the Islamic courts. Therefore, the figures presented here differ considerably from those that appear in the annual reports of the Islamic court of Cianjur.²⁵

6.3.2 Spousal support

The 'bundle' of spousal support rights is based on the 'open' provision in the 1974 Marriage Law that the court may establish an obligation for the former husband to his former wife,²⁶ which has been specified along the lines of *fiqh* in the 1991 Compilation of Islamic Law (see Chapter 4). This 'bundle' includes four obligations of the husband: maintenance (*nafkah iddah*), clothing (*kiswah*) and housing (*maskan*) for the duration of the waiting period of the wife (*iddah*); and a consolation gift (*mut'ah*). As a policy, the Islamic court of Cianjur puts

23 Parts of this section were published in the journal for Law, Social Justice and Global Development Journal (LGD), see Van Huis 2010.

24 Article 66(5).

25 The annual reports of the Islamic court of Cianjur 2006-2008 list no child and spousal support cases (all were part of a divorce suit) and the number of joint marital property cases listed is about half of the total number I found in the books. If one wants to check the numbers presented, one must go through the register books of the court of the years 2006-2008 and count the post-divorce claims that are listed under *cerai talak* and *gugat cerai* one by one.

26 Article 41(c).

pressure on the husband to hand over the total sum of those four rights to the court first before the pronouncement of the talak.

As a rule, women can claim spousal support rights in the following two cases: first, when the divorce is not final (*ra'ji*), and the marriage still can be reconciled (*rujuk*) during the waiting period of 90 days; or, second; in final (*ba'in*) and non-final divorces, when the wife is pregnant, which extends the waiting period until the point of delivery of the baby. The Islamic court of Cianjur considers all divorces petitioned by women as final divorces.²⁷ Thus, in practice Muslim women in Cianjur only have spousal support rights if their divorce was petitioned by the husband (*cerai talak*) and they are limited to the 90-day waiting period. Only when the Islamic court establishes the wife's disobedience (*nusyuz*) will she also lose her spousal support rights in *cerai talak* cases.

The court files of 2006 till 2008 reveal that all claims on spousal support in *talak* divorces were granted. This implies that in not a single case the court denied a spousal support claim on the basis of the wife's disobedience. In fact, many husbands did accuse their wife of disobedience and made statements about their wife 'often leaving the house without permission' or 'not performing her marital duties', both traditional instances of *nusyuz*. The fact that there was not a single case in which the court held a wife to be *nusyuz* indicates that the Islamic Court of Cianjur has reinterpreted the traditional concept of *nusyuz* and narrowed its boundaries.²⁸

A thorough analysis of spousal alimony cases distorts this positive picture somewhat. In 2007, in all but one case the amount of spousal alimony to be paid by the husband was much lower than the wife had requested. Moreover, in all but one court judgment the amount of support to be paid was much closer to the husband's statement about what he was capable to pay than to the wife's original claim. For instance, in one case the wife claimed spousal support of Rp 7.5 million during her waiting period, five million *mut'ah* and 25 million overdue maintenance payments.²⁹ The husband said he was only capable of paying Rp 1.5 million in maintenance during the waiting period, one million in *mut'ah* and five million in overdue maintenance payments. The amount of spousal post-divorce rights that were included in the court order, rather followed the husband's than the wife's claims: 1.5 million spousal support, 3.5 million *mut'ah*, and five million in overdue maintenance payments. Thus, the wife claimed a total sum of Rp 37.5 million, the husband claimed

27 For example, in case 381/pdt.Ag/2007/Cjr the wife claimed spousal support for the time of the waiting period. However, this was refused on the basis that this was a *gugat cerai* case resulting in a final divorce *talak ba'in*.

28 In Chapter 9 I will discuss the concept of *nusyuz* and its application by the Islamic courts of Cianjur and Bulukumba in more detail.

29 Case 215/Perd/Ag/2007/Cjr.

he was capable of paying 7.5 million and the court ordered a payment of 10 million.

The explanation for the courts' tendency to follow the husband's claim about his financial capacity is that court judgments typically are not based on written evidence, but are negotiated in the courtroom, since judges are convinced that there is a better chance that ex-husbands implement an agreement than a court order. Only if negotiations fail will the court decide. If the wife cannot prove that her demand is reasonable – something which is difficult when the husband is not a salaried employee – the court will often accept the husband's statement of what he is capable of paying.

A judge explained to me that he considered it better if the husband agrees to the judgment, so he will pay the sum and proclaim the *talak*. He revealed that there is a legal loophole, which husbands are able to exploit. As mentioned earlier, after the Islamic court has established the amount of spousal support and *mut'ah*, the husband still has to pronounce the *talak* in order to give the divorce legal status. Thus, in *talak* divorces it is not the court judgment that brings the divorce into effect. The court only gives the husband *permission* to pronounce the *talak* in the court, with the judges being the witnesses. If after six months the husband has not done so, the case will expire, together with the decision regarding spousal support and any other post-divorce claims. This means that if they consider the amount of support or *mut'ah* they have been ordered to pay too much, husbands can decide to halt the divorce process by not pronouncing the *talak*.³⁰

An analysis of the register books from the years 2006-2008 resulted in the following number of spousal support claims made at the Islamic court of Cianjur (see Table 6). In 2006 a total of 28 women out of a total of 460 divorces claimed and were rewarded spousal support, equaling six percent. In 2007 and 2008, this percentage dropped to 2.7 percent and 2.9 percent respectively. However, since the court only granted spousal rights claims in men-petitioned *talak* divorces, I have also calculated the percentage spousal divorce claims as part of *talak* divorces. As could be expected, a much higher percentage emerges: 28 rewarded claims out of 104 *talak* divorces in 2006, or 27 percent. Because the total number of *talak* divorces were also lower those years, the percentage of spousal support claims as part of *talak* divorce cases does not drop as much: to 17 percent in 2007 and 22.5 percent in 2008.

The fact that between 2006 and 2008 73 to 83 percent of the women did not claim spousal support rights in *talak* divorces may relate to a lack of knowledge about their rights. The divorce survey therefore asked the respondents to what extent they agreed with the statement 'the wife has the right to receive support from her husband after he divorced her.' On a total of 120 respondents 109 respondents agreed (90.8 percent), of which 28 re-

30 Personal communication with Judge Isak, Islamic court of Cianjur, 18-12-2008.

spondents (23.3 percent) very much agreed, and only eight respondents (6.7 percent) did not agree. This demonstrates that women in Cianjur know their spousal post-divorce rights well.

The divorce survey shows that more than a fifth of the respondents reached an agreement about post-divorce financial arrangements with their former husband. A considerable number of 21.7 percent of the total respondents had done so, 54.2 had not and 24.2 percent chose not to answer the question. The divorce survey indicates that most of those agreements were not put on paper. Of the 36 respondents that answered the question about whether they had made a verbal or written agreement, 29 respondents or 80.6 percent answered they had made a verbal agreement and only seven respondents or 19.4 percent had made a written one. However, according to the divorce survey, such agreements are only followed through in 10 percent of the cases.

All in all, the Islamic court of Cianjur's performance in providing women with spousal support in *talak* cases is considerable. About 20 percent of women are granted spousal support claims, and since the court insists that spousal support is paid in one sum prior to the husband's proclamation of the *talak*, most court orders seem to be implemented. The most negative aspect from a women's perspective is that the husband has an advantage over his wife in the courtroom as the judge tends to follow his claim about his financial capacity.

Table 6. Post-divorce claims at the Islamic court of Cianjur

	2006		2007		2008	
Spousal support	28	6.1%	12	2.7%	16	2.9%
<i>In talak divorces</i>	28	27%	12	17%	16	22.5%
Child support	16	3.5%	12	2.7%	11	2%
Joint marital property	No data	No data	9	2%	10	2%

6.3.3 Child support

The second post-divorce matter I have explored is child support. As explained in Chapter 4, Islamic courts have a legal mandate to establish the amount of child support to be paid by the father. This mandate is based on the 1974 Marriage Law, which provides that a father is obliged to provide maintenance for his children, no matter which of the spouses petitioned the divorce, nor to whom custody of the children is designated. The obligation has been adopted by both the 1989 Islamic Judiciary Law and the 1991 Compilation of Islamic Law. In the judicial process, the Court must consider the financial capacity of the father. For fathers who are civil servants and do not have the custody over their children, the amount of child support is fixed at one third of their salary under the 1983 Government Regulation concerning Marriage and Divorce for Civil Servants (see 4.4.4). In all other cases the manner of

establishing the amount of child support is entirely left to the discretion of the judge.

One would expect a higher number of child support claims than spousal support claims, since child support can be claimed in *talak* divorces and *gugat cerai* divorces. In fact, the number of child support claims are actually lower. In 2006, only 16 child support claims were made on a total of 460 cases, which equals 3.5 percent. In 2007 and 2008 respectively, there were 12 child support claims (2.7 percent) and 11 claims (2 percent).

One of the explanations for this low number of child support claims could be women's lack of knowledge about child support rights. However, as was the case with spousal support, the divorce survey shows that women in Cianjur are well aware of their child support rights. Of the 120 respondents, 116 agreed to the statement that the husband should provide child support until the child is an adult (96.7 percent), of which 35 respondents (29.2 percent) very much agreed. Another explanation could be that a majority of the women concerned did not have any children with the husband concerned. Yet, I think this is unlikely, as in Indonesia the birth of a child usually follows soon after marriage.³¹ Moreover, traditionally women in Cianjur will take care of their children after divorce, especially of the younger ones. In case of a dispute they have a large chance to winning because of the statutory provision that in principle mothers will be assigned custody over children below 12 years old. A more plausible explanation for the low number of child support claims is the fact that the Islamic court discourages women from claiming child support and tries to press the spouses to reach an agreement among themselves.

It is of course also possible that in Cianjur fathers have the inclination to give child support voluntarily without court involvement. For this reason, the divorce survey assessed the number of agreements concerning child support. Of the 113 respondents who answered this question, 34 (30 percent) had reached an agreement, whereas 59 (52.2 percent) had not.³² Agreements between the spouses, and the discouragement from claiming support in the divorce process, are thus important explanations for the non-claiming behavior of women.

To examine the nature and frequency of this child support based on agreements, the divorce survey asked how often the father provided specific forms of child support. As Table 7 indicates around 50 percent of divorced fathers in Cianjur occasionally give some forms of child support voluntarily, but only few do so regularly. Unsurprisingly, more than 80 percent of respondents

31 In Indonesia the mean age of mothers at the first birth and the mean age of women at their first marriage are not far apart. According to the WHO's *Indonesian demographic and health survey 2002-2003* WHO the numbers were an age of 21.9 years at first birth and 20.2 at first marriage. Source: www.ino.searo.who.int/en/Section3_158.htm.

32 Twenty respondents filled in 'no answer.'

indicated that they were dissatisfied with the child support from their former husband (see Figure 4).

Table 7: Frequency that fathers provide specific forms of child support (N=120)

	Very often	Often	Occasionally	Seldom	Never
Buying supplies (clothing, toys, etc)	2.5 %	3.3 %	49.2%	42.5 %	2.5 %
Money to the mother	1.7 %	2.5 %	35.8 %	60.0 %	0 %
Educational costs	3.3 %	2.5 %	42.5 %	50.0 %	1.7 %
Pocket money to the child	5.0 %	3.3 %	45.8 %	43.3 %	2.5 %
Money or clothes for Islamic holidays	8.3 %	9.2 %	31.7 %	49.2 %	1.7 %

When a woman is persistent and submits a child support claim, however, the court will order the husband to pay a monthly child support contribution. Very much like spousal support, the amount of child support the wife claimed was generally not followed by the court when the husband objected to it. The wife usually had to accept the amount her husband says he was capable of paying. As one woman put it: 'I thought I'd better take this money rather than not get any money at all.'³³

As mentioned earlier (see 4.4.4), civil servants are subject to a special regulation and as the next case illustrates this facilitates an execution mechanism that runs through the office of the father concerned. *Ibu N.* was 31 years old when her husband, a civil servant decided to petition for a *talak* divorce. She and her husband had three children together: a girl of one year old, a boy of three and a girl of five. At first she did not want to divorce because of the children's young age, but her husband, who later appeared to have secretly married another woman, was persistent and in the end she felt she could not do otherwise than go along with the divorce. He obtained the required permission from his superior, which at first was refused considering the age of the children. He then petitioned for a *talak* divorce at the Islamic court.³⁴ The court's judgment was as follows: the court gave permission to the husband to utter the *talak*; it ordered the husband to pay spousal support in the form of Rp 1.5 million maintenance in the waiting period (*nafkah iddah*), and another Rp 750.000 as consolation (*mut'ah*); finally, the husband was ordered to transfer one third of his salary as child support to his former wife.

Ibu N.'s former husband paid the spousal support and *mut'ah* at the Islamic court, but did not pay the established amount of child support. 'Mostly he gave some pocket money (*uang jajan*), about Rp 50,000, each time he came to see our children.' It took *Ibu N.* a few months to decide to go to her hus-

33 Interview with *Ibu I.*, Cianjur, 29-03-2009.

34 Case 307/Pdt.G/2007/PA Cianjur.

band's superior to complain, because 'I wanted to give him a fair chance first to show before God that he is a good person.' Yet, initially her husband's superior's reaction went beyond what she had wished for, so she backed off: 'he said he was going to fire him. That was not my intention.' Only after she heard from a friend that she could ask the treasurer to get her former husband's state child allowance directly transferred to her account did she decide to go to her husband's office again. 'The treasurer was very cooperative. It was not difficult.' Not long after, *Ibu N.* automatically started receiving one million *Rupiah* in state child allowance transferred to her account, which equals more or less one third of her husband's salary.³⁵ *Ibu N.*'s case shows that enforcement mechanisms and women's knowledge of them are vital. Even when child support rights and enforcement mechanisms are in place, as is the case for civil servants, one still needs to know how to get the machinery going, otherwise nothing will happen.

6.3.4 Joint marital property

The third post-divorce matter I have examined is joint marital property. In all marriages, except those in which the spouses have made different arrangements through a prenuptial agreement, the property that both spouses have obtained during the marriage is joint marital property. Property that each spouse owned before the marriage remains their own property. After a divorce husband and wife both have a right to half of the joint marital property. Joint marital property claims can be included in a divorce petition as claim or counterclaim, or be claimed in a separate case.

The number of joint marital property claims filed at the Islamic court in Cianjur is low. In 2007 there were nine joint marital property cases and in 2008 there were ten. Here too the court encouraged couples to make an agreement, which in turn could have discouraged potential claimers. Moreover, since 2008, and based on a regulation of the Supreme Court,³⁶ the Islamic court of Cianjur made joint marital property agreements one of the possible aims of the compulsory mediation process. Previously this mediation process was, at least formally, exclusively aimed at reconciling the spouses, that is at preventing divorce, and not at making arrangements pertaining to the consequences of a divorce. This policy change may have encouraged couples to resolve the issue together as well.

Moreover, the court files show that generally a considerable amount of property was at stake in joint marital property cases. They typically concerned large plots of land, houses, cars and large amounts of cash. The parties involved in such a property dispute usually were from the middle and higher

35 Interview with *Ibu N.*, Cianjur, 30-03-2009.

36 Supreme Court Regulation 1/2008 concerning Mediation Procedures in the Courts.

classes and often they were represented by a lawyer. The high stakes at play in joint marital property cases increases the chances of appeal, but also leads to non-implementation intended to frustrate the enforcement process. The latter is illustrated in the next case.

In this divorce case *Ibu D.* claimed child support and joint marital property.³⁷ Her husband had left her for another woman and no longer provided maintenance. Her husband, however, did not want to divorce. She went to the Islamic court herself, without help from the KUA or a legal representative, where she found court clerks willing to help her with her suit. She claimed Rp 500,000 per month in child support for her daughter, and the court ordered the father to pay Rp 300,000. However, her main priority was the joint marital property. It consisted of 2070 square meters of wet rice fields, 1900 square meters of land, two houses, two tractors and a motorcycle, all registered in her husband's name. In its judgment the court ordered that the joint marital property had to be divided equally among the spouses.

However, after the court judgment her husband only handed over the smaller house of the two to live in and a plot of one hundred square meters to her and her daughter. Until that point he had not provided any child support. All other land and the larger house remained in his possession. Subsequently *Ibu D.* tried to solve the case through family negotiations, to no avail. In the end she decided to call in the police, but her husband was not intimidated and the police could only try to negotiate as there was no formal execution order from the Islamic court. Thus, she turned to family negotiations again as for the moment she had not sufficient means to pay the court fee required for a formal request for a court execution order. However, she said that she was saving money for it, in case the family negotiations failed.³⁸ This case illustrates that in joint marital property disputes a court judgment often is not the end of the legal process and if you do not have the financial means, enforcement can be difficult.

Even if the petitioner has sufficient resources to set the enforcement mechanisms in motion, violent resistance can be an effective means of frustrating the process. In 2011, the former head of the district branch of the political party PDI-P, Dedeh Saryamah, divorced her husband. He claimed the marital property, which included the office of the PDI-P that had been registered under his wife's name. The Islamic court granted the claim. When the property was not handed over voluntarily, he requested an execution order. Eventually a team of the Islamic court and the police attempted to execute the court judgment. However, a crowd of about a hundred PDI-P supporters was waiting to fight them. They attacked the Islamic court staff and the police, who were

37 Case 358/Pdt.G/2007/PA Cianjur.

38 Interview with *Bu D.*, sub-district Cugenang, Cianjur 29-03-2009.

forced to retreat.³⁹ This case was not an isolated incident, as an Islamic court official told me anecdotes about how the court had been visited on a number of occasions by *jawara*, local mafia-like clans that rule a number of areas in the southern part of Cianjur, to intimidate officials and influence the process.⁴⁰ For this reason, he explained, the circuit court that visits South Cianjur regularly does not handle joint marital property cases, or other cases where the stakes are high.

The cases above show that there are three ways to frustrate enforcement of marital property cases: prolong the process through appeals or other legal actions, frustrate the process by not implementing the court order, and threaten with violence. Still, many people in Cianjur do not have a lot of property and they will not bother to go through a complicated and oftentimes frustrating process. Of course, there are also couples who divorce rather peacefully and implement their agreements; however, the divorce survey indicates that these are a minority.

If we compare the three kinds of post-divorce matters, Islamic spousal support, child support and joint marital property (see Table 6) we can identify substantial differences between them. First, the percentage of spousal support claims is higher compared to other post-divorce rights, especially when you keep in mind that only women in *talak* divorces have a right to spousal support. Thus, in the year 2008 three percent of the total number of divorces included spousal support claims, which is only slightly higher compared to the two percent of women that claimed child support or joint marital property in 2008. When women who are defendants in a *talak* divorce case are singled out, however, it appears that around a fifth of them claimed spousal support rights.

6.4 POSSIBLE EXPLANATIONS FOR THE LOW NUMBER OF POST-DIVORCE CLAIMS

6.4.1 *The role of the enforceability of judgments*

In this section I attempt to clarify the amount of agency and costs women must put into a claiming process of, respectively, spousal support, joint marital property, or child support. In order to do so, I have subdivided the judicial process into the stages of claiming and enforcement. For each type of claim, I look at how much effort, in terms of agency and costs, is required to go through both stages of the judicial process. Additionally, I will look at the

39 The case took place after my field research, but caught my attention because it was national news. See for instance <http://news.liputan6.com/read/274508/eksekusi-tanah-kantor-pdip-ricuh>.

40 Personal communication with Pak Agus Yaspiain, Cianjur, 10-01-2009. See also Nurlaelawati (2010: 191-192) on the issue of *jawara* in Banten province.

chances that the entire process will be completed successfully and that redress will be obtained. I argue that the amount of effort required in the judicial process and the chance of success may partly explain the differences between the number of spousal support claims, joint marital property claims and child support claims.

In spousal support cases achieving redress is relatively easy in terms of costs and agency and the chance of redress is high. Since women only have spousal support rights in *talak* divorce cases, the husband has to pay the court fees. This makes claiming spousal support rights free of charge. In the enforcement stage, women do not require much agency either. The presence of a policy at the Islamic court in Cianjur which pushes the husband to pay the entire sum of spousal support first, before being allowed to pronounce the *talak* (*ikrar talak*) very much facilitates the implementation process. It is almost as if payment of the spousal support order has been made a requirement for the effectuation of the divorce itself. As a consequence of this pressure, almost all spousal support orders are implemented without women having to go through the extra effort and costs in the enforcement procedure. In fact women bear no procedural costs at all in both the claiming and the implementation stages.

People who claim joint marital property require a lot of agency from the start since it is vital to get legal proof of joint marital property, a matter I discuss in more detail in Chapter 9. Moreover, there are possible costs in the claiming stage: if it was the wife who petitioned the divorce she bears the court fees; court fees are higher when the court must conduct a field investigation; and there are extra costs if one of the parties appeals the judgment. When after a successful claiming process the defendant does not hand over half of the joint marital property voluntarily, the claimant will have to go to the trouble and bear the costs of an extra procedure at the Islamic court to request an execution order. These are all factors which influence women's decision whether to include the joint marital property claim or not. As most families in Cianjur have little or no property, few women make the claim.

Even so, execution only concerns a single act of transferring property to the rightful claimant and in that sense, even if it sometimes has to be done by force, it is relatively easy to enforce, especially if compared to those monthly child support payments for which no execution mechanism exists. Finally, because of the high amount of agency and costs required in the claiming process there is a considerable chance that the 'haves' are separated from the 'have-nots' and that the amount of property concerned is substantial. Litigants who already successfully made a joint marital property claim at the court are only one step away from a substantial amount of property, and therefore there is a fair chance that they will go all the way to the enforcement stage.

Child support, like spousal support, requires agency in the claiming process as women must defend their claim against the husband's counterclaim of ability to pay. As in spousal support cases, no additional court fees are

involved. With the exception of women falling under the 1983 Government Regulation concerning Marriage and Divorce for Civil Servants, or similar regulations for the police and military, the implementation process is complicated, and enforcement mechanisms are absent. This is partly due to the nature of child support orders. In contrast to joint marital property and spousal support claims, for which implementation is relatively simple as it only involves a single transfer of property or money, child support is a long-term obligation of monthly payments. Each payment itself is a relatively small one, but they add up to a large amount of money. Court files in Cianjur reveal that child support usually concerns a monthly amount of between Rp 300,000-600,000. Interviews with women who obtained a court order for child support indicate that although there are good examples, most men pay far less than the court judgments ordered them to, if they pay at all.

Women who wish to seek enforcement of a child support judgment must go to the trouble and cost of filing an execution request at the Islamic court (in 2008 a minimum court fee of Rp 800,000, plus costs for travel a lawyer, etc). The periodical nature of child support makes enforcement complicated. One or two months of unpaid support is not worth the Rp 800,000 in court fees. The amount of unpaid child support must be substantial for women to take action. Even if the court were able to force the former husband to pay the residual support, each subsequent payment remains uncertain. Moreover, proving the default of the husband and the remainder is not easy, as the husband can claim that he no longer has the capacity to pay. Women who seek enforcement need a lot of agency, and the outcome of the implementation process is uncertain.

According to the 2006-2008 annual reports of the Islamic court of Cianjur, no women in Cianjur listed a child support execution request at the Islamic court and to the memory of the current judges no woman had ever done so. When asked about how he would treat an execution case if it were brought before court, judge Munawar answered that he would not automatically accept the case. He was of the opinion that the difference between the amount of child support ordered by court and the actual amount paid by the former husband does not automatically constitute a debt, as every case has to be seen in its context. His reasoning is in accordance with a Supreme Court ruling on the matter, discussed in Chapter 9. Judge Munawar therefore thought that confiscation of goods was too heavy a measure (*berlebihan*) in the context of unpaid child support.⁴¹ Hence, there is a considerable chance that if women in Cianjur will file an execution request of due child support, their efforts will remain fruitless.

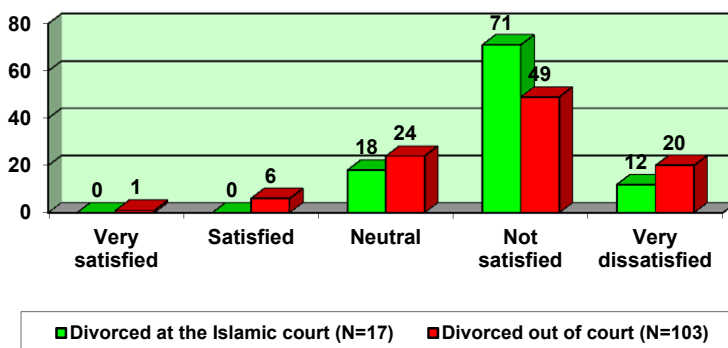
41 Personal communication with judge Munawar, Sindangbarang, district of Cianjur, 24-11-2008.

6.4.2 Socio-economic and cultural factors

Although a cost-benefit model can partly explain the low numbers of child support and joint marital property claims, the local socio-economic and cultural context also plays an important role. In addition to the effort, the costs and chance of success of a court process, a number of cultural factors may also explain why women do not claim post-divorce rights during a court divorce. First, it is considered socially preferable to resolve post-divorce matters out of court within the family sphere. Indeed, during my courtroom observations I noticed that judges of the Islamic court of Cianjur often encourage spouses to 'arrange such matters peacefully.' Therefore it is important to know how former spouses in Cianjur arrange post-divorce matters informally. If former husbands voluntarily provide post-divorce support and women are generally speaking satisfied with this, there is simply no need for most women to claim post-divorce rights in court.

If we look at the outcomes of the divorce survey, the image regarding voluntary post-divorce support becomes clear. About 30 percent of the respondents answered that they had reached an agreement with their former husbands about child support, and 23 percent said that they had reached an agreement about their own financial rights. However, the former husband executed the agreement in fewer than 10 percent of cases. Thus, former spouses make agreements about post-divorce rights in only a minority of cases and former husbands are lax in executing them. Not surprisingly, dissatisfaction is high among all respondents, whether divorced at the Islamic court, with 83 percent dissatisfied, or out of court, with 69 percent dissatisfied (see Figure 4).

Figure 4: Satisfaction concerning the father's child support (percentage)



Second, interviews in Cianjur indicate that after a divorce women want to live their lives as independently as possible from their former husbands. When I asked why they did not claim child support, some women replied that they wanted to be independent from their husband. Child support, consists of

monthly payments and, especially when the money does not come easily, requires a lot of involvement with the former husband, more than some women would like. Psychological factors, thus, play a role. Many women do not feel comfortable confronting the former husband or his family with the lack of child support they receive; 'I do not want to make any trouble' (*saya tidak mau bikin ribet*) and I will just accept it (*saya pasrah*) were the reasons women gave in the open question about this subject in the divorce survey. Some women who ended a marriage because of economic hardship tended to show empathy for the difficult economical situation of their former husbands. Moreover, most women considered non-payment by the husband a religious sin, and not a legal offence that requires legal action.

Thirdly, most divorced women in the sample – including the 'poor' – successfully managed to live their lives independently of their former husbands. One of the most surprising outcomes of the survey is that in the respondents' view, divorce does not seem to have major negative economic consequences for the women involved in the majority of cases. 39 Percent of officially and unofficially divorced women state that there is no change in their economical position, while 26 percent state that their economical position is better than before they were divorced. This means that in the perception of 65 percent of the women, divorce had no negative economic consequences. There are no differences between women who went to court and those who divorced out-of-court. Explanations for this are that 50 percent of the respondents earned an income and two thirds lived with their parents and thus were supported through their family network. These women do not have to rely on support of their former husband and presumably are less inclined to put much effort into bringing a support claim before a court. Still, for 27 percent of the respondents, all women with children, the divorce meant a worse economic situation.⁴² Those families would theoretically benefit most from the regular support payments the Islamic court in Cianjur can impose on the ex-husband, but only if its court orders would be made enforceable. Unfortunately, enforcement of post-divorce court orders is the Islamic court's weak point.

6.5 CONCLUSION

The divorce survey indicates that in Cianjur a large majority of 86 percent of women does not access the Islamic court to divorce, but divorce informally, out of court. Moreover, an analysis of the court files of the years 2006-2008 reveals that about 90 percent of the women who divorced at the Islamic court did not claim any post-divorce rights. It appears that the Islamic court of

42 Eight percent of the respondents did not answer the question.

Cianjur is above all a divorce court and not so much a court where women realize their post-divorce rights.

This observation can be explained by three factors. First, the Islamic court faces competition from local alternative authorities in Islamic matters. Many local religious actors, including government officials connected to KUAs, have an interest in providing their services to people who consider divorce at the Islamic court too much of a hassle. Because of the support of these religious actors, out-of-court *talak* divorces remain socially accepted in Cianjur.

Second, implementation and enforcement of court judgments is problematic. This is especially the case where child support is concerned. Child support court orders can easily be ignored as they are not considered to be enforceable through the court. In joint marital property cases the claiming and enforcement stages require considerable knowledge about procedures, agency and costs and as a consequence very few small claims are brought before court. As most joint marital property cases involve relatively large amounts of property, the chances that the defendant appeals the case, or frustrates the case by not executing the court order, is considerable. This in turn increases the efforts and costs of the process.

All in all, I argue that there is no indication that better access to the Islamic court alone – that is, more women divorcing in the Islamic court instead of out of court – will automatically lead to better access to justice for the majority of lower class and lower middle class women and their children in post-divorce matters. Civil servants have their own regulation and enforcement mechanisms, and therefore have a more privileged position, but for the majority of litigants the Islamic court cannot guarantee that they will obtain the child support or joint marital property that they are legally entitled to.

Thirdly, the local socio-economic and cultural context is such that a claim at the court is not looked upon favorably and not deemed necessary. Women generally know what their rights are but there is no claiming culture. On the contrary, there is a cultural preference towards resolving matters privately, and towards preventing private disputes to become public, which also is reflected in the attitude of the court when it encourages couples to arrange their matters informally. Moreover, some women considered the former husband's failure to fulfill his spousal and child support obligations a religious sin rather than a violation of a legal obligation.

Other women expressed psychological motivations why they do not want to claim their rights. For instance, they do not want to have too much involvement with their former husband as they do not get along at all, or, conversely, they have empathy for him and understand his troublesome economic situation. Indeed, often the reality is that the former husband is poor and has no property. The husband's dire economic situation in many cases was one of the main reasons to divorce in the first place. The effort of claiming post-divorce rights in such situations will be fruitless, as the former husband has

nothing to offer. Even a waiver of court fees will be of little importance in this regard.

That automatically brings me to one of the most remarkable findings of this study. According to a majority of 65 percent of the mothers surveyed, the divorce did not result in a worsening of their economic situation and 26 percent of those 65 percent even stated that their economic situation had improved after divorce. Thus, not only must one be careful not to overstate the role of the Islamic court in society as regards post-divorce matters, one must also be careful not to overstate the role of post-divorce rights in poverty reduction. Many women have their own income and are furthermore supported by their parents or other family members. However, for those women who do not have such safety-nets, post-divorce rights can be potentially important, provided that court orders can be enforced. Of course, this would require that women in Cianjur would obtain a divorce at the Islamic court in the first place.

