9 Trends in present-day judicial divorce processes in the Islamic courts

> 'The past decades of Indonesian efforts to do so indicate that public reasoning about law and values can begin from different starting points – the fiqh of Umar, human rights, Gayo or Javanese adat – and approach a set of values and norms, such as gender equality, fairness and agreement.' (Bowen 2003: 257)

> 'Despite achievements women may have made in court, such achievements were ambiguous, because it was done consistently from 1974 to 2005 primarily by appealing to their fulfilment of the roles of obedient wife and self-sacrificing mother. […] [T]hey rarely presented themselves as the household leader or controller of finances in the absence of their husband's care, but rather dwelt upon their own religious morality and dedication to their husband and families.' (O'Shaughnessy 2009: 203)

9.1 Introduction

Chapters 2, 3 and 4 discussed the history of the Islamic courts and the Muslim family law they apply. In Chapters 6 and 8 I have analyzed the position of the Islamic courts of Cianjur and Bulukumba in divorce and post-divorce matters, as viewed from the perspective of their potential users and placed in their local and historical contexts. In this chapter, we turn to the Islamic court judge and his or her specific role with regard to women's divorce and post-divorce rights. Whereas the previous chapters focussed on the historical development of the Islamic courts and their position in the communities of Cianjur and Bulukumba, in this chapter I narrow down the research focus to the courtroom. More specifically, I will discuss how the Islamic courts apply legal substantive and procedural norms in particular cases, how they treat the claims of the parties involved, and how this affects women's divorce and post-divorce rights.

It is important to note that the analysis that follows draws just as much on courtroom observations and interviews with judges as on court records. In their legal justifications judges do not always refer to legal innovations in legal doctrine, as not al innovations are part of case law, but may be the result of a consensus judges reach in seminars or Supreme Court capacity-building programs. By combining a close reading of court files with court room observa-

tions, I have managed to detect a number of such legal innovations, which judges apply in the everyday judicial processes in the Islamic courts.

Most of the academic literature sustains the view that, generally speaking, the Islamic court has interpreted the 1974 Marriage Law and the 1991 Compilation of Islamic Law in a relatively liberal way.[1] This liberal attitude is said to have had considerable influence on the legal reasoning of Indonesian citizens in Muslim family matters. As John Bowen has remarked, the concepts of gender equality, fairness and consensus-seeking are an integral part of legal reasoning in Indonesia (Bowen 2003: 257).

Other, more recent studies indicate more conservative attitudes of Islamic court judges. Nurlaelawati convincingly demonstrates judges' strong adherence to traditional *fiqh* in issues like polygamy and inheritance, leading to conservative judgments that contradict the more moderate legal provisions in the 1974 Marriage Law and the 1991 Compilation of Islamic Law. In her study of divorce in Yogyakarta, Central Java, O'Shaugnessy even concludes that 'there has been little or no change at all in women's favor' since 1974, since women's subordinate position in marriage and divorce is systematically upheld in the Islamic courtroom' (O'Shaughnessy 2009: 202-203). In short, there are divergent opinions about the effects of the Islamic courts' rulings in terms of women's rights.

Below, I attempt to provide my own analysis of the nature of everyday adjudication by the Islamic courts in Indonesia, primarily based on court room observation and court files I have collected at the Islamic courts of Cianjur and Bulukumba. In addition, I discuss a number of related judgments of the Supreme Court, the Constitutional Court, and Islamic high courts. I will analyze the Islamic courts' interpretation of a number of legal issues pertaining to divorce, including the role of evidence and procedure, and I will assess the consistencies and inconsistencies thereof in the light of the potential impact on women's divorce rights. Moreover, I will reveal some dynamics between the spouses that are hidden behind the broad concepts of 'no-fault divorce' and 'broken marriage.' Thus, through the close reading of court files and analyses of everyday adjudication processes, I aim to provide an explanation of the reasons why academicians come to such divergent readings about the effects of the Islamic courts' judgments on women's rights.

9.2 Marriage registration

One of the legal requirements for Indonesian citizens is to register all important life events, including marriages. Donor organizations link this legal obligation with legal rights of women and children. By registering their marriage, women

1 See section 1.1 of the Introduction.

and their children become right-bearers, and are protected by law against the detrimental consequences of a divorce or a husband's death, so the argument goes (See Sumner 2008: 7-8; Sumner and Lindsey 2010: 20-27). I will reserve my opinion on this developmental argument, linking marriage registration with empowerment, for the next chapter. Here, I focus solely on the legal reasoning and treatment of evidence in marriage registration cases by the Islamic courts in Cianjur and Bulukumba.

As we have seen in Cianjur, and to a lesser extent in Bulukumba, and as Wirastri and I have explained elsewhere (Huis & Wirastri 2012), citizens do not always comply with the marriage registration requirement. In Chapter 4 we have seen that such marriages can be registered through the Islamic courts. Article 7 (3) of the 1991 Compilation of Islamic Law provides that this may only happen under specified conditions: 1. in order to make a formal divorce possible; 2. if the marriage certificate is lost; 3. if the legality of the marriage is in doubt; 4. if the marriage was concluded before 1974 (this provision derives from the Marriage Law); and 5. if there are no legal obstacles to the marriage.

Nurlaelawati has noted that these provisions are ambiguously worded and inconclusive as about to which of them apply for a marriage to qualify for registration through the Islamic court: one, all, or some of those conditions? She describes how judges often do not to read the provisions in a cumulative way and, for example, often register marriages concluded after 1974. Nurlaelawati is concerned that this lenient application of the marriage registration provisions works against the goal of marriage registration itself, as non-compliance can easily be repaired retroactively (Nurlaelawati 2010: 202-203). Here I will present a number of marriage registration cases from Cianjur and Bulukumba that confirm Nurlaelawati's observations concerning the non-accumulative nature of the marriage registration provisions in the Compilation of Islamic Law, and I will give insight in how the judges apply the conditions for marriage registration through the court.

9.2.1 Marriage registration in pension-related cases

Let us start with the provision which stipulates that someone may petition for a marriage registration case when he or she intends to divorce. Judges at the Islamic courts of Cianjur and Bulukumba do not interpret this provision as exclusive, and accept other reasons for marriage registration. I have witnessed several cases in which marriage registration was related to the pension rights of a widow after her husband had passed away, and hence

did not pertain to an intended court divorce.[2] Indeed, court clerks in Cianjur informed me that PT TASPEN, the pension agency for civil servants in Indonesia, only accepts court judgments as legal proof of an existing marriage in cases where the widow concerned does not possess an original marriage certificate. When the original marriage certificate has been lost, PT TASPEN does not accept duplicate marriage certificates issued by the KUA, allegedly because of the KUA's reputation for accepting bribes.

During my court room observations I noticed that the Islamic courts' application of procedure in marriage registration cases is also rather lenient, often out of sympathy with the elderly women concerned, and in view of the fact that they have outlived most of the wedding attendees and hence first-hand witnesses are hard to find. Other challenges to the judges and the elderly petitioners, who typically were unrepresented by a lawyer, were some of the petitioners' lack of knowledge of formal Indonesian; their dependence on their children during the court process; as well as their dependence on the advice and suggestions of court staff, including the judges.

The following case is an example of a lenient application of procedure in pension-related marriage registration cases. It concerned a 71 year old widow, whose husband, a teacher at an elementary school, had passed away the year before (in 2008).[3] The couple got married in 1973 and had four children, one of whom had passed away. The widow did not possess the original marriage certificate but a duplicate issued in 1982, which PT TASPEN did not accept as legal proof of the marriage. The marriage fulfilled three of the conditions for marriage registration: the marriage certificate had been lost, the legality of the marriage was in doubt, and the marriage was concluded before 1974. In the courtroom, as typical for marriage registration cases, the judges asked the widow the date she was married, who her guardian was, how much the dower (*mahr*) was, and who the two formal witnesses of the marriage had been. The court also asked whether her husband had been married to or involved with other women, in order to assess the chance of other wives emerging after the registration had been finalised. When the judges asked her who she had brought as witnesses, she replied that she brought two neighbors, one of whom was the neighborhood head (*Kepala RT*). Still, the Islamic court had some doubts about the witnesses, as neither of them had witnessed the act of marriage. As one of the judges stated to the widow: 'ideally a witness can give a testimony about the act of marriage itself.'

2 Thus, the Islamic court in Cianjur commonly accepts pension-related marriage registration cases. Interestingly, it does not accept marriage registration cases relating to inheritance claims. To me such division seems rather arbitrary as both pension and inheritance cases deal with the legal consequences of the spouse passing away.

3 Case 9/pdt.P/2009/PA.Cjr, based on the file and courtroom observations on 28 January 2010.

Nonetheless, the court decided to accept the witnesses and to proceed with the witness testimonies. Both witnesses stated that they were convinced that the widow had been married to the petitioner, and that they had four children together of which one had passed away. According to the *Kepala RT* they formed a single family living together in a single household (*sekeluarga dan serumah*), which might alleviate the judges' concerns about a polygamous marriage. In its verdict, the Islamic court argued that the testimonies of the witnesses, who were not first-hand witnesses, must be taken together with the statement of the widow and the duplicate KUA marriage certificate. In fact, the Islamic court argued that a duplicate of a marriage certificate is sufficient legal proof of a valid marriage:

> 'Considering that piece of evidence P1 is a photocopy of the duplicate marriage certificate of the petitioner and her husband […] which has been legalised and issued by the KUA in Cibeber, the Judge is convinced that the marriage between the petitioner and her husband has been concluded in the presence of, and registered by, a qualified official and fulfils the conditions and requirements of a marriage in accordance with Islamic law, as stipulated by Article 2 and 6 of the Marriage Law and Article 14 of the Compilation of Islamic law.'

Thus, an ironic situation occurs in which PT TASPEN does not accept a duplicate as legal proof and demands a court judgment, whilst in the subsequent judgment the judge accepts the same duplicate as main evidence of a valid marriage. One may be tempted to conclude that the whole court process was an unnecessary waste of time for both the petitioners and the court. However, one must not overlook an important part of the judge's inquiries in this case: through their questions they do try to assess the reliability of the marriage claim and to examine whether the marriage had been polygamous or not.

The next divorce case involves a forged duplicate of a marriage certificate. In a case originating from the Islamic court of Bulukumba[4] a woman wanted to divorce her husband because he had left her three years before after a serious fight. The husband's whereabouts were unknown and, as a consequence, the court process was conducted in the absence of the defendant. The couple married in 2000 and had a son together who was 6 years old during the court process in 2010. Since 2005 the couple had often quarrelled, allegedly because the husband drank and did not take responsibility for his son. During these quarrels the husband often became violent, as on the night before he left his family. The petitioner stated that her husband uttered the *taklik al-talak* during the marriage ceremony, and she handed over a copy of the marriage certificate as legal proof of the marriage. In his judgment, the judge found that the marriage certificate was indeed issued by the competent institution but the name on the certificate was that of another woman. It had been crossed

4 Case 43/Pdt.P/2010 PA Blk.

out and replaced by the petitioner's name. Therefore, the Court decided that the petitioner had never been married to the man concerned, and as a result her divorce case was rejected.

This case again illustrates that the Islamic court takes marriage certificates as the primary legal proof of a marriage. Since there was something wrong with the marriage certificate, the court considered that no marriage had taken place. Even though the non-married status also means a formal separation from her husband, it has legal consequences for the son, who is now considered born out of wedlock and consequently has no official relationship with his biological father (see below). It is unclear how the petitioner obtained the marriage certificate, whether she had changed the name herself, or whether another wife was in play. In Cianjur, judges told me that problems often occur regarding different spelling of names on legal identity cards, due to the sloppiness of bureaucrats and citizens. I have seen instances in which the judge simply advised the petitioner to withdraw a piece of evidence as the misspelling only complicated the court process and her divorce. In this particular case in Bulukumba, the petitioner was apparently unable to provide other convincing legal proof of the marriage, and concerns about her being an unofficial second wife were too serious. For these reasons the case was rejected.

Nonetheless, the Islamic courts do register marriages where no certificate is available at all, even when they were concluded after 1974 (see also Nurlaelawati 2010: 202-203). Thus it applies a double standard: on the one hand it considers marriage certificates as the only legal proof of a marriage, and strictly rejects problematic marriage certificates, while on the other it can be very lenient regarding witness evidence. Based on my court observations, I think it is even likely that if the petitioner in the case above had left out the falsified marriage certificate and asked for a marriage registration based on witness accounts alone, she most probably would be formally divorced by now, provided the witnesses accounts confirmed both that the marriage had been concluded according to the religious requirements of an Islamic marriage. As we will see in the next two cases, the latter issue of religious formality is a compelling reason for the Islamic court to reject the registration of sometimes long-lasting and socially recognized marriages.

9.2.2 Marriage registration cases rejected on religious grounds

Article 7(e) of the 1991 Compilation of Islamic Law states that marriages can be registered through the Court, provided there are no legal obstacles to the marriage. Based on Article 2(1) of the 1974 Marriage Law, which stipulates that a marriage must be concluded according to the religious requirements and the customs of the prospective spouses, the Islamic court typically interprets Article 7(e) to mean that marriage between Muslims must be concluded according to Islamic requirements. Thus, in marriage registration cases, the

judge typically checks whether the wife was represented by a male guardian, that is her father or another relative of his line, whether the bride's guardian made an offer (*ijab*) during the marriage ceremony, stating that he is willing to marry off the bride for a certain dower (*mahr*), whether the groom accepted this offer (*kabul*), and finally, whether the marriage was concluded in the presence of two formal Muslim, male witnesses. In most cases I witnessed in the courtroom the legal requirements were in order, at least according to the petitioners and witnesses, but I found two court files in which the registration was rejected as the marriage failed to meet the religious requirements.

The first marriage registration case[5] concerned a marriage concluded in 2001 from which one son had been born. In 2003 the husband of the 27 year old petitioner left for Malaysia to work, and since then she had had no contact with him, let alone received maintenance. She petitioned for formalisation of the marriage and a subsequent divorce at the Islamic court of Bulukumba. As she had no income of her own, she possessed a Statement of Insufficient Means (*Surat Keterangan Tidak Mampu*) from the village head and she was a registered recipient of subsidised rice under the government's RASKIN scheme (*Beras Miskin*, rice for the poor). She filed for a court fee waiver, which she was granted. It appears from her petition that according to her knowledge the marriage had fulfilled all religious requirements. No one in the family had objected, and there had been no other legal barriers to the nuptials. The village *imam* married the couple, two Muslim formal witnesses were present, the *mahr*, twenty palm trees, was offered by the groom and accepted by her guardian, her uncle. Her uncle was chosen to act as guardian as a stand-in for her father who had passed away. Unfortunately, although the witness testimonies confirmed that the couple were married, they also revealed that the uncle was the brother of the petitioner's mother and not of her father, meaning that one of the religious requirements was not fulfilled. The court then rejected the case on the ground that no Muslim marriage had taken pace .

For the woman and her son concerned, this judgment has possible legal and social consequences. First, the fact that the marriage is no longer recognized formally means that the son has no legal relationship with his biological father and therefore he would be considered born out of wedlock, which in turn bears social stigma. Second, the judgment may very well affect her prospects for remarriage. As discussed in the previous chapter, in Bulukumba an informal divorce has a stigma attached and the woman concerned did not obtain a divorce certificate. Although the court ruled her previous marriage invalid, meaning that she legally does not need a divorce certificate to remarry, the local community where she lives will probably perceive the issue differently.

5 Case 391/Pdt.G/2009/PA Blk.

In the second case,[6] the Islamic court of Bulukumba rejected a marriage registration on very similar grounds. However, in this case the *adat* practice of marriage by elopement (*kawin lari*) played a role. The petitioner was a woman, 31 years of age, who filed a marriage registration case in order to be able to formally divorce her husband. The marriage was concluded in the year 1996 in Malaysia, where both had migrated in order to find work. The couple had two sons together. In the first few years they lived happily together, but one day the petitioner asked her husband if he could help her with removing her head band (*sabuk kepala*) as she was tired after a day working in the coconut plantation. This request somehow upset her husband and he hit her. Following this incident, the marriage became problematic.

In 2007 the couple moved to Kalimantan for work. The behaviour of the husband did not improve, as he became very jealous. When the petitioner received an SMS from her cousin, he hit her and left, never to return. She returned to Bulukumba in 2010 and filed to register her marriage, in order to obtain a divorce. The marriage was never registered and thus the legal proof rested solely on the accounts of the petitioner and two witnesses. As in all marriage registration cases, the judge first inquired about the guardian, the *mahr*, and the formal witnesses. The marriage included all ingredients: a guardian, correct *mahr*, and two witnesses, but two matters were considered problematic by the court. First, according to the first witness, the guardian was not related to the petitioner. She defended herself by stating that this was because her family did not approve of the marriage. Second, both testimonies stated that the formal witnesses were Christians, not Muslims. The court rejected the case because the marriage failed to meet the religious requirements concerning the guardian and the witnesses in a marriage, and ruled the marriage invalid (*tidak sah*).

Thus on the basis of religious formality the Islamic court decided not to recognise a marriage that had lasted about 14 years and from which two sons were born. The sons consequently lack a clear legal relation with their father, which may have negative consequences regarding their legal rights. But another aspect plays a role here: it appears that the couple married without their parents' permission. As we have seen in Chapter 8, marriage by elopement (*kawin lari*) was traditionally a permissible but dangerous custom in South Sulawesi, for which the *adat* had developed means of reconciliation (see also Idrus 2003: 124-132). By insisting on the presence of a guardian, the Islamic court rules out cases in which no male relative in the father's line wants to become guardian of the wife. The only option left in such cases is to file a request at the Islamic court to marry under a guardian appointed by the court (*wali hakim*). This formal trajectory probably forms an additional barrier to those who intend to elope. In this way, the Islamic court complicates the

6 Case 72/Pdt.G/2010/PA Blk.

possibility of retroactive registration of marriages by elopement in cases were parents do not agree. Hence, it works both against the modern norm to choose your own spouse, and the old traditional *adat* norm of *kawin lari*.[7]

9.2.3 Marriage registration in polygamy cases

Before the 1974 Marriage Law came into force, polygamous marriages did not require permission of the Islamic court. Marriages, including polygamous ones, had to be registered, but registration was considered an administrative duty only, not a requirement for a valid marriage. Hence, when a widow petitions for marriage registration in a pension-related case, the Islamic court is very cautious about the possibility of other wives. In the previous cases, the judges typically asked the petitioner and two witnesses whether or not the husband concerned had been married to or involved with another woman.

Nonetheless, polygamous marriages concluded before 1974 can still be registered through the Islamic court, as the next case illustrates.[8] A 78 years old widow explained to the court that she had been married to a civil servant since 1956, and her husband had recently passed away. At the time of marriage the civil servant had been married to another woman, but according to the petitioner the first wife did not object to her husband's polygamous marriage with her. Moreover, she emphasized that her husband's first wife was infertile, thus providing social legitimacy to her polygamous marriage. The two witnesses, one of whom was still a minor at the time of the marriage, had both attended the ceremony and confirmed the widow's story. There was no formal legal proof of the second marriage other than the addition of her name to the original marriage certificate by the current village head. In the end, the Islamic court registered the marriage based on the testimonies of the witnesses and the petitioner herself.

As in most cases, the judges took a very lenient stance concerning witness accounts, making full use of their discretion in establishing the trustworthiness of the testimonies of the petitioner and her witnesses. The judges explained to me after the hearing that they felt they had to be lenient out of consideration for the conditions at the time of the marriage and the age of the petitioner, and they believed they were able to assess whether the petitioners and the witnesses were telling the truth in most cases. One must take into account that prior to 1974 there were few legal regulations concerning polygamy and

7 Judges in Bulukumba told to me another way to marry against the will of parents; by revealing that the appropriate boundaries of an extra-marital relationship have been transgressed. Thus, a couple present the parents the option to prevent a scandal by giving permission to marry. In this way, young people may also circumvent impossibly high *mahr* demands by the parents of the prospective bride.

8 Case 25/Pdt.P/2009/PA.Cjr, of which I observed a court hearing in the Islamic court of Cianjur on 10-2-2009.

therefore second, third and fourth wives have equal rights to marriage registration and pension as the first wife.

The situation is different for marriages concluded after the 1974 Marriage Law came into force. The Islamic court generally does not accept marriage registration cases concerning polygamous marriages concluded after 1974. The judges told me that since such marriages require prior court permission, retroactive registration would infringe upon the legal conditions for polygamous marriages in the Marriage Law. As a matter of fact, there is Supreme Court case law on the matter. In a case originating in the district of Tanjungkarang, Bandar Lampung, Sumatra, the first-instance Islamic court had validated a polygamous second marriage in 1994 on the grounds that it fulfilled the religious requirements of a Muslim marriage. The appellate Islamic high court overturned the judgment, because court permission is required for a polygamous marriage. The Supreme Court ruled in cassation that the legal argument of the Islamic high court was correct in this matter (Zein 2004: 30-46). In 2007[9] the Constitutional Court also sustained the restrictions on polygamy in the Marriage Law, stemming potential legal changes in this regard (Butt 2010).

The next case[10] illustrates a a very similar stance of the Islamic court of Cianjur regarding registration of polygamous marriages concluded after 1974. During the first hearing, the judge asked the petitioner, a man of 54 years old, to elucidate why he petitioned for a marriage registration case. The man explained that his second wife had passed away and that he wanted to register their marriage retroactively in view of their children's rights. The judge then asked whether the second marriage had been registered, which was not the case. Subsequently, the judge asked him about the first wife. The man responded that he was still married to her, and had children with her too. The judges deliberated with each other briefly, then responded with the advice to withdraw the case: 'you have to bring your first wife and children to the court first. It concerns the rights of the first wife and her children as well. You may proceed with this case, but there is a considerable chance that the registration of the marriage will be rejected.' In the end the man decided to follow the judge's advice, and withdrew his case.

The judge was clear that registration of a second marriage stood no chance in court, and that the only means he had to formally arrange the rights of his second wife's children was to come to the court with his first wife and children in order to come to an agreement. At that time, in 2009, an informal polygamous marriage meant that the children resulting from that marriage had only a formal civil relationship with the mother, not the father.[11] The follow-

9 Constitutional Court Case 12/PUU-V/2007.

10 Case 33/Pdt.P/2009/PA.Cjr, of which I observed the court hearing at the Islamic court of Cianjur on 10-2-2009.

11 Article 43(1) of the 1974 Marriage Law.

ing judgment by the Constitutional Court may have changed this legal situation.

9.2.4 Constitutional Court judgment on children born out of wedlock

In a high-profile case[12] petitioned by pop singer Machica Mochtar and her son, and involving a former State Secretary, the Constitutional Court ruled in 2012 that Article 43 (1) of the Marriage Law, which states that a child born out of wedlock has a legal relationship with the mother only, contravenes the rights of children to protection and equal treatment before the law, as stated in Article 28B(2) and Article 28D(1) of the Constitution. In its judgment the Court did not subsequently invalidate Article 43(1) based on a breach of the Constitution – which is the normal procedure – but offered, and ordered, the following revision of its content: 'a child born out of wedlock has a formal civil relationship with the mother and the mother's family, as well as with the man who is his or her father, and the father's family, when his or her blood relationship can be proven with scientific and technological evidence and or other legal proof.'

The judgment's effects are still pending awaiting its implementation by the Indonesian government. However, the Constitutional Court's judgment can be interpreted to imply that, provided the mother can legally prove that a man is her child's biological father, this legal status of father has the same implications as that of a father whose children were born in wedlock. This could mean that his children have support and inheritance rights (see Cammack, Bedner & Huis forthcoming).

The Indonesian *Ulama* Council (Majelis *Ulama* Indonesia/MUI) immediately rejected the idea that children's rights automatically flow from a natural blood relationship with the biological father, no matter whether born in or out of wedlock, as this conflicts with Islamic doctrine on the matter. The MUI issued a legal opinion (*fatwa*) to this extent, but it recognized the duty of the biological father to provide maintenance.[13] It is important to note that the MUI's *fatwa* only concerned children born out of 'adulterous relationships' (*anak zina*), whereas the Constitutional Court case was based on a case in which a child was born out of an informal marriage.

The content of the MUI *fatwa* is remarkably moderate, even if it strongly rejected the Constitutional Court's judgment that a civil father-child relationship can occur out of wedlock. The MUI does not object to a government regulation which put an obligation on a father to provide maintenance for his biological children *per se,* even when it concerns a child born out of an

12 Constitutional Court case 46/PUU-VIII/2010, decided on 13 February 2012.

13 Fatwa Majelis *Ulama* 11/2012 *Tentang Kedudukan Anak Hasil Zina dan Perlakuan Terhadapnya* (*fatwa* concerning the status of children born out of wedlock and their treatment).

adulterous relationship. The MUI even recommends the Indonesian Government to regulate the maintenance obligations of fathers, up to the inclusion of biological children in the will (*wasiat wajibah*). The main difference between the MUI's opinion and the judgment of the Constitutional Court is that according to the MUI, these obligations should be imposed as a penalty (*hukuman ta'zir*) for adulterous behaviour rather than be a natural right automatically flowing from the biological relationship between the father and child. In this way, such obligations will not infringe on clear Islamic prescriptions concerning blood relationships. The MUI even views these 'penalties' as part of the duty of the government to protect children rights, and uses the word obligatory (*wajib*) in this respect.[14]

The Constitutional Court judgment has another potentially major consequence, one which received much attention from neither the MUI nor the media. In my view, the judgment may undo some of the legal consequences concerning the restrictions on polygamy in the Marriage Law. The legal and financial result of unregistered polygamous marriage will be less profound for the family of an unregistered second wife when the rights of biological children are fully recognized. Hence, the right of the biological children from the father's informal relations will often be opposed to the rights of the formal wife and children, increasing the tensions within the family when the father is found to have a second wife, or a lover.

9.3 Disobedient wife, or irresponsible husband? Grievances in the courtroom

An analysis of the court files of the Islamic courts of Cianjur and Bulukumba reveals that the judge primarily decides divorces based on the divorce ground of continuous strife of Article 19(f) of the 1975 Government Regulation on the Implementation of the Marriage Law (see 4.4.2). In Cianjur, all 73 divorce judgments I collected, consisting of 48 husband-petitioned *talak* divorces and 25 wife-petitioned *gugat cerai* divorces, were based on this divorce ground.[15] In Bulukumba the picture is similar. Of the 43 divorce cases I collected in Bulukuma, only three were based on the divorce ground in Article 19(b), that one of the parties left the other for more than two years without notice. All other 40 cases, 20 *talak* divorce and 23 *gugat cerai* cases were based on Article 19(f).

14 See provision 2(5 and 6) and provision 3(3) of Fatwa 11/2012.

15 During my fieldwork I primarily collected court files in which the petitioner made claims pertaining to post-divorce rights. Typically, only in *talak* divorces can a wife claim *nafkah iddah* (spousal maintenance during the waiting period) and most commonly the right to *nafkah iddah* is not recognized by the judge in *gugat cerai* cases. As a result, I possess a relatively large number of *talak* divorce files.

However, as already discussed in Chapters 6 and 8, Article 19(f) tends to conceal other reasons behind the divorce and the respondents in the divorce surveys in Cianjur and Bulukumba mentioned many other reasons to divorce, including polygamy and economic reasons. Close reading of divorce court files reveals the genuine grievances between spouses as aired in the courtroom. Those grievances are captured in Table 9. Most frequently, a single spouse puts forward multiple grievances, resulting in a total number of grievances that exceeds the total number of files.

A close reading of court files does not necessarily reveal the actual reasons for divorce, but much more the strategies the litigants employed in playing up the norms in society concerning moral behaviour of a husband and wife (cf. Peletz 2003: 128-129). We must be careful not to take the grievances presented for granted, as it is well possible that one party to the dispute simply intended to make his or her case stronger by exaggerating, or even making up, negative behaviour of the other spouse. As I have observed, especially when custody, maintenance and marital property issues are involved the parties tend to turn to a mudslinging strategy accusing each other of immoral behaviour. Nonetheless, I do believe that the figures below can teach us a great deal about what underlies the judgments based on marital strife.

Table 9. Grievances and divorce reasons of the spouse as included in the court files

		Cianjur (N=73 files)		Bulukumba (N=43 files)	
		My husband:	My wife:	My husband:	My wife:
1	Disobedient/not performing duties	1 (1.4%)	27 (37%)		4 (9.3%)
2	Does not pray	1 (1.4%)			1 (2.3%)
3	Leaves house without permission		8 (11%)	1 (2.3%)	7 (16.3%)
4	Debts		2 (2.7%)	1 (2.3%)	4 (9.3%)
5	Lack of maintenance	19 (26%)		11 (25.6%)	
6	Adultery	6 (8.2%)	8 (11%)	5 (11.6%)	1 (2.3%)
7	Domestic Violence	12 (16.4%)	1 (1.4%)	13 (30.2%)	
8	Transgressed *taklik al-talak*			13 (30.2%)	
9	Does not want to live with parents-in-law			2 (4.7%)	3 (7.0%)
11	Jealous	3 (4.1%)	9 (12.3%)	3 (7.0%)	3 (7.0%)
12	Does not want to have sex	2 (2.7%)			1 (2.3%)
13	Sent away by parents-in-law	2 (2.7%)		3 (7.0%)	2 (4.7%)
14	Migrated elsewhere to work	4 (5.5%)	10 (13.7%)	5 (11.6%)	2 (4.7%)
15	Entered/intends to enter a polygamous marriage	22 (30.1%)		8 (18.6%)	
16	Does not respect parents-in-law			1 (2.3%)	3 (7.0%)
17	Drinks	2 (2.7%)		3 (7.0%)	
18	Materialistic		7 (9.6%)	1 (2.3%)	4 (9.3%)
19	Gambles	1 (1.4%)		2 (4.7%)	
20	Arranged marriage				4 (9.3%)

		Cianjur (N=73 files)		Bulukumba (N=43 files)	
		My husband:	My wife:	My husband:	My wife:
21	Impotence	1 (1.4%)		1 (2.3%)	
22	Maintenance for the first wife				1 (2.3%)
23	No offspring		2 (2.7%)		1 (2.3%)
24	Slander/ does not protect honor		2 (2.7%)		3 (7.0%)
25	Informal divorce	22 (30.1%)			
26	Did not marry 'the right one' (*jodoh*)	10 (13.7%)	10 (13.7%)		
27	Does not want to live near ex		1 (1.4%)		
28	Goes out at night	1 (1.4%)			
29	Is not assertive enough	1 (1.4%)			
30	Apostacy	1 (1.4%)			
31	Does not treat well children of earlier marriage		1 (1.4%)		
32	Does not want to have children yet	1 (1.4%)			
33	Is sentenced to prison	1 (1.4%)			

If we look at the top five complaints divided by sex and district, the following picture appears. To start with the top five grievances forwarded by men in Cianjur about their wives: disobedience tops the list with 37 percent, followed by did not marry the right one (*bukan jodoh*; 13.7 percent), my wife migrated to work (13.7 percent), my wife is overtly jealous (12.3 percent), and finally, *ex aequo*, adultery and leaving the house without permission (both 11 percent). In Bulukumba the picture is slightly different, as no single grievance stands out as much. Leaving the house without permission tops the list of the husbands' grievances in Bulukumba with 16.7 percent. This is followed by disobedience, materialistic behaviour, incurring debts, and arranged marriage completing the top five, all with 9.3 percent.

The concept '*jodoh*', mentioned by 10 men in Cianjur, is not mentioned at all by men in the Bulukumba files. This is remarkable, since Idrus in her anthropology of Bugis marriage has stressed the importance of this concept in South Sulawesi (Idrus 2003: 67-69). Another difference is a significant lower number of grievances related to the wife's labor migration in Bulukumba (4.7 percent) than in Cianjur (13.7 percent). Indeed, in Cianjur women more often migrate to work abroad than men, whereas in Bulukumba it is men or whole families do so more often.[16] Whereas migrants from Cianjur primarily take

16 According to data of the Office of the Working Force and Transmigration (*Dinas Tenaga kerja dan Transmigrasi/Disnakertrans*) in 2012, 6591 of the migrant workers in Cianjur were women and 1911 men. http://www.bnp2tki.go.id/statistik-penempatan/6779-penempatan-berdasar-daerah-asal-kotakabupaten-2011-2012.html.
In South Sulawesi 1,045 of the migrant workers were women, and 2,356 men http://bppkbsulsel.files.wordpress.com/2011/04/data-statistik-gender-tahun-2009.pdf.

jobs as domestic workers in the Arabian Peninsula, most workers in South Sulawesi work in the plantations of Malaysia.[17]

Let us now turn to women and the top five grievances they put forward about their husbands during the court process. Beginning with Cianjur, two grievances stand out. Most women complained about the fact that their husband had married, or intended to marry, another woman (30.1 percent), or put forward that their husband had already informally divorced them (again 30.1 percent). These two main reasons were followed by lack of maintenance (26 percent), domestic violence (16.4 percent), and finally, not *jodoh* (13.7 percent). By comparison, in Bulukumba the top five is as follows: transgressing the *taklik al-talak* (30.2 percent), domestic violence (30.2 percent), lack of maintenance (25.6 percent) her husband had entered, or had the intention to enter a polygamous marriage with another woman (18.6 percent), adultery and migration (both 11.6 percent).

The differences between the two districts are striking. In Cianjur, an out-of-court *talak* divorce is one of the main grievances put forward by women, whereas in Bulukumba, I did not find any out-of-court divorce grievance in the court files. It is true that in some cases, as in Cianjur, Bulukumba men returned their wife to their parents-in-law, but apparently the social meaning of this act differs between the two regions. The act of returning the wife to the parents is considered in Cianjur to constitute a socially acceptable divorce in itself, in Bulukumba it seems to suggest an intention to divorce only. This absence of out-of-court divorce is an important difference, because it means that, unlike women in Cianjur, the women who are returned to their parents in Bulukumba are considered still married and not marriageable.

Another striking difference is that women in Bulukumba put forward their husband's breach of *taklik al-talak* as grievance and proof of their broken marriage, whereas in Cianjur *taklik al-talak* was absent from the court files. A third difference is the absence of the concept of *jodoh* in Bulukumba (in Cianjur 13.2 percent), as already signalled in the male-petitioned cases. The fourth difference is the relatively high amount of domestic violence-related grievances in Bulukumba (30.2 as compared to 16.4 percent). It is unclear why the number of domestic violence-related grievances is high in South Sulawesi, but perhaps they are related to the strong emphasis on the protection of *masiri* (honor) in the region (see Idrus 2003).

The analysis of the court files above allows us to make some generalizations regarding the strategies employed by men and women in the court room. In the courtrooms of both Cianjur and Bulukumba, a significant number of husbands who are in the process of both *talak* and *gugat cerai* divorces depicted their wife as disobedient and leaving the house at will. These men clearly

17 In 2010, 81 percent of the Migrant Workers originating in South Sulawesi worked in Malaysia. See http://bppkbsulsel.files.wordpress.com/2011/04/data-statistik-gender-tahun-2009.pdf.

appeal to their position as head of the family and to the ideal of a humble, subservient wife. Wives also appeal to their husband's position as head of the family, but in rather different ways. They stress that leadership comes with responsibilities and they consider a lack of success in providing for the family, fooling around with other women, and violent behaviour as proof of their husband not doing a good job as a man. In Bulukumba this seems to be more the case than in Cianjur. In Cianjur women more often display acceptance of their fate: 'we were just not meant to be.'

The negative images men and women give of their spouses in divorce cases imply that they have a certain, ideal type of wife or husband in mind. It is possible to depict this ideal by replacing the negative traits with their antonyms. An ideal wife emerges who is obedient, does not leave the house without prior notice, is not too materialistic and not too jealous. The ideal husband provides sufficient income, is not violent towards his wife, and does not wish to marry anyone else. In Bulukumba a good relationship with parents-in-law seems to be of greatest importance, whilst in Cianjur it is essential that the spouses are convinced they were made for each other.

9.4 Broken marriage

Although the importance of *jodoh* may vary in the courtroom, the lack of 'love' and 'affection', plays a central role in the legal justification of the judge in divorce cases. Both the Islamic courts of Cianjur and Bulukumba typically argue, based on Article 3 of the Compilation of Islamic Law, that a marriage must be based on peace, love and compassion (*sakinah, mawaddah, warahmah*). When these ingredients are lacking the marriage must be considered broken (*pecah*). In practice, no matter whether the wife or the husband petitions the divorce, the judge will grant the divorce if the petitioner is determined to end the marriage. Such determination is typically considered sufficient proof that the marriage is broken. For instance, the Islamic court of Cianjur concluded in a *gugat cerai* case that the fact that the court could not convince the petitioner to withdraw the case was a strong indication that the goal of a peaceful, loving and compassionate marriage had not been achieved, and that the marriage was broken.[18]

In fact, the Supreme Court argued in a judgment of 18 June 1997 that 'if the hearts of the two parties are already broken, the marriage cannot be repaired when [only] one of the parties wants to heal the marriage, because when the marriage is continued, the [other] party who wants to break up the

18 Case 357/Pdt.G/2007/PA Cjr.

marriage will do anything possible to undermine the marriage.'[19] In a similar manner the Islamic court in Cianjur argued in a divorce case petitioned by the wife in which the husband did not agree to the divorce,[20] that a divorce petition in itself is a strong indication of a broken marriage:

> 'Considering that […], the essential goals of marriage such as prescribed by the sharia and the abovementioned legal provisions, can only be accomplished when the two parties, husband and wife, stand together to create and maintain them. Hence, when it appears that one of the spouses, or both, have the desire to divorce, than maintaining such marriage (*rumah tangga*) will be a work without end (*pekerjaan sia-sia*) and without avail. That is why divorce will bring more advantages (*maslahat*) than disadvantages (*mafsadat*) to them.'

As a result of this lenient application of the formal divorce grounds in the Marriage Law, cases in which the court rejects a petition for divorce are scarce. The next case is such an atypical case.[21] Its analysis serves as an indication of how extreme the circumstances must be before the Islamic court rejects a divorce case.

9.4.1 The case in which the petitioner was terminally ill

The petitioner was a man of 89 years old who, as a local businessman and founder of two Islamic institutions, was a wealthy and influential man in Bulukumba. The entire case was handled by his legal representative, as the petitioner was too ill to appear in court in person. The defendant, a woman of 35 years old with only senior high school education, defended herself in court, and did remarkably well. On 12 January 2010, the petition for a *talak* divorce was send to the Islamic court of Bulukumba. The petition, however, puts forward the most common claims in *talak* divorce cases.

The petitioner married the defendant in 1986,[22] and a daughter was born out of the marriage. Since January 2009 the marriage had been unstable (*goyah*), and as a consequence quarrels and disagreements frequently occurred. The disagreements concerned the defendant's tendency to leave the home without her husband's prior consent and neglect of her marital duties. In November the quarrels reached the snapping point when the defendant refused to listen to any advice, left the home without permission from her husband and his family and did not return. As a result the couple had lived separated for two

19 Supreme Court judgment 534/K/AG/1996 as cited in the judgment of the Islamic High Court of Makassar 113/Pdt.G/2009/PTA.Mks concerning the judgment of the Islamic court of Bulukumba 63/Pdt.G/PA.Blk of 30 June 2009.

20 Islamic court of Cianjur, Case 98/Pdt.G/2007/PA Cjr.

21 Islamic court of Bulukumba, Case 18/Pdt.G/2010/PA.Blk.

22 It means that she married at the age of 12 and still obtained a marriage certificate.

months. The attitude and acts of the defendant had caused physical and psychological harm to the petitioner (*mengakibatkan pemohon menderita lahir dan batin*) and therefore the petitioner had come to the conclusion that the marriage was already broken (*pecah*) and could not be repaired.

The divorce petition was based on the legal ground of continuous strife allegedly caused by the wife's disobedience, such as leaving their home without notice, neglecting her marital duties and refusing to take her husband's advice. Up to this point the case is a very common one. The defendant's first step, however, was rather exceptional: before starting with her response (*jawaban*), the unrepresented defendant took exception (*eksepsi*). The exception was based on the weak physical and psychological condition of the petitioner, which according to the defendant made the power of attorney he had signed dubious (*di luar akal sehat*). The petitioner's lawyer responded that the exception had to be rejected (*dikesampingkan*), as his client's physical condition did not reduce his right to legal representation and his right to perform legal acts. The lawyer stated that the power of attorney was in order, as it was signed with the petitioner's fingerprint, legalised by a notary, and subsequently listed at the Islamic court. The reply (*replik*) of the defendant held that the power of attorney concerned was contrary to the meaning and purpose of Article 1320 of the Civil Code (KUHP), which requires that a person must be capable (*cakap*) to perform legal acts. The defendant considered the fact that the petitioner, someone who is educated and has an autograph, used a fingerprint to sign as proof of the lawyer's deceit (*rekayasa*) and bad faith (*itikad buruk*), revealing his intention to take control of the possessions of the petitioner at the expense of the defendant. The court argued that the issue of the fingerprint alone was insufficient proof of the alleged deceit and that therefore the exception was rejected.

Hence, the *talak* divorce case was accepted and the court process could proceed. The defendant presented her response, which can be summarized as follows. The defendant claimed she had not been disobedient, always took care of her husband, and nursed him when he fell ill. She never left the house with the intention to leave her husband, but was locked out by her own daughter and son-in-law, who lived in the same house with the petitioner and defendant. She made the accusation that the entire case was based on the bad faith (the defendant used the Dutch term *kwader trouw*) of her own family and in-laws, who were attempting to control her husband's entire estate. She claimed that they had even threatened to kill her.

Both parties brought witnesses to the court. Based on these witness accounts, the court tried to unravel three issues: whether the defendant had neglected her duties, whether one could speak of marital strife between the petitioner and the defendant, and whether the defendant had left the petitioner or was locked out. Concerning the first issue of neglect of marital duties, the court considered the claim that the wife frequently left her home in the evening proven by witness accounts. However, since she always returned to take care

of her ill husband, this fact was not considered to constitute neglect of her husband. Hence, in fact, the court ruled that leaving the home without permission can be permissible behaviour for a wife, and in itself does not necessarily render a wife legally disobedient (*nusyuz*).

Concerning the claim of continuous strife, according to all witness accounts the petitioner lost his capacity to talk prior to 2009, the date when the alleged quarrels started. The court argued that since the petitioner's condition was such that he was unable to talk, he had to be considered unable to quarrel as well. As a consequence, the court considered the claim of continuous strife unproven. That left the petitioner with the third issue of the defendant leaving her husband. The court considered the defendant's claim that she was locked out to be proven by the witness accounts. Moreover, her daughter and son-in-law had moved the petitioner to the home of the defendant's son-in-law, and therefore the current separation between the petitioner and defendant could not be attributed to the defendant, who, moreover, had declared her readiness to take care of her ill husband. Consequently, this separation did not constitute a reason for divorce. Hence, all three claims were rejected by the court. The court argued that none of the legal divorce grounds had been met, and that therefore the *talak* divorce petition was rejected. The defendant won the case.

The case is extremely atypical, and not only because the divorce was rejected, or because of the petitioner' age. The case, a very complicated one, had been won by a woman with only high school education, defending herself against powerful in-laws and an educated lawyer. Although it is likely that she received legal advice, considering her use of Dutch legal terms and knowledge of the procedural possibility of taking exception, it still is striking that she managed to prevent a divorce.

9.4.2 No-fault divorce

In cases based on continuous strife, it is difficult to establish who is at fault. Moreover, Supreme Court case law has changed virtually all 'continuous strife' divorces into no-fault rulings. Professor Abdul Manan, Supreme Court judge of the Islamic court chamber,[23] contends that the Supreme Court has effectively replaced the legal divorce grounds of the 1975 Government Regulation on the Implementation of the Marriage Law and of the 1991 Compilation of Islamic Law with a single concept: broken marriage. He explained to me that: 'hence, in my view there are no longer legal [divorce] grounds like those listed in Article 19. One legal ground is enough: *broken marriage* (he used the English term).' In such cases the judge ought not to decide who is at fault: 'the

23 Interview with Judge Abdul Manan, Supreme Court, Jakarta, 11 August 2011.

Supreme Court has ruled that the judge must not decide who is at fault, but only establish that the marriage is broken (*pecah*) – *broken marriage*.'

According to judge Abdul Manan, as a standard (*patokan*) the Islamic courts look at five criteria. First, they examines whether there has been a (failed) attempt to reconcile the spouses. Second, whether the spouses live separately. Judge Abdul Manan stated that contrary to what is stated in the 1974 Marriage Law and the standard *taklik al-talak* (see Chapter 3), a three-month separation suffices:

> 'according to case law of the Supreme Court three months is enough, three months living separated, a three months minimum – I mean. Thus, although the law stipulates two years, three months is enough.'

The other criteria judge Abdul Manan mentioned were: third, good communication between the spouses no longer exists; fourth, the spouses are neglecting their duties as wife and husband, and do not provide maintenance or affection; and fifth, inappropriate relationships are at play. By silently introducing the concept of broken marriage as the central divorce ground, the Supreme Court has significantly changed the rules of the game in judicial divorce processes.

There are handful of Supreme Court judgments laying the groundwork for the 'broken marriage' principle in Article 19(f) divorces. The earliest I could find dates from 5 October 1991.[24] In a critical paper on the disadvantages of no-fault divorces published on the website of the Islamic chamber of the Supteme Court, Muh Irfan Husaeni, judge of the Islamic court of Painan, provides a solid analysis of this case, which can be summarized as follows.[25]

The case originated from the Islamic court of Pariaman, West Sumatra, which in 1989 decided to grant a *talak* divorce. The petitioner claimed that there was continuous strife caused by the unfounded jealousy of his wife. In 1987 she left the house taking her belongings with her and did not return. The defendant claimed that she fled the house as her husband had threatened and hit her. As she considered herself not at fault in leaving her husband, she made a counterclaim demanding child support, due maintenance, expenses for medical treatment, spousal support during the *iddah*-waiting period and the consolation gift of *mut'ah*. The court argued that the defendant had been *nusyuz* as she had demonstrated her bad intentions by taking her belongings with her when she left, and it rejected her counterclaim. Permission for a *talak* divorce was granted. In appeal, the Islamic high court of Padang argued that the husband's behaviour was the cause of his wife leaving, and that as a result

24 Supreme Court case 38/K/AG/1990.

25 I base my analysis of this case on Muh Irfan Husaeni's paper: 'No Fault Divorce dalam Perkara Perceraian di Pengadilan Agama. (Menyoal kalimat "…maka tidak perlu lagi dipertimbangkan siapa yang bersalah …" Sebuah kajian akademik)', published online on 30 December 2011, http://badilag.net/artikel/9354-no-fault-divorce-dalam-perkara-perceraian-di-pengadilan-agama-oleh-muh-irfan-husaeni-sag-msi--3012.html.

she should not be considered *nusyuz*. Moreover, the Islamic high court argued that since the petitioner himself was the cause of the continuous strife, he could not base the divorce case on this ground, and therefore his petition ought to be rejected. What ought to happen was a *syiqaq* divorce in which two family members as representatives of each party (*hakam*) tried to work out a solution.

The petitioner took the case to appeal in cassation, as according to him the high court had failed to apply the law correctly. First, he argued, the Islamic high court had not recognized the defendant's confession or witness accounts about the continuous strife. Furthermore, it had neglected the fact that the defendant's claim of threats and maltreatment by the petitioner lacked evidence. Finally, the high court's argument that the petitioner's own behaviour was the cause of the continuous strife and therefore could not be the basis of his divorce case was erroneous.

The Supreme Court agreed that the law was not applied correctly by the Islamic high court of Padang, but mainly because the high court had tried to establish who was at fault (*siapa yang salah*). It considered that it is sufficient in cases based on Article 19(f) to establish the occurrence of continuous strife within the marriage. It argued that it is not appropriate (*patut*) to hold one of the parties responsible for the marriage falling apart (*pecahnya perkawinan*), as this may be expected to have a negative impact on the relation between the two parties and on their children. Subsequently, it overturned the judgment of the high court of Padang and decided *ex officio* to grant the petitioner the *talak* divorce, to award the defendant spousal support during the *iddah*, and to put the obligation on the petitioner to provide child support until his child is a legal adult.

Ever since, Article 19(f) divorces have been increasingly treated as no-fault divorces based on the concept of 'broken marriage.' The concern judge Muh Irfan Husaeni forwarded in his paper was that by insisting that all Article 19(f) divorces must be considered no-fault divorces, the Supreme Court totally disregards the feelings of the spouse who is abandoned, the wife and children who have not been taken care of, victims of domestic violence, and wives who find out that their husband informally married another woman. According to him, a ruling 'without establishing who was at fault' does not reflect the feelings of justice in society concerning such cases. As a result, the Islamic court turns into a divorce registration office (*kantor isbath cerai*).

I agree with the observation of judge Husaeni that Islamic courts have been turned into divorce registration offices. In fact that is their main function and the one they are best at. We have also seen above that in exceptional cases the courts do reject a divorce suit and not only on procedural grounds. Moreover, if post-divorce rights are part of the claim or counterclaim, the Islamic court still plays its true role of judge. In those cases the issue of fault becomes relevant again and especially the concept of disobedience (*nusyuz*).

9.5 The narrowing limits of disobedience (*nusyuz*)

9.5.1 *Nusyuz* in *talak* cases

Another consequence of the no-fault divorce judgment is that the legal consequences of the wife's disobedience have been limited, as in most cases the court no longer establishes who is at fault. In the previous section we have also seen how the Supreme Court did not consider the wife's act of leaving the house as an act of disobedience in itself, but as a matter that has to be viewed in the whole context of the marriage concerned. The Supreme Court judgment of 18 June 1997[26] is more specific and rules that it is neither necessary to establish who caused the quarrels, nor to establish which spouse left the other. This contradicts traditional *fiqh,* as a wife leaving the house was traditionally considered a clear case of *nusyuz*.

During my field research I was particularly interested in post-divorce rights and as a result, I have collected mainly divorce cases, which include a counterclaim by the wife. I have found that, provided administrative and procedural requirements were in order, the Islamic courts usually granted spousal support and *mut'ah* claim in *talak* divorces, even if the husband and his witnesses accused the wife of disobedient behaviour, and sometimes even in cases where the wife was absent from the court process. One may conclude that in *talak* divorce cases, the Islamic court in Cianjur and Bulukumba will only consider the wife to have been *nusyuz* in extreme cases.

In fact, the next case[27] is the only example of all *talak* cases I possess, in which the judge established the wife's behaviour to be *nusyuz*. The petitioner was a police officer who requested permission to divorce his wife, a primary school teacher. The couple was married in 2002 and had a daughter together. When the petitioner was sent on duty to Bulukumba, his wife did not feel comfortable there and returned to her previous job in Bone. This caused tension, which increased when the wife accused her husband of adultery. Ironically, she was herself caught with another man. According to a witness account, the petitioner had discovered the presence of a man in the defendant's house and organized a raid in which he, the petitioner, and four others participated. They forced the door and found the defendant wearing only a sarong in the company of a man wearing only a towel. The defendant and the man concerned were brought to the police, where they signed a confession of adultery.

The defendant responded that she had signed the statement because she was pressured to do so and that the man concerned in fact was a relative (third cousin) and a colleague. He had accompanied her to work, and then to visit

26 Supreme Court judgment 534/K/AG/1996.

27 Case 75/Pdt.G/2009/PA.Blk, decided by the Islamic court of Bulukumba on 16 November 2009.

her sick grandmother, and during the raid had happened to take a bath. The petitioner denied all of this, as he had never seen the man before. The defendant subsequently replied that she did not want a divorce, but since the petitioner insisted, she made a counterclaim consisting of *mut'ah*, spousal support during the *iddah*, due maintenance, custody over her child, child support, and her dower. The petitioner responded that he was willing to provide child support and to hand over the dower, a cacao garden near his parent's house, but not to pay any maintenance to his wife as he claimed that she had been *nusyuz*. Furthermore, the petitioner insisted that he – not the defendant – should obtain custody over their daughter. The court granted the divorce as the marriage obviously was broken. Additionally, the court did consider the fact that the defendant was found half-naked with another man, while insufficient proof of adultery, was sufficient proof of *nusyuz.* As a consequence, the court rejected the defendant's claims concerning due maintenance, spousal support during the *iddah*, and *mut'ah*, and she lost her rights to these.

That brings us to the final issue of custody. The court considered that the defendant was a good mother (*ibu yang baik*) as there had been no indication that she would neglect her child. In view of the young age of the child and the provisions in the Compilation of Islamic Law concerning children below the age of twelve years, the court granted custody of the child to the defendant, without diminishing the right of the father to have the opportunity to show his affection (*menyalurkan kasih sayangnya*) towards her. Finally, child support was granted by the court, and set rather high at Rp 700,000 per month, considering the petitioner had stated that he was only willing to pay Rp 200,000, while the defendant had demanded Rp 750,000. However, the court argued that it was a reasonable sum considering the petitioner was a policeman with a stable income.

The case above illustrates that in an extreme case the Islamic court of Bulukumba did establish a wife to have been *nusyuz* and as a consequence she lost some of her post-divorce rights in a *talak* divorce. However, the case also indicates that the court does not automatically consider women who are caught with another man to be bad mothers; it just makes them *nusyuz*. Yet again, the judges took the whole context in which the disobedience occurred into account when they decided to grant a *nusyuz* wife custody over her child.

9.5.2 *Nusyuz* in *gugat cerai* cases

The legal position of the wife is different in wife-petitioned cases. In these *gugat cerai* cases women do not have spousal support rights at all, and as a result spousal support claims are generally absent. However, recent changes in legal doctrine may have increased the rights of women in female-petitioned divorces, and once again *nusyuz* is the central concept. I must confess that in the first instance Islamic courts of Cianjur and Bulukumba I did not find any *gugat*

cerai cases in which the petitioner was granted spousal support. However, in an interview with the head of the Islamic high court of Makassar, Judge Dr. H. M. Hasan Muhammad,[28] I presented an example of just such a case, which originated in the Islamic high court of Surabaya[29] and asked his opinion. To my surprise, he pointed out to me that only recently the higher echelons of the Islamic court had reached a consensus about this issue, meaning that under certain conditions women do not lose their rights on *mut 'ah* and spousal support in *gugat cerai* cases. Judge Hasan Muhamad explained that:

> 'the judges that participated in the seminar agreed that, even though it concerns *gugat cerai*, if the conditions in the case are such, we will still impose an obligation for the husband to provide spousal support during the waiting period, *mut'ah*, clothing (*kiswah*) and housing (*maskan*).'

He explained that the participants in the seminars were judges and clerks on the level of the Islamic high court, and admitted that the new doctrine had not yet penetrated to the first instance Islamic courts. However, he was a strong supporter: 'I have personally done so [adjudicated such a case], although the petitioner had not claimed it in her petition, we sentenced the husband to provide *mut'ah*, *kiswah* and the like.' He illustrated the conditions under which the wife may keep these rights:

> 'If the legal ground is marital strife we look at who caused the strife. If the cause of marital strife is the oppression (*tekanan tekanan*) of the husband – then we will act. The same goes for maltreatment, like hitting, lack of household money or maintenance, marrying again. That is a different kind of marital strife than when the wife is adulterous or leaves the home too often. […] The clearest case is when the cause is domestic violence towards the wife […]. The husband can even be reported to the police for criminal prosecution.'

One may conclude that after the introduction of the no-fault divorce in the 1990s, we may have just witnessed the birth of another legal innovation: the concept of the *nusyuz* husband. Whereas previously men who behaved badly within their marriage could easily get away with it by avoiding the court, and, by so doing, made sure that the wife petitioned the divorce and as a result

28 Interview with the head of the Islamic high court of Makassar, Drs H. M. Hasan Muhammad, Makassar, 26 July 2011.

29 Case 11/Pdt.G/2008/PTA.Sby. In this case a wife petitioned for divorce and claimed among other rights *mut'ah* and spousal support during the *iddah*. The first-instance Islamic court rejected this claim, but the high court overturned the judgment and decided that the wife had not been *nusyuz* as she left home and petitioned for divorce because of physical abuse and sexual affairs conducted by her husband. The court therefore ordered the defendant to pay a sum of *mut'ah* and spousal support. One judge had a dissenting opinion and argued that the 1991 Compilation of Islamic Law is clear on this matter, which in his eyes means that women lose those rights when they petition for divorce.

lost her spousal post-divorce rights, in this configuration he must pay. When the wife's *nusyuz* is clearly established, she will still lose her rights, but it seems that the limits of the wife's *nusyuz* have narrowed down whilst the Islamic courts have just opened up the possibility of men's *nusyuz*. This could mean new steps towards equality. However, case law will determine how this newborn concept will develop, as for the moment, at least in the Islamic courts of Cianjur and Bulukumba, it has not taken root yet.

9.6 INCONSISTENT POST-DIVORCE JUDGMENTS: CIVIL SERVANTS AND DUE CHILD SUPPORT CASES

Although no-fault divorces have become the norm in the Islamic courts, there are also matters where judgments are much more inconsistent. One of these areas concerns the competence of the Islamic courts in post-divorce cases concerning civil servants; more specifically, the competence to establish and order the husband to pay spousal and child support based on the 1983 Government Regulation concerning Marriage and Divorce for Civil Servants (GR 10/1983; see section 4.4.4). The issue at play is that the Supreme Court has ruled that all post-divorce support matters concerning civil servants fall to the administrative courts and not the Islamic courts.[30] The first-instance Islamic courts, however, typically accept cases of civil servants together with their post-divorce support claims, especially when claims are based on the 1991 Compilation of Islamic Law and not GR 10/1983.

For women and their children, a claim based on the Compilation of Islamic Law usually means weaker rights to spousal and child support than a claim based on GR 10/1983. According to GR 10/1983, in *talak* cases women without children have a right to a half of their husband's salary until they remarry and one third if they have children, plus an additional third in child support if the children reside with her. In *gugat cerai* cases they lose spousal support rights, but the child support remains one third of the salary. Unfortunately, it appears that many wives of civil servants do not know what their rights are, and if they do, they appear not to know how to proceed. When wives of civil servants do not make a claim based on GR 10/1983, judges typically base their judgment on the Compilation[31] which means that enjoyment of the right to spousal support lasts until the *iddah* waiting period ends, and not until remarriage as under GR 10/1983. That is an enormous difference.

30 Judgment of the Supreme Court 11/K/AG/2001 of 10 July 2003.

31 For instance, in 2006, the Islamic court of Cianjur only in two of the 12 *talak* cases involving a civil servant ordered the payment of one third of the husband's salary to the ex-wife. In these two cases the wife had made the claim based on GR 10/1983, whilst in the ten other cases the women concerned only made a *nafkah iddah* claim based on the KHI.

Nonetheless, I came across cases in the Islamic courts in which women did make a claim based on GR 10/1983 and the court granted it. The following judgment of the Islamic court of Cianjur is such a case.[32] The court ordered the petitioner to pay the defendant spousal maintenance during the *iddah* (one third of the salary of the petitioner during those three months); *kiswah* (Rp 250,000), and *mut'ah* (Rp 2 million). In addition, the court ordered the petitioner to pay the defendant a monthly sum of a third of his salary as long as she remained unmarried. The court order concerning spousal support of one third of the salary during the *iddah* is a clear mix: the court applied a norm from GR 10/1983 to a rule taken from the Compilation. In contrast, in a civil servant divorce case in which the wife claimed spousal support based on GR 10/1983, the Islamic court of Bulukumba decided that it had no jurisdiction to divide a salary and that the claimant should refer to the competent authority.[33]

A similar inconsistency in judgments can be found in cases pertaining to due child support. One may expect that due child support is treated in the same manner as due maintenance of the wife, since both concern the husband's support obligations. In case of maintenance of the wife, the Islamic courts can and regularly do impose the obligation on a husband to pay a certain amount of due maintenance. However, the Supreme Court argued in 2004, and again in 2005, that child support should be treated differently and based on traditional *fiqh*. It ruled that child support due during the marriage cannot be claimed in a divorce case, as this does not constitute a debt.[34] The Islamic court of Cianjur cited the Supreme Court judgment in a case of 2007[35] in which it rejected the petitioner's claim to due child support based on the argument that:

> 'even when it can be established that the defendant, as the father of two children, has been negligent with regard to his obligation as a father of providing maintenance for his children, the court considers this [child support] to be an obligation which is meant to be enjoyed by the children (*lil intifa'*) which does not result in ownership rights (*litamlik*), and therefore the negligence of the father in fulfilling his obligation [to provide for his child] cannot be claimed in court.'

In a judgment a year earlier,[36] the same court did grant the petitioner's claim to due child support. In this case the male petitioner had admitted that he had not provided child support, because his child – still a new-born baby – had been placed under the care of their grandmother, his mother-in-law. The

32 Islamic court of Cianjur case 43/Pdt.G/2007/PA.Cjr decided on 17 February 2007.
33 Case 249/Pdt.G/2010/PA.Blk decided on 27 December 2010.
34 Judgments of the Supreme Court 24/K/AG/2003 of 8 January 2004 and 608/K/AG/2003 of 23 March 2005. The *fiqh* cited by the Supreme Court was Kitab Al Fiqhi al Islamiyu wa Adillatuhu, Juz VII, pp. 829.
35 Islamic court of Cianjur case 381/Pdt.G/2007/PA.Cjr.
36 Islamic court of Cianjur case 124/Pdt.G/2006/PA.Cjr.

Islamic court argued, that 'no matter where the child resides, the Compilation clearly stipulates the obligation of the father to provide for his children – let alone a new-born.' Therefore it considered it 'appropriate and fair' to order the petitioner to pay an amount of due child support of Rp 2.5 million.

Recently, two judgments of Islamic high courts have followed the case law of the Supreme Court andit is likely that in the future, judgments on this issue will become more consistent.[37] I believe that this development is harmful to the legal position of women pertaining to child support, and potentially for children, because enforcement of child support is already problematic, as I have demonstrated in Chapters 6 and 8.

9.7 Equality in marital property: men and women struggling to claim their rights

As I have argued in Chapters 6 and 8, and elsewhere (Huis 2010), rules regarding joint marital property are potentially easier to enforce than monthly support obligations, because they concerns a single act of handing over rights to property. However, in the claiming process providing evidence can be difficult, because of the Islamic courts' much less lenient attitude towards proof when it concerns movable and immovable property. The claimant is required to provide a clear description of the property. In case of land, this means describing its boundaries and providing legal proof of ownership. If it involves valuable movable objects, the claimant must list brand name, type and estimated value, and again provide legal proof of ownership. In both cases, the purchase of the property must be proven to have taken place during the marriage.

For many men and women this is a difficult task, especially when they have left their marital home without taking the evidence with them. For instance, in a divorce case in which the defendant claimed marital property, the Islamic court of Bulukumba rejected the defendant's claim on a tractor, refrigerator and TV. The claim was considered obscure (*obscuur libel*), because the claimant did not manage to give clear specifications.[38] In another *talak* divorce case in Bulukumba[39] the defendant claimed marital property consisting of a house, land, and garden purchased in 2005 and fully paid for in 2006. The claimant had provided details about the location and the boundaries. The paper evidence she presented was a photocopy of a property tax return (*SPPT pajak bumi dan bangunan*). Additionally, two of the four witness accounts fully supported her claim, whereas the third witness stated that he did not know,

37 It concerns two judgments by the Islamic high court of Surabaya: 132/Pdt.G/2009/PTA.Sby and 79/Pdt.G/2010/PTA.Sby.

38 Case 40/Pdt.G/2009/PA.Blk decided on 23 June 2009.

39 Case 243/Pdt.G/2010/PA.Blk decided on 5 January 2010.

and a fourth said that the land was not purchased but a gift. The court rejected the claim because the copy of the tax return of the property tax was considered insufficient legal proof of ownership.[40] In a similar case in Cianjur, the claimant (the wife) presented two copies of a tax return, but the Islamic court rejected the claim on the same ground of 'insufficient proof of landownership as is meant in the Agrarian Law of 1960.'[41]

The Islamic courts tend to be much more lenient about legal proof in marital property cases when it concerns monetary income. In the second marital property case in Bulukumba above, the claimant also claimed half of the income (Rp 18 million) her husband had earned in Malaysia. He replied that he had spent almost all of his earnings in Malaysia, and the residue of Rp 3 million on red bricks, an act which had infuriated his in-laws, who paid him a visit bringing their cleavers (*parang*). The Islamic court argued that through his reply the petitioner had admitted his wife's claim that this sum had existed, and established that the Rp 18 million was marital property, half of which had to be paid by the husband to his wife. Apparently, the claimant neither had to prove what was left of the 18 million nor whether the husband's spending had been unreasonable.

In Cianjur I came across a very similar case with one major difference.[42] Here the claimant was the husband and his wife the migrant worker. The petitioner of divorce was a woman who had been recruited to work in Saudi Arabia. Her husband stayed behind and in her absence married another woman. This put a lot of stress on the marriage and the wife decided to petition for a divorce. In the counterclaim the husband demanded Rp 3 million as part of his right to marital property. His wife claimed that she had earned Rp 18 million during her stay in Saudi Arabia, but had spent 10 million to pay her recruiter and had given the residue to her mother who had spent it on building a house. The court, however, argued that it was convinced that the petitioner had brought sufficient income from Saudi Arabia to justify a claim of 3 million as the husband's share of marital property. Again, the Islamic court did not require bank accounts or other paper proof of the current finances. The court considered the wife's confession that she had indeed earned the money sufficient grounds to grant the husband's claim, disregarding her claim that it had all been spent. Compared to the non-monetary cases, the lenient attitude towards legal proof is striking: in the monetary cases no paper evidence of the property was required in the context of the existence of partial confessions, whereas in the immovable and movable property cases witness evidence was useless without the right paper evidence being presented.

40 The Supreme Court used the same argument in judgment 767/K/Sip/1970 of 13 March 1971.

41 Case 98/Pdt.G/2007/PA.Cjr.

42 Case 318/Pdt.G/2008/PA.Cjr decided on 27 August 2008.

9.8 Conclusion

The legal analyses I have presented in this chapter indicate that, generally speaking, there is considerable room for legal innovation in the Islamic courts of today. Nonetheless, it is much more difficult to say whether the Islamic courts with regard to women's divorce and post-divorce rights are developing in a clear-cut moderate or conservative direction, as the developments vary per legal issue, or even sub-issue. The registration of marriage cases reveals a lenient approach to witness evidence, often out of empathy with the women concerned, but this is combined with a stringent attitude towards falsified documents and a strict conservative stance towards the religious requirements of a Muslim marriage – even if non-compliance was caused by a lack of knowledge. The same ambiguity can be found in the Islamic courts' attitude towards polygamy. Whilst there are indications that at least a number of judges are becoming more lenient towards the limitations set by the Marriage Law in their handling of polygamy requests (see Nurlaelawati 2013; O'Shaughnessy 2009), in marriage registration cases most judges are still careful not to accidentally legalize an informal polygamous marriage in the process. The limits of the Islamic courts' legal doctrine are shifting, but its tradition remains the judges' first point of reference.

In some cases the Islamic courts have stretched the legal provisions to their very limits. The inclination of the Islamic courts' policy to primarily grant Article 19(f) divorces on the divorce ground of continuous marital strife has rendered the eight other divorce grounds irrelevant. What is more, the legal concept of 'continuous strife' has been turned into a no-fault divorce, meaning that it is sufficient for the parties to demonstrate that the marriage is broken. As a consequence, getting divorced has become very easy, for both men and women. A notable illustration of this is that in a number of cases the judge considered the divorce petition itself sufficient proof of a marriage broken beyond repair.

Another consequence of no-fault divorce is that the Islamic court judge is not required to blame the broken marriage on the immoral behaviour of one of the parties. The danger is that as a result judgments fail to represent local feelings of justice, especially in cases of adultery and domestic violence, where the victim may feel a strong need to have the perpetrator held publicly accountable for his behaviour and the divorce. In these kinds of no-fault cases, the goal of a peaceful divorce for the sake of the children clashes with a sense of injustice that the judge did not address such problems in the public reading of the judgment.

However, one must realize that most court sessions are closed hearings and, within the framework of a no-fault divorce, judges have sufficient leeway to lecture the spouses about their behaviour. Thus, whilst one might expect that introducing concepts such as 'no-fault divorce' and 'broken marriage' has led to morals taking a less central position during the court process, this

is clearly not so. A considerable number of the court cases I have attended and files I have collected were filled with mutual accusations about immoral behaviour. Those accusations appeal to general social ideas of what a good husband and wife ought to look like, or their own speculation about judges' opinions. Thus, even though I understand why O'Shaughnessy concluded that not much has changed since 1974 in the Islamic court rooms with regard to the positioning and treatment of women in divorce cases, I do not agree.

Indeed, women are still accused of disobedient behaviour by their husbands and, moreover, women who insist on divorce still run the risk of being lectured by judges to be more patient, accept a 'corrective tap,' or the presence of a second wife. Judges who did so told me that the insistence on the wife's patience in fact is part of the reconciliation attempts that judges are legally obliged to carry out throughout the divorce process; a procedural obligation in which women indeed seem to be targeted more often than men. In a similar manner, research focusing on the treatment of women in divorce cases in which domestic violence plays a role found that judges' behaviour towards the female victims is often insensitive (see Irianto & Cahyadi 2008; Irianto & Nurtjahyo 2006).

The Islamic courts' five criteria in establishing a broken marriage, which were developed by the Islamic chamber of the Supreme Court clearly indicate that the Islamic courts have no intention to refrain from involving themselves in such moral issues, e.g. regarding the marital duties of the spouses, or disturbance from outsiders (adultery, polygamy, in-laws). Judges typically delve into the spouses' personal lives, giving each spouse and their witnesses sufficient room to air the details pertaining to the flaws and behaviour of the other party, lecturing them in passing about the ups and downs of a marriage, their marital rights and duties, including the wife's duty to respect her husband and – if he is present at all – the husband's responsibilities towards his family. Hence, although much has changed with regard to the legal grounds for divorce, the court process itself as it manifests itself in the courtroom has not changed quite as much.

Nonetheless, I hold that significant legal changes do take place in the Islamic courts. It does not so much occur in the interactions between the actors in the courtroom, but in the details of the legal justifications in the court judgments. I agree with O'Shaugnessy that a strong emphasis on the wife's disobedience and disrespect for her husband remains, but I believe I have sufficiently demonstrated that significant changes have occurred in the legal consequences that the Islamic court attaches to such disrespectful behaviour. If we define *nusyuz,* the Muslim legal term pertaining to such disrespectful or disobedient behavior, as 'disobedient behaviour towards the spouse with legal consequences', than it becomes apparent that the Islamic courts have narrowed the limits of what constitutes *nusyuz* for women, as in most cases there are no legal consequences attached. In almost all *talak* court files I have collected, judges granted spousal support and *mut'ah*, even if witnesses had

confirmed behaviour which traditionally is considered disobedient, such as, for instance, leaving the house without permission.

A slightly different situation occurs when one looks at wife-initiated divorces. The Compilation of Islamic Law has laid down the traditional legal consequences for a woman when she petitions for a divorce: she loses her rights to maintenance during the waiting period and her right to *mut'ah.* One could confuse those legal consequences with *nusyuz*, but actually they are based on the fact that such a divorce is considered final (*ba'in*). In recent cases a number of Islamic high courts have ruled that women do not lose these rights when they are not *nusyuz*, and when the divorce had to be attributed to their husband's negative behaviour. In other words, the judges attached legal consequences to the inappropriate behaviour of husbands; they were considered to have been *nusyuz*.

We have seen that there are indeed voices urging the introduction of male *nusyuz* through the codification of Muslim family law (see Chapter 4) and these judgments perhaps form legal innovations in anticipation of such legal changes; all the more since they seem to reflect the consensus in the higher echelons of the Islamic courts. Thus, this return of *nusyuz* in court judgments may contribute to more equality, in the sense that it applies to both men and women. At the same time, it may jeopardize the concept of no-fault divorce. The Islamic courts will only consider the husband's *nusyuz* if he clearly transgressed the limits of decent behaviour, *and* his wife did not so. It thus may mark the return of the 'at-fault' husband in no-fault divorces.

There are also examples of the introduction of conservative *fiqh* rules through case law, one of which is the Supreme Court's 2005 judgment pertaining to due child support. The decision has the consequence that the father can be ordered to pay child support, but the due payments cannot be enforced through the Islamic courts. Several Islamic high courts and first instance courts have followed the Supreme Court judgment, and therefore I have reason to fear that Supreme Court case law may undo what the Constitutional Court, in its controversial ruling concerning the legal relation and legal responsibility of a biological father to children born out of wedlock has attempted to achieve: ensuring that men take responsibility for their children.

It is hard to generalize about the developments in the administration of justice in the Islamic court. They are characterized by both lenient judgments and strict application of rules, depending on the subject. The norms judges apply are not fixed and move slowly towards more equality, sometimes stretching to the limit, without giving up the patriarchal basis of the Indonesian family and the Islamic basis of Muslim family law. Thus, the court hearings are still characterized by women defending themselves against accusations of being bad mothers and wives, and men who are blamed for being irresponsible womanizers. At the same time much of the dynamics take place in the legal details of legal justifications pertaining to divorce. Read carefully and

one may discover legal innovations like the return of the at-fault husband in no-fault divorces and the birth of the *nusyuz* man.