Matrilineal Islam: State Islamic Law and everyday practices of marriage and divorce among people of Mukomuko-Bengkulu, Sumatra, Indonesia

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The Autonomy of the Islamic Court: Indonesian Marriage and Divorce Law for Muslims

2.1 Introduction

The introductory chapter showed that Indonesian matrimonial affairs have been the subject of state control through several statutory reforms. The reforms have: made marriage registration and judicial divorce mandatory; restricted polygamy; introduced a minimum marital age, and equal divorce grounds for wives and husbands; and formalised so called 'legal pluralism', by introducing state-sanctioned Islamic law and establishing an Islamic court exclusively for Muslims (M. Cammack, 1989; M. E. Cammack, 1997; Nurlaelawati, 2010; Soewondo, 1977; van Huis, 2015). For the most part, the reforms had already been developing through judicial practice in the Islamic court. This is apparent in case law dating back to the colonial era, whenever judges creatively interpreted *fikih*,[27] *adat* (customary law) and *siyāsah* (state law) in their judgements (J. R. Bowen, 2005; Lev, 1972; Nurlaelawati, 2010; van Huis, 2015, p. 85). Therefore, following Van Huis' line of argument, Indonesian family law for Muslims was a result of two aspects: legislative deliberation in parliament, and judicial tradition in the Islamic court (van Huis, 2015, p. 113). They were crucial to the development of Indonesian family law (see also the 'bureaucratisation' process in Chapter 1 Section 1.4.1.2). While

[27] There are three different terms that are used interchangeably to refer to the prescribed rules of Islam, i.e. sharia, *fikih*, and Islamic law. Sharia is (in a broad sense) equal to Islam as a religion, but its narrow meaning refers to the 'practical' rules mentioned in the primary sources of Islam, i.e. the Qur'an and prophetic traditions. Meanwhile, *fikih* means 'practical' rules deriving from primary sources, through a process of *ijtihad* (legal reasoning). In this sense, both sharia in its narrow meaning and *fikih* yield the same output: namely, practical rules. The only distinction is in how the rules are derived. This explains why the terms are often used interchangeably, to mean either 'practical' rules, or provisions prescribed in Islam (Anwar, 2021, pp. 1–3; Auda, 2008, p. xxiii). Lastly, the term 'Islamic law', which was invented by colonial regimes (Buskens & Dupret, 2014; Cohn, 1989), refers to either sharia in the narrow sense or *fikih* that have gained legal status from a sovereign regime (state). In this chapter these distinctions will be retained, but sometimes the term Islamic law will be employed in its broader sense, to include either sharia in its narrow meaning or *fikih*.

the legislation provides a threshold that prevents judges referring to more conservative interpretations of Islamic family law, judicial tradition acquaints them with judicial law making.

In contrast with legislation, which is imposed top to bottom, judicial law-making is predominantly formed through dialogue between adjudicating judges and justice seekers in a courtroom. In the latter, judges cast themselves as interpreters of (Islamic) law, whereas justice seekers appear before the court to negotiate their respective interests and conditions. In this way, the state's Islamic court serves as an important place, not only for judges to encounter justice seekers, but also for the development of Muslim family law, considering the absence of substantive legislative reforms after the passing of Law 1/1974 on Marriage. However, as maintained by many studies, developments within the Islamic court are still 'less inventive', since the balance between the Islamic triangle, i.e. sharia, state law, and customary law (Buskens, 2000), is equally important and cannot be underestimated in the Indonesian context (Lev, 1972; Nurlaelawati & van Huis, 2020; van Huis, 2015, p. 113). By featuring an *isbat nikah* (a retroactive validation of marriage) and 'broken marriage' as grounds for divorce, this chapter seeks to investigate the role of Islamic court judges in reforming marriage and divorce law. These topics will be viewed in light of their role in maintaining the balance between the preservation of law and the need to consider social conditions when promoting reforms in the field of marriage and divorce among Muslims.

This study reveals a consistent trend of judicial law making in the field of marriage and divorce law, as apparent in the 'extended' and 'refined' forms of *isbat nikah*, and in the 'invention' of broken marriage as a unilateral, no-fault, and all-encompassing ground for divorce. Employing the new *isbat nikah*, judges manage to accommodate unregistered marriages that are still pervasive, as long as they are religiously valid and not against other legal provision(s). Meanwhile, through the increasing use of broken marriage as a ground for divorce, they promote

a simpler and more equal divorce procedure for husbands and wives, as well as lifting the burden to find who is at fault from their own shoulders. Moreover, in the case of broken marriage divorce, judges can still employ consideration of fault, especially when the 'fault' is relevant to a spouse's post-divorce rights. In this manner, a question of fault is dealt differently from the general norm of broken marriage that continues to be treated as a unilateral and no-fault divorce ground. These judicial developments, as argued in this chapter, demonstrate the 'autonomy' of Islamic court judges in exercising judicial law making, mainly to bridge gaps between a formal application of the law and a sense of justice within society that is informed by social norms, *adat* and religious provisions. In this respect, judges manage to reconcile two unfruitful schisms in the law, i.e. formalists versus instrumentalists (cf. Terdiman, 1987, p. 807), by exercising their autonomy as its official interpreters.

For analytical purposes, the concept of autonomy is adapted from Bedner to mean:

> "...the condition in which legal institutions, constituting a legal system, are able to perform their tasks—and notably the systematic development of substantive rules and principles of law—in accordance with the procedural rules designed to guide them, without interference from outside actors based on non-legal grounds" (Bedner, 2016, p. 10).

To make this concept operational, Bedner draws on essential autonomy of law features from three great social traditions. *First*, the Weberian tradition: an autonomous law requires the presence of a 'cannon of interpretations', by which legal rules are linked to its underlying principles and concepts, in order to minimise the gap between formal-rational law and social reality. *Second*, Bourdieu's elements, applicable in either sociological or juridical fields: the functioning of an autonomous law lies in the division of labour between theoreticians and practitioners, with their own distinctive internal rules; together, they constitute *corpus juridique*, by which judges are guided when adjudicating similar cases (Bourdieu, 1987). *Third*, Luhmann's autopoietic theo-

ry: an autonomous law requires 'communication', by which "law reproduces its own elements by the interactions of its elements" and 'self-referential autonomy', and "laws are only regarded as norms because they are intended to be used in decisions, just as these decisions can only function as norms because this is provided for in laws" (Bedner, 2016; Michailakis, 1995; Savelsberg & Teubner, 1994).

Equipped with this theoretical framework, Bedner concludes that legal institutions in Indonesia, notably Indonesian courts, generally lack the autonomy to perform the legitimating and stabilising functions ascribed to them by Western social theory. In his view, the state's Islamic court is an exception, because it has developed some of the required features to be 'relatively' autonomous. Islamic court judges have managed to bridge a gap between sanctioned law and the sense of justice within society that is informed by *adat* and religious provisions. They have also managed to bridge gaps in theoretical thinking, i.e. between that of scholars and the Supreme Court, and practitioners or the first instance court. The legal training received by Islamic court judges differs from that received by their counterparts in general courts, because it places emphasis on integrating Islamic doctrine and legal theories, and as well on having a platform for communication, i.e. *Mimbar Hukum* magazine (*Majalah Peradilan Agama*, from 2013 onwards). While the presence of all these features is remarkable, the court still lacks autonomy from outside interference (particularly from Islamic authorities), due to its strong religious symbolism. Nonetheless, recent judicial innovations on the *isbat nikah* and the broken marriage grounds mean it can be argued that the Islamic court is an autonomous institution, capable of exercising judicial law making from within, unconstrained by outside interference.

The emergence of the Islamic court as an autonomous institution has witnessed the transfer of Islamic authority to Islamic court judges. The judges develop a platform for Islamic family law reforms by balancing theory (the existing norms

of marriage and divorce) with practice (the sense of justice informed by *adat*, religious provisions, and social conditions). In this regard, judges cast themselves as prominent actors in exercising religious authority and reforming Islamic family law.[28] The discussion in this chapter looks closely at *isbat nikah* and broken marriage to give an account of how Islamic court judges exercise their autonomy in reforming Islamic family law. The main reason for focusing on these two topics is practical, that is to select the most established judicial innovations on marriage and divorce in the Islamic courts. However, one should keep in mind that important developments are taking place regarding other topics as well. For this reason, the discussion on *isbat nikah* and broken marriage must not be approached in isolation as they invariably correlate with other relevant topics I discussed in the subsequent chapters of this dissertation, such as joint marital property, alimony, child support, *mahar* (bride price), and even inheritance.

To provide a background, the discussion on *isbat nikah* and broken marriage in this chapter must be read against the background of Chapter 1 Section 1.4.1, which provides a general overview of Indonesian Islamic family law. The topics of *isbat nikah* and broken marriage will be discussed analytically, in a chronological way, by consulting the codified laws and then looking at how judges have shaped them. The materials for the discussion were mostly drawn from landmark decisions by the Islamic Chamber of the Supreme Court, *Peraturan Mahkamah Agung* (PERMA, or Supreme Court regulations), *Surat Edaran Mahkamah Agung* (SEMA, or Supreme Court circular letters), and *Rapat Pleno Tahunan* (yearly plenary meetings). Interviews with judges, emerging discourse available in the quarterly magazine *Peradilan Agama*, from 2013 onwards, and relevant decisions by the Constitutional Court were also consulted.

[28] For instance, a call for judges to perform *ijtihad*, or judicial law making, was widespread within the Islamic Chamber of the Supreme Court. Accordingly, the English term 'judicial activism' was employed in the editorial notes of the second edition of *Majalah Peradilan*. This call was disseminated confidently via trainings for judges and quarterly-magazines (*Majalah Peradilan Agama Edisi-2*, 2013).

2.2 *Isbat Nikah* (a Retroactive Validation of Marriage)

One of the key features of the Indonesian Marriage Law 1/1974 is the establishment of religion as the foundation of marriage. In article 2, paragraph (1), the law stipulates that "a marriage is valid when the two parties conclude the marriage according to their religion and conviction." The same article stipulates in paragraph (2) that, "the parties must register their marriage according to the existing law." The articles do not mention how registration status relates to the validity of a marriage, but the law is clear on registration being the only way for a marriage to be recognised by law. Accordingly, the Religious Judicature Law 7/1989 enables the retroactive validation of marriages concluded before the 1974 marriage law was passed.

Nevertheless, a strict application of marriage registration is problematic, considering that unregistered marriages are still pervasive (Fauzi, 2023; Platt, 2017; van Huis & Wirastri, 2012).[29] In 2018, Islamic courts received 122,932 *isbat nikah* petitions—113,648 (92.4%) were approved, 4,758 (3.9%) were withdrawn, and 4,526 (3.7%) were scheduled to be decided in the following year (Badilag Mahkamah Agung RI, 2020). This led Islamic court judges to find the middle ground by bridging the strict application of registration law and the high demand for retroactive validation. *First* the judges started to validate unregistered marriages retroactively, including marriages that were concluded after the Marriage Law was passed; *second*, they extended the application of *isbat nikah* by introducing a more comprehensive form of *isbat nikah*; and *third*, to avoid arbitrary use, they applied the comprehensive form of *isbat nikah* only when an unregistered marriage was religiously valid and there were no legal barriers to such a marriage.

[29] Among Muslims, many unregistered couples file *isbat nikah* at the Islamic Court, to register their marriage retroactively. Isna Wahyudi, once a judge at Giri Minang-West Nusa Tenggara Islamic Court, confirmed that from this first instance court alone there was an average of 2,000 petitions in one year for marriage validation; the majority of these petitions were marriages concluded after the enactment of the marriage law (Wahyudi, 2014).

2.2.1 Registration and the Legality of (Islamic) Marriage

Article 2 (1) of the Marriage Law 1/1974 maintains that the religion or conviction adhered to by the parties determines the validity of their marriage. By emphasising the religious nature of Indonesian marriage, the article promotes a normatively pluralistic marriage law that acknowledges multiple orders, applicable to people according to their respective religions and convictions (Künkler & Sezgin, 2016). This acknowledgement introduces a formal pluralism to Indonesian marriage law that, in reality, distinguishes Muslim marriages from those of non-Muslims (Pompe, 1988, p. 262).[30] Nevertheless, an exclusive acknowledgement of Islamic marriage does not apply to the entire body of religious provisions, since the law also modifies the substance of this body by imposing restrictions, and even prohibitions (M. Cammack, 1989; Pompe, 1988). The marriage law, for instance, restricts a husband's unilateral rights to divorce and polygamy;[31] in its implementing regulation, article 4 (2) of Government Regulation 45/1990 even forbids a female civil servant to be taken as the second wife in a polygamous marriage. However, this *is* still allowed under Islamic law. Given these restrictions, Pompe suggests that, from an analytical reading of the existing statute, religious provisions (notably Islamic) are applicable, as long as they are not in opposition to the marriage law and its implementing regulations (Pompe, 1988, pp. 270–271).[32] This analytical view leads to another question: Does article 2 (2) on registration act as a restriction on the validity of Islamic marriage?

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[30] Article 12 of Marriage Law 1/1974 stipulates that the procedure of marriage is carried out according to other regulations. Government Regulation 9/1975, article 2, stipulates that a Muslim marriage is registered by a marriage registrar from the Office of Religious Affairs (KUA) - as mentioned in Law 22/1946 and Law 32/1954 on Marriage Registration - and a non-Muslim marriage is registered by a marriage registrar from the Office of Civil Registry. This stipulation, among other relevant regulations, maintains the distinction between Muslim marriage and non-Muslim marriage.

[31] Articles 3 and 4 of Marriage Law 1/1974, and Articles 40-45 of Government Regulation 9/1975.

[32] This view corresponds to the explanation in Article 2 (1) of Marriage Law 1/1974: "religious provisions include other relevant regulations, which apply to people according to their respective religions and convictions, as long as the provisions are not in conflict with, or stipulates otherwise than, the marriage law."

The marriage law contains no explicit answer to the question posed above.[33] The lack of clarity around how the status of registration relates to the validity of a religious marriage has generated debates. Those who perceive article 2 as a unit, consider that registration determines the validity of a marriage. In contrast, those who see it as separate hold the opposite opinion, considering registration a merely administrative requirement (Otto, 2010, pp. 463–464). Marriage registration is also mentioned in the Compilation of Islamic Law, which aims to provide Islamic court judges with a standard point of reference.[34] Article 4 of the compilation stipulates that a marriage is valid when it is concluded under Islamic law, corresponding to article 2 (1) of Marriage Law 1/1974. Article 5 (1) of the compilation stipulates that, "to ensure marital order (*ketertiban perkawinan*) among Muslims, every marriage shall be registered", and (2) "registration is conducted by the Official Marriage Registrar". The compilation further stipulates, in article 6 (1), that "every marriage shall be conducted before and under the supervision of the Official Marriage Registrar", and (2) "a marriage carried out without the supervision of the Official Marriage Registrar does not have the force of law". The compilation, particularly article 6, paragraph (2), makes it clear that the discussion on marriage registration among Muslims is no longer about validity, but more about legal recognition. An unregistered marriage is neither valid nor invalid, but it is unrecognised by state law.

The emphasis on state recognition, instead of validity, does not prevent the marriage law and other relevant regulations from imposing a strict distinction between registered and unregistered marriages. The law maintains that registration determines the legality of marriage, without which the marriage

[33] The implementing regulations of the marriage law, i.e. Government Regulation 9/1975 *junto,* Civil Registration Law 23/2006, mention that an unregistered marriage is liable to administrative fines, and even felony, but this does not necessarily imply that the marriage would be invalid.

[34] The Compilation of Islamic Law was issued via Presidential Instruction No. 1/1991. Its formulation involves *ulama*, judges from the Islamic court and General Court, and many key figures from the Ministry of Religious Affairs and the Supreme Court.

would not have the force of law. In a slightly different manner, Religious Judicature Law 7/1989 stipulates that it is within the Islamic court's jurisdiction in the field of Muslim marriage to validate a marriage retroactively. Still, this procedure only applies to marriages concluded before the enactment of Marriage Law 1/1974.[35] In this sense, the existing laws allow no possibility for a marriage to obtain legal recognition if it was conducted *after* the passing of the marriage law, unless the marriage has been registered first. Failure to register a marriage would mean that the marriage will 'never' have state recognition, regardless of whether it is religiously valid or not. All the stipulations eventually generate a concept of 'state legality'. This concept refers to a marriage that, besides being religiously valid, is also required to be properly registered. The legality of a marriage that requires the fulfilment of religious provisions and registration becomes a defining feature that distinguishes a registered marriage from a marriage that is unregistered.

2.2.2 Dual Validity and a More Extended Form of *Isbat Nikah*

The emerging concept of state legality shows that the state's strategy is to manage marital affairs by acknowledging religious validity while also imposing controls upon it, via the obligation to register. In this way, the state uses registration as a tool to force people to comply with state marriage. Otherwise, the rights and duties arising from a marriage will not have the force of law. According to the law, a marriage will be considered legally valid upon completion of a religious marriage ceremony and the signing of a marriage certificate with the official marriage registrar from the Office of Religious Affairs (*Kantor Urusan Agama,* KUA). However, after the marriage law passed, judges from the state Islamic court remained indecisive about the state's agenda regarding the legality of marriage (J. R. Bowen, 2003; Riadi,

[35] This exception corresponds to the non-retroactive principle of the marriage and religious judicature laws. This is explained in number [22] of article 49 (2) of Religious Judicature Law 7/1989, as amended by the first amendment via Law 3/2006 and the second amendment via Law 50/2009.

2011). Throughout that period, Islamic court judges started to acknowledge the validity of a religious marriage by allowing it to achieve retroactive validation. By applying retroactive validation to unregistered marriages conducted after 1974, the judges are recognising the 'dual validity' of Muslim marriages in Indonesia, i.e. (state) legal *and* religious validities. In doing so, *first*, the judges overlook the strict provisions of marriage registration and make a religiously valid but unregistered marriage capable of retroactive validation; *second*, they extend the form of marriage validation via *isbat nikah;* and *third*, they establish dual validity for Muslim marriage.

First, in the decade after the marriage law passed, judges began validating unregistered marriages retroactively. The Marriage Law 1/1974 only recognises the legality of a registered marriage, and does not allow an unregistered marriage—other than those concluded before the marriage law came into effect—to be validated retroactively. This provision placed unregistered marriages beyond the scope of the marriage law. It did not equip judges with a legislative reference for validating a marriage, if the parties had failed to register it in the first place. This provision trapped judges in the difficult position of deciding whether to adhere to the prescribed law, or to extend the use of marriage validation (*pengesahan perkawinan*) to those who are not entitled to it by law. As Bowen suggests, the Islamic Chamber of the Supreme Court did not immediately develop a stable corpus of case law on this matter, as seen in many judgements during the period 1991-1995. In 1991, the court treated unregistered marriages as invalid, although such marriages were religiously valid; in contrast, in 1995 the court treated unregistered marriage as valid; and in 1995, the court switched again to treating it as invalid (J. R. Bowen, 2003, pp. 182–185). Edi Riadi, currently an acting judge at the Supreme Court, shares Bowen's view in his doctoral thesis, in which he reviews the case law during 1991-2007 and comes to the same conclusion (Riadi, 2011). In some cases, judges would admit a petition to validate an unregistered

marriage, on the ground that the marriage was religiously valid. Yet, in other cases, judges would reject such a petition.

The judges' indecisive attitude toward unregistered marriage has confirmed the foundation of dual validity established in the Marriage Law, i.e. legal and religious validity. Here, dual validity differs from another concept with the same name, which designates a state marriage as comprising of state (legal) and religious validities (cf. J. R. Bowen, 2001, p. 9; Nurlaelawati, 2010, p. 103). The use of dual validity in this book considers legal and religious validities to be two separate entities that exist simultaneously. While the legal validity refers to a 'state' marriage that is both registered and religiously valid, the religious validity referring to a marriage that is not registered but is religiously valid. The distinction between the two concepts is increasingly blurred. As judges have overlooked the prescribed provisions on marriage registration, a legal precedent for the possibility of retroactive validation toward an unregistered marriage concluded after 1974 has been created. According to this trend, a religiously valid but unregistered marriage can obtain legal validity from an Islamic court, after it has validated the marriage retroactively. In this way, a religious marriage is not only valid according to religious provisions, it is also 'recognisable' to the state. By recognisable, I mean that the status of such a marriage may be elevated to the level of legal validity after obtaining retroactive validation from an Islamic court. However, one should keep in mind that after this validation a marriage still needs to be registered, as legal validity is only achieved through the issuance of a marriage certificate (*buku nikah*).[36]

Second, the application of dual validity was reinforced by the adoption of the 1991 Compilation of Islamic Law, which formally introduces *isbat nikah* as a replacement for *pengesahan perkawinan* (marriage validation) in Religious Judicature Law 7/1989. The compilation stipulates, in article 7 paragraph (3),

[36] Article 7 of the Compilation of Islamic Law stipulates that "only a marriage certificate can serve as legal proof of a marriage".

that *isbat nikah* may only happen under the following conditions:

> (a) In order to make a formal divorce possible; (b) If the marriage certificate is lost; (c) If there is doubt about the validity of one of the marriage conditions; (d) If the marriage was concluded before the enactment of the marriage law (this condition derives from the Religious Judicature Law 7/1989); and (e) If there are no legal barriers to the marriage, according to the Marriage Law 1/1974.

The prescribed conditions for *isbat nikah* can be divided into two categories: one intended for a registered marriage, and the other intended for an unregistered marriage. The first category comprises: point (b), on the applicability of *isbat nikah* to a marriage when the marriage certificate is lost; and point (c), when there is doubt about the validity of one of the marriage conditions. Point (b) applies only to a registered marriage, since the loss of a marriage certificate implies that the marriage is registered. Nurlaelawati believes this point is unnecessary, particularly if the condition is applied from the date when the missing certificate was issued. If the lost certificate was issued after the marriage law came into effect, the parties could go to the Office of Religious Affairs (KUA), where their marriage was registered, to ask for a duplicate. On the other hand, if the date of the lost certificate is before the enactment of the marriage law, the parties could relate their petition to point (d), which derives from religious judicature law and includes all marriages before the passage of the marriage law (Nurlaelawati, 2010, pp. 202–203).

Nevertheless, Van Huis maintains that point (b) is still necessary to replace the lost certificate. Drawing his argument on pension-related cases, he shows how the pension agency for civil servants, i.e. PT TASPEN, only accepts a court ruling (*penetapan*) instead of a duplicate obtained from KUA (van Huis, 2015, p. 226). This debate relates closely to the discussion among judges about whether or not, after *isbat nikah*, the relevant parties (couples) should still go to the KUA to obtain a marriage certificate. Some say that a *penetapan* is adequate, since couples often need only that, but others say that a certificate is still needed for

a formal divorce lawsuit, except in cases of *isbat nikah*. Likewise, point (c) applies only to a registered marriage, because it does not make sense to examine the validity of a marriage condition if the marriage was never recorded in the first place. For example, if a petition to examine a marriage were to be filed at an Islamic court, but the marriage in question had not been registered, the person filing would have no legal standing before the court. This corresponds to point (a), discussed later, where an *isbat nikah* itself is a prerequisite procedure, if the parties of an unregistered marriage wish to make a formal divorce possible. Point (c) is to provide certainty for a husband and wife who are in doubt as to the validity of one of their marriage conditions. In all other cases, such marriage, according to articles 26 (1) and (2) of the marriage law, is liable to nullification through the court.

The second category comprises: point (a), on the applicability of *isbat nikah* as a prerequisite procedure to make a formal divorce possible; point (d), to validate a marriage concluded before the enactment of the marriage law; and point (e), to validate a marriage when no legal barriers to it exist. Unlike the first category, all the conditions in the second category are designated for an unregistered marriage. Point (a) is not necessary if the marriage is registered, but it remains unclear whether or not this point is restricted to marriages that precede the marriage law. However, it hardly makes sense if this condition is intended for marriages concluded before the marriage law was passed, because the same logic as in point (b) applies here; marriages preceding the marriage law are eligible (under point [d]) for retroactive validation. Point (d) needs no further explanation, since this condition is simply a reiteration of the condition stipulated in the religious judicature law. The wording of point (e) implies that the marriage referred to here is a marriage concluded after 1974: "there are no legal barriers according to the Marriage Law 1/1974"[37], otherwise point (e) would not mention "the 1974

[37] The legal barriers refer to the marital barriers stipulated in articles 8,9, and 10 of the Marriage Law 1/1974, constituting: (1) religious barriers, such as incest and other situations prohibited in religion (mainly Islam); and, (2) state-imposed barriers, such as prohibition

Marriage Law", because the law is not intended for retroactive application.

The first category, which applies only to a registered marriage, is of concern to this discussion. Likewise, point (d) from the second category will not be addressed, because it is a mere reiteration of the 1989 Judicature Law. This leaves just two conditions: one is point (a), and the other one is point (c). These conditions are quite problematic in terms of their positions regarding the restrictions introduced by the 1989 Judicature Law. Are they an extension, or a mere reiteration, of the judicature law? It remains unclear how these conditions relate to the religious judicature law, which restricts the application of retroactive validation to marriages concluded before the issuance of the marriage law. Nurlaelawati suggests assuming that Islamic court judges are applying *isbat nikah* strictly. In that case, all the conditions in article 7 paragraph (3) of the compilation are cumulative and not in conflict with the religious judicature law. However, she maintains that judges tend to treat these conditions as non-cumulative, either in the name of "public utility" or to accommodate petitions brought before them (Nurlaelawati, 2010, p. 143, 2013b). Van Huis confirms the non-cumulative nature of these conditions, by presenting many relevant cases (van Huis, 2015, p. 225). The judges' inclination to treat the prescribed conditions in article 7 as non-cumulative has extended the form of *isbat nikah,* which can now be used to validate an unregistered marriage retroactively, as long as no legal barriers (point [e]) prevent such retroactive validation.

Third, judges' lenient use of the extended form of *isbat nikah* has established dual validity for Indonesian marriages among Muslims; a religious marriage is now recognisable by state law. Thus, the strict distinction between a state marriage, which is both legally and religiously valid, and a mere religious marriage is blurred. This trend is advanced further by a number of collaborations between the Ministry of Religious Affairs and local gov-

of informal polygamy.

ernments, in order to organise mass *isbat nikah*. These collaborations are intended to tackle unregistered marriages, which are still pervasive. For instance, the local government in Jember-East Java—together with Jember Islamic Court and the regional office of the Ministry of Religious Affairs—organised a mass *isbat nikah.* The programme even set a MURI (*Museum Rekor-Dunia Indonesia*) record for validating 1,000 marriages at once, and the majority of the marriages were concluded after the marriage law had come into effect. In total, from 2017 to 2020, the Islamic court in this region validated 7,112 unregistered marriages (Permana & Nursalikah, 2020). Given this trend, the Supreme Court became aware of the possible misuse of retroactive validation via mass *isbat nikah* and consequently circulated Circular Letter 5/2014, stating: "Mass *isbat nikah*, conducted domestically using either local government funds or international funding, is allowed. However, the ceremony must be held carefully, in accordance with sharia rules, and its extensive impact (including on inheritance, and other matters) must be taken into consideration. Moreover, a mass *isbat nikah* due to be held abroad must first obtain permission from the head of the Supreme Court."[38] Accordingly, the Supreme Court sets certain limits for the use of *isbat nikah*, as will be discussed below in more detail.

2.2.3 Refining the Law of *Isbat Nikah*

The extended forms of retroactive validation through *isbat nikah* have shifted the attitude of judges towards the legality of a religious marriage. Such marriage is now eligible for retroactive validation, which challenges the strict distinction between registered and unregistered marriage, because the latter may be validated retroactively throughout couples' lives. Given this shift, the question is whether or not *isbat nikah* can be applied to all unregistered marriages. The answer, as might be expected, is neither 'yes' nor 'no', since the registration law is still retained,

[38] The 2011 Supreme Court Decree, number 08-kma/sk/v 2011, enables *Isbat nikah* for Indonesian migrant workers, at the office of Indonesian representation.

to this day.[39] On the one hand, judges expanded the use of retroactive validation, blurring the distinction between registered and unregistered marriage. On the other hand, they continued to rely on the existing law of marriage registration. To bridge the gap, and mainly to avoid the arbitrary use of *isbat nikah*, judges created several limits to the application of *isbat nikah* from prescribed law, case law, Supreme Court supervision, and Constitutional Court decisions. The boundaries were set at a threshold that eventually refined the application of *isbat nikah*. Before discussing the limits in detail, I will first examine the impact of the extended form of *isbat nikah*.

2.2.3.1 The Impact of an Extended Isbat Nikah

The main impact of judges' extensive use of *isbat nikah* has been the establishment of dual validity for state marriage; namely, legal validity and religious validity. The establishment of dual validity has made the distinction between registered marriage and religious marriage more fluid, as the status of a religious marriage may be elevated through *isbat nikah* and registered retroactively. This fluidity is beneficial for both the judges and the parties seeking validation. The first benefit is linked to the use of *isbat nikah* as a prerequisite procedure to obtain a formal divorce, which derives from a non-cumulative interpretation of point (a), article 7 of the compilation. *Isbat nikah* on this ground extends judges' authority to dissolve not only a registered marriage but also an unregistered one, after granting an *isbat nikah* petition. The second benefit is linked to condition point (e) of the compilation, which allows the use of *isbat nikah* if no legal barriers to an unregistered marriage exist. Accordingly, Van Huis suggests that the Islamic Court interprets point (e) to mean that a marriage between Muslims must be concluded according to Islamic requirements (van Huis, 2015, p. 228). This interpretation makes an *isbat nikah* petition possible at any time, as long as the marriage is religiously valid and not constrained by any legal

[39] An effort to revoke this law, namely article 2 (2) on marriage registration, via the Constitutional Court resulted in failure (Constitutional Court judgement number 46/PUU-VIII/2010, 17 February 2012).

barriers. As a result, the extended forms of *isbat nikah* benefit parties longing for certainty about their unregistered marriages, and strengthen the state's authority over those who come before them petitioning for *isbat nikah*.

In unusual cases *isbat nikah* may even apply to a religiously invalid marriage, as appears in Supreme Court judgement number 134K/AG/1996. In this case the Supreme Court nullified the decision of the South Jakarta Islamic Court, which rejected an *isbat nikah* petition.[40] The first instance court denied the petition based on the following legal facts: (1) The couple confirmed that they had concluded a religious marriage on 1 September 1989, without an official marriage registrar being present; (2) The marriage was not conducted by a valid guardian; and, (3) At the time of the marriage, the bride was still in a waiting period (*idah*) of a revocable divorce to her previous (religious) marriage with another man. These facts led the judges to issue a verdict stating that the petition was null and void, and must be rejected. However, the Supreme Court overturned this decision and validated the marriage as "the first marriage". The bride's first marriage did not count, because it was never registered and therefore not legally binding. Regarding the religious barriers concerning the bride's former marriage, i.e. using an invalid guardian and still awaiting divorce, the Supreme Court formulated a legal consideration: "A marriage becomes liable to nullification (*fāsid*), not null and void (*bāṭil*), if the bride is a divorcee, is still waiting for a revocable divorce from her former husband, and is represented by an invalid guardian. The bride's second marriage remains intact as long as her ex-husband from the first marriage has not submitted a petition for marriage nullification to an Islamic court."

This consideration corresponds to Article 26 (1) of Marriage Law 1/1974, which stipulates: "a marriage concluded before an official registrar, invalid guardian, and without the presence of two competent witnesses is eligible for a nullification. The nullification can be initiated by blood relatives from the husband

[40] South Jakarta Islamic Court Decision Number 01/Pdt.P/1995/PA.JS.

and wife, by public prosecutor, and by the couple themselves." The Supreme Court interprets this article to mean that nullification is dependent on a petition, and that the marriage remains intact, as long as those who are entitled by law to nullify it have not brought the case to a competent court. However, this case does not demonstrate common practice because, in more recent cases the first instance court has tended to reject an *isbat nikah* petition if the marriage was not concluded according to Islamic requirements. Van Huis features a case from Bulukumba Islamic Court, where the judges did not validate a marriage because it was revealed that the acting guardian was the brother of the petitioner's mother, which means that he is neither a competent nor a valid guardian (van Huis, 2015, p. 229). The lack of consensus on this matter might generate other debates about whether or not *isbat nikah* applies to a religiously invalid marriage. This question will be addressed in a separate section that focusses on the limits of *isbat nikah*. In this section, reference to this case is only to show that religious marriage is now recognisable by state law through the extended use of *isbat nikah*.

2.2.3.2 The limits of isbat nikah

The judges' inclination to interpret the content of Article 7 of the Compilation of Islamic Law as non-cumulative conditions has not only extended forms of retroactive validation through *isbat nikah*, it has also made *isbat nikah* prone to misuse; most notably, when it is used to validate informal polygamy. To avoid the arbitrary use of *isbat nikah*, judges have started to treat points (a) and (e) of Article 7 as cumulative conditions. Article 7 allows the use of *isbat nikah* - in point (a) - to obtain a formal divorce, and - in point (e) - to validate a marriage retroactively - in point (e) - as long as the marriage is not in opposition to the legal barriers prescribed in the marriage law. Through a cumulative reading, the Islamic court judges set the phrase "… if no legal barriers exist", derived from Article 7 point (e), as a threshold for exercising the law of *isbat nikah.* They interpret 'legal barriers' wording to mean not only prescribed barriers in the marriage law,

but also limitations stipulated by the compilation, the Supreme Court's yearly plenary meetings,[41] and other relevant provisions. The interpretation of legal barriers is shaped simultaneously by case law and its reference to relevant judgements by the Constitutional Court.

Initially, judges interpreted the legal barriers in Article 7 point (e) to mean the barriers stated in Articles 8, 9, and 10 of the 1974 Marriage Law. Article 8 prohibits: "(a) A marriage between two parties of the same vertical bloodline; (b) A marriage between two parties of the same horizontal bloodline, such as brother-sister, nephew-aunt, and niece-uncle; (c) A marriage between two parties related by marriage, such as stepchildren and in-laws; (d) A marriage between two parties related by breastfeeding (*raḍāʿah*); (e) A marriage between two parties related by the same bloodline, when there is more than one wife; (f) A marriage between two parties that is prohibited by religious or other provisions." Article 9 also "prohibits a polygamous marriage, except for those who are exempted by articles 3 (2) and 4 of the 1974 marriage law." Article 10 "prohibits a third remarriage between two parties, except if their religion or conviction allows it." These codified barriers, which are restated in articles 39-44 of the 1991 Compilation of Islamic Law, are derived substantively from religion (mainly Islam) and the state's plan to restrict the application of polygamy. The barriers manifest in two general limits: one is that the petitioned marriage is neither religiously invalid nor against the existing laws, and the other is that the petitioned marriage is not informal polygamy.

The first limit concerns the religious validity of a marriage. Islamic court judges are likely to reject an *isbat nikah* petition if the marriage being petitioned is religiously invalid. In judge-

[41] Since 2012, the Supreme Court has arranged a yearly plenary meeting in each chamber, involving both judges and clerks. The results of this meeting take the form of legal formulations that are disseminated via circular letters. The circular letters are available on the Supreme Court's website. In addition, the letters (including other reforms initiated by the Supreme Court) are communicated to the public via *Majalah Peradilan Agama*—replacing and reviving a well-known *Mimbar Hukum* journal that no longer exists—which has been issued every three months since 2013.

ment number 439K/AG/1996, a woman got married to a widower with three children. The marriage was unregistered and concluded according to Islamic provisions. After three years and six months, they began to quarrel, and the wife wanted a divorce. To obtain a formal divorce, she filed a petition at an Islamic Court to validate her marriage. The evidentiary session revealed that the wife was still religiously married to another man at the time she got married to her current husband. The court rejected this petition on the ground that paragraphs (1) and (2) of Article 2 of the marriage law are cumulative. While paragraph 2 requires a marriage to be registered, the first paragraph needs it to be conducted according to the party's religion or conviction. Given this consideration, by rejecting the above petition the appeal court and Supreme Court reinforced the first instance court judgement. This judgement corresponds to the previously mentioned case of Bulukumba Islamic Court, where the acting judges rejected an *isbat nikah* petition because the marriage being petitioned was religiously invalid (van Huis, 2015, p. 229). The marriage was not conducted by a valid guardian, but rather by the brother of the petitioner's mother, and for this reason the marriage could not be validated retroactively.

In a recent development, the Supreme Court required an *isbat nikah* petition for a religious marriage to be conditional on valid grounds and evidence. In judgement number 111/K/AG/2011, the Supreme Court annulled Baubau Islamic Court's judgement granting an *isbat nikah* petition, because the petition was based on false testimony. The testimony was proven to be faulty by the Baubau General Court decision. The details of this case are as follows:

> In 2006 a man filed an *isbat nikah* petition to the Baubau Islamic Court. In his petition he claimed to have married a woman in 1997. The marriage was registered at the Office of Religious Affairs in his home town. Soon after the wedding, the couple went to Malaysia to work. The wife later returned to their home town in Poelang Timur-Sulawesi, whilst the husband went back and forth between Sulawesi and Indonesia for eight years. In 2005, the husband was imprisoned in Malaysia for eight months. Af-

ter completing the term, he went back to meet his wife, but she had meanwhile got married to another man. Disappointed, he wanted to repudiate his wife and filed an *isbat nikah* petition to validate his marriage, because (he claimed) the marriage certificate was lost. The petition was filed on the ground of Article 7 point (b): "if the marriage certificate is lost." The wife admitted that they had concluded a religious marriage during their stay in Malaysia, rather than in their home town as was also claimed by the man. The couple had three children whilst being married, but their marriage was never registered.

In the judgement, the first instance court accepted the petition. It also allowed the husband to utter *talak* before the court, and distributed the couple's joint marital properties 50:50. The Kendari Court of Appeal reinforced this decision. Unsatisfied with the decision, the wife filed a cassation to the Supreme Court on the ground of false testimony delivered by the petitioner's witnesses. To support her claim, the wife attached two verdicts from Baubau general court,[42] sentencing each witness presented by the husband to the commission of fraud by delivering false testimony. After examining the petition, the Supreme Court concluded that the evidence (two witnesses) was not valid, referring to the Baubau General Court verdicts. For this reason, the Supreme Court annulled the first instance and court of appeal decisions on the *isbat nikah* and ultimately rejected the husband's petition for divorce as well.

This case is quite complex, because it involves an *isbat nikah* petition, divorce petition, and *harta-sepencarian* (distribution of joint-marital property) petition. In addition, the petitioned marriage was concluded abroad, the wife was already married to another man, and the petition was framed around Article 7 point (b), which turned out to be a false claim based on engineered testimony proven by general court verdicts. Hypothetically, the outcome of this case would have been different if the husband had not committed fraud and the petition was registered on other grounds, notably points (a) or (e) of Article 7 of the compilation. This hypothesis draws on the existing legal precedent and judges' inclinations to treat *isbat nikah* leniently, as long as the marriage is religiously valid and not against the

[42] Judgement numbers 319/Put.Pid.B/2009/PN.BB and 320/Put.Pid.B/2009/PN.BB.

law. The 2015 Supreme Court plenary meeting even mentions, in point (8), that "an unregistered marriage abroad between two Indonesian citizens can be brought to the Islamic Court for *isbat* a year after their return, if they did not register the marriage directly after returning."[43] In this regard, the nullification of *isbat nikah* in judgement 111/K/AG/2011 is likely to be attributed to the petitioner's inability to frame his petition within more relevant grounds, notably grounds from points (a) or (e), and his false claim of a lost marriage certificate. In other words, the nullification is caused by the petitioner's strategy failing to consider recent developments within the Supreme Court, rather than by whether or not such a marriage is eligible for an *isbat nikah*.

The second limit requires that the marriage being petitioned is not informal polygamy, regardless of whether the marriage is religiously valid or not. In judgement number 477K/AG/1996 the Supreme Court rejected an *isbat nikah* petition for a polygamous marriage. In this case, a 22-year-old woman was married to a 25-year-old man who had impregnated her. The marriage was concluded according to the procedures prescribed in Islam: a valid guardian, two competent witnesses, and a dowry. Five years after the wedding, and blessed with one child, the couple started to live in disharmony, and the wife asked for a divorce. She registered a petition to validate her marriage at an Islamic Court, as a prerequisite procedure to obtaining a formal divorce. In her case, involving an Islamic court was mandatory, not only to formalise the divorce but also to make divorce possible, since a wife is not entitled to a unilateral divorce under Islamic provisions. However, the petition was rejected by both the first instance court and the court of appeal, because the marriage was not registered and the husband had been married to another woman before the marriage was petitioned; his second marriage had been concluded religiously, without his first wife's permission. The Supreme Court later reinforced this judgement, because the marriage was an informal polygamous marriage.

[43] The Supreme Court Circular Letter 3/2015.

The judges' refusal to validate informal polygamy corresponds with an emerging trend in the general court to start penalising informal polygamous marriage. The marriage law does not clearly mention legal sanctions for the violation of restrictions on polygamy. Its implementing regulation, namely Government Regulation 9/1975, only sets an 'out-dated' and trivial administrative fine of 7,500 rupiahs (around 50 cents) for informal polygamy. In 2010 there was a proposal to amend this outdated law in parliament by drafting the substantive law of Islamic courts (*Hukum Materiil Peradilan Agama*) to criminalise informal polygamy with up to three years imprisonment. Yet, following the controversy it triggered and the strong resistance it received from society, this proposal ended up in deadlock. In fact, Civil Registration Law 23/2006 basically enables local governments to impose heavier administrative fines on people who fail to register vital events, such as marriage (including informal polygamous marriage), but its implementation falls short of expectation. Local authorities rarely allow an informal polygamy complaint to proceed to the competent authorities. Nevertheless, Van Huis mentions that the Criminal Chamber of the Supreme Court has started to apply felony to informal polygamy by employing Article 279 of the Criminal Code (van Huis & Wirastri, 2012, p. 12). Article 279 stipulates that:

> "Persons who marry despite being aware that there are legal barriers to the marriage can receive a maximum sentence of five years (paragraph 1 [1]). The same penalty applies to persons who marry, despite knowing that an existing marriage of one of the parties forms a legal barrier to their own marriage (paragraph 1 [2]). Persons who deliberately conceal a previous marriage that constitutes a legal barrier to marriage, as intended in paragraph 1 (2), will face a maximum sentence of up to seven years imprisonment (paragraph 2)."

By featuring judgement number 2156 K/Pid/2008, Van Huis gives an example where a husband who secretly concluded informal polygamy was sentenced to six months imprisonment for violating Article 279 of the Criminal Code (van Huis &

Wirastri, 2012, p. 12). This development corresponds with an earlier judgment from the Constitutional Court, which upheld the restrictions on polygamy even if the marriage was religiously valid. In 2007, the Constitutional Court judges rejected a lawsuit filed by Muhammad Insa. He claimed that the codified restrictions on polygamy were against his constitutional right to practice his religion, as his religion allows polygamous marriage. In this judgement, the judges argued that the restrictions were a correct understanding of Islamic doctrine and not against the constitution (Butt, 2010, p. 279; M. Cammack et al., 2015; Chan, 2012). The marriage law does maintain the religious nature of marriage. However, its application is restricted to conditions required by law, i.e. Articles 4 and 5 of the Marriage Law 1/1974, and Article 4 (2) of Government Regulation 45/1990 for Civil Servants. Such restriction refers to Article 28 J of the Constitution, which enables legislation-level law (*Undang-Undang*) to restrict the application of people's fundamental rights; notably, their rights to practice religion. The same logic applies to the restrictions on a husband's access to unilateral *talak,* which I discuss in the broken marriage section.

All these barriers prevent an unregistered marriage from getting validated retroactively, via *isbat nikah*. A petition may be granted after the judges have assured that an unregistered marriage did not violate the barriers. In the 2012 plenary meeting, the Islamic Chamber of the Supreme Court formulated: "In point (11), an *isbat nikah* is basically allowed, in order to obtain a formal divorce, except if the marriage being petitioned is clearly against the existing laws,[44] and in point (12) an *isbat nikah* to obtain a formal divorce is not allowed if the petitioned marriage constitutes informal polygamy without the first wife's permission, except where permission for polygamy is available from Islamic Court."[45] Accordingly, the Supreme Court sets prac-

[44] It is important to note that the Marriage Law also stipulates that a marriage shall be based on mutual consent (Article 6[1]), and that the minimum marital age is 19 years for the bride and groom (Article 7). However, it remains unclear whether or not these restrictions stand as a barrier for an *isbat nikah* petition.

[45] Supreme Court Circular Letter 7/2012.

tical guidelines for judges in exercising their jurisdiction on *isbat nikah.* The guidelines include the following directions: "it requires the judges to be very careful in adjudicating an *isbat* petition; it requires a petition to be announced, grounded with clear reason and purpose, and treated as contentious if the petition is filed only by one party (either a husband or a wife); and those whose rights are injured by an *isbat* petition may either file their objection and intervene in the ongoing process of *isbat*, or file a petition for nullification, if the petitioned *isbat* has already been granted (Mahkamah Agung RI, 2013, pp. 153–155)."

In the 2018 plenary meeting, the Supreme Court mentioned in point (1.h) that "an *isbat nikah* petition for informal polygamy cannot be accepted, even if the petition is to secure the best interests of a child. In this case, a parent may instead apply for a petition to determine the child's origin."[46] The background of this formulation is the 2012 Constitutional Court amendment on Article 43 (1) of the 1974 Marriage Law.[47] This amendment modifies Article 43 (1), to mean: "a child born outside of wedlock has a legal relationship (*hubungan perdata*) with his or her biological father and the father's family, if medical technology or other means of legal evidence can convincingly prove biological fraternity." Initially, the Supreme Court adapted this amendment to fit its own existing *isbat nikah* trend. A petition to legalise a child's status was conditional on an *isbat nikah* judgement that first validated his or her parent's marriage. Only then could the child's legal relationship to his or her biological father be legalised.[48] In this sense, a petition on a child's origin is restricted to the limits set for *isbat nikah*, i.e. a religiously valid marriage, and not informal polygamy. Later, as Nurlaelawati and Van Huis suggest, Islamic court judges started to legalise child-father relationships from informal polygamous marriage, but conflicting judgements on this issue remained (Nurlaelawati & van Huis,

[46] Supreme Court Circular Letter 3/2018.

[47] Before the amendment, this article stipulated that "a child born outside of wedlock is legally related only to his or her mother and the mother's family."

[48] Point 14 of Supreme Court Circular Letter 7/2012.

2020, pp. 365–366).[49] This recent development explains why the 2018 Supreme Court plenary meeting ruled not to combine an *isbat* petition with a petition on a child's origin (*hak asal usul*). This separation enables the Supreme Court to legalise child-father relationships within informal polygamy, whilst invalidating informal polygamy itself.

In summary, this section demonstrates that Islamic Court judges play a defining role in developing a nuanced interpretation of *isbat nikah*. On the one hand, they extended the application of *isbat nikah* to any unregistered marriage concluded after the passing of Law 1/1974. On the other hand, to avoid an arbitrary use of *isbat nikah,* they refined its application by introducing certain limits, i.e. a religiously valid marriage, not informal polygamy, and not against the law (such as would arise with invalid grounds or false evidence). In this manner, they managed to reconcile the gap between a formal application of *isbat nikah* and increasing demand from society to validate unregistered marriages retroactively. Moreover, the judges adapted the 2012 Constitutional Court ruling on child-father legal relationships to the existing interpretation of *isbat nikah*. Initially, legalisation of a child-father relationship is conditioned to an *isbat nikah* judgement. Later, a child of informal polygamy may legalise his or her legal relationship to the biological father through a separate child origin petition. In doing so, judges seek to protect not only the child but also the first wife, whose husband committed informal polygamy without her consent. However, beyond this adaptation a child-father legal relationship may only be 'acknowledged' (with a restricted legal relationship), rather than 'legalised' (with

[49] Details of the impacts of the 2012 Constitutional Court ruling on the status of children born outside wedlock can be read in (Nurlaelawati & van Huis, 2020). Their article revealed how the Islamic court incorporates the Constitutional Court ruling, by distinguishing a child's legalisation (a full filial relationship) from a child's acknowledgement (a mere biological parental relationship). The legalisation enables a child to claim a full filial (*nasab*) relationship to his or her biological father, but this procedure is constrained by the limits set on *isbat nikah*, exempting a recent development on informal polygamy. However, acknowledgment establishes a child-father biological relationship only (not a full *nasab* relationship and restricted rights), but this procedure allows greater competency for Islamic court judges to establish a child-father relationship, including a pre-marital child who is not valid in a religious sense.

a full *nasab* relation). Regardless of this limitation, we learn that reform on this subject is strictly dependent on Islamic court judicial developments.

2.3 Broken Marriage Divorce

In Indonesia, statutory (legislative) reforms have brought two significant changes to divorce. One requires a divorce to be judicial and accompanied by sufficient ground(s). The other differentiates between two competent courts on divorce: a state Islamic court for Muslims, and a general court for non-Muslims. In this regard, the divorce statute may be subsumed under the 'second phase' of reform—the categories employed to divide different trajectories of family law reform in majority-Muslim countries (Welchman, 2007, pp. 108–109)—where judicial divorce and divorce ground(s) are made mandatory. Nevertheless, in a recent development within the Islamic court, Islamic court judges have stepped into the 'third phase' of reform, where a husband's facility to *talak* (unilateral repudiation) is balanced with a wife having more options for judicial divorce. The third phase of reform manifests in the invention of a broken marriage concept. This concept is the result of both inductive and deductive methods. It gradually evolved through judges' interpretation of divorce ground point (f) as unilateral and no-fault, and developed through several criteria attached to this ground. The ground was then deductively linked to an underlying purpose for Indonesian marriage, i.e. realising a marriage based on mutual love and consent. Later, the judges refined the application of broken marriage by reapplying fault consideration to the consequence of such divorce, allowing them to deliver a nuanced and just judgement that is threatened by a strict application of a no-fault ground. Before addressing broken marriage, the following discussion elaborates on judicial divorce and divorce grounds in Indonesian (Islamic) family law.

2.3.1 Judicial divorce and different grounds for divorce

Article 39 of the 1974 Marriage Law stipulates in paragraph one that "a divorce must be conducted in court, after

the court has attempted and failed to reconcile the parties", and in paragraph two that "there must be sufficient ground(s) for the breakdown of a marriage". The first paragraph makes divorce a state affair, by requiring it to be conducted in a competent court. The competent court refers to two different courts, i.e. the Islamic court and the general court. In Government Regulation 9/1975, the Islamic court is designated for Muslims or those who have concluded their marriages in accordance with Islamic religion, and the general court is provided for non-Muslims. The second paragraph requires a divorce lawsuit to be based on sufficient grounds. In the marriage law and its implementing regulations, divorce grounds comprise six conditions for all citizens and two additional conditions exclusive to Muslims:

> For all Indonesian citizens, the Explanation to Article 39 (2) of the 1/1974 Marriage Law *jo*. Article 19 of the 09/1975 Government Regulation mentions six grounds for divorce: (a) If a spouse commits adultery or suffers from incurable addiction to alcohol, opium, gambling, etc.; (b) If a spouse leaves the other spouse for two consecutive years, without permission or a legitimate reason for doing so; (c) If a spouse is imprisoned for a minimum period of five years; (d) If a spouse commits domestic violence; (e) If a spouse suffers from a physical disability or incurable disease which causes him/her to neglect their duties as husband and wife; and, (f) If continuous dispute and discord occurs between the spouses, and there is no hope of living peacefully together within a household.
>
> For Muslims, Article 116 of the 1991 Compilation of Islamic Law stipulates two additional grounds: (g) The violation of *taklik talak* (conditional divorce); and, (h) A religious conversion (*riddah* or *murtad*) that causes discord and disharmony.

Accordingly, a husband or wife may register a divorce at the competent court only when their respective spouse has violated at least one of these grounds. In this sense, the grounds are fault-based in nature, and are available as 'exit' grounds for those who are not at fault for the breakdown of their marriage. These grounds apply to both spouses, except the *taklik talak* ground - point (g) - which is only relevant to wives. Nevertheless, a divorce petitioned for by a husband is distinguished from that petitioned

for by a wife; namely, *talak* divorce for a husband and *gugat* divorce for a wife. The distinction revolves around different mechanisms and outputs available to the husband and wife in obtaining a formal divorce. The mechanisms refer to a wide range of divorce procedures, such as *talak* (a husband's unilateral right to repudiate), *khulʿ* (a consensual divorce), and *fasakh* (a divorce by judge[s]). The outputs refer to the consequences of the given procedures, such as a revocable divorce, an irrevocable divorce, and a final divorce.

First, regarding the mechanism of divorce, in *talak* divorce a husband seeks permission from the Islamic court to repudiate his wife, whilst in *gugat* divorce a wife requests that Islamic court judges terminate her marriage. This distinction is modelled after traditional *fikih* provisions, which give a husband the privilege of unilateral divorce (*talak*). However, this privilege is now subject to state control. A husband is still required to provide valid grounds, as prescribed in the marriage law, and can only then perform *talak* before an Islamic court. In certain cases, a husband is no longer entitled to perform *talak*, if he converts from Islam to another religion (*riddah* or *murtad).*[50] In *gugat* divorce there are two mechanisms available to a wife, i.e. *khulʿ* and *fasakh*. *Khulʿ* is consensual divorce, in which a wife agrees to pay compensation (*iwad*) to her husband in exchange for his *talak*. In Indonesia, *khulʿ* divorce may be obtained through regular *khulʿ*, *taklik talak, šiqāq*, and *fasakh* (van Huis, 2019a). Each procedure is different, but they may all end up as *khulʿ* in the hands of judges. In view of this, Van Huis suggests that different forms of *khulʿ* are the result of a 'judicial tradition', developed by judges in their daily adjudication (van Huis, 2015, p. 82). *Fasakh* is judges' prerogative right to terminate a marriage on their own. They often employ *fasakh* when a marriage is already beyond repair, but the husband has refused to pronounce *talak*.

[50] A husband can still initiate divorce via *gugat* divorce, by requesting that Islamic court judges terminate his marriage through *fasakh* (Mahkamah Agung RI, 2013).

Second, regarding outputs, *talak* divorce first generates *talak raǧʿi*, and *gugat* divorce generates *talak bain ṣuǵrā*. Whilst the former constitutes 'revocable' divorce, the latter is 'irrevocable' divorce. In a revocable divorce, the husband might reconcile with the divorced wife (*rujuk*) within a waiting period (*idah*).[51] In an irrevocable divorce, a husband is not entitled to *rujuk* and the only way to reconcile is via remarriage. There is also another type of irrevocable divorce, *talak bain khulʿi.* This type of divorce is adapted from *khulʿ* (consensual divorce), which in Indonesia appears in many forms: *regular khulʿ*, *taklik talak*, *šiqāq*, and *fasakh* (Nakamura, 2006; van Huis, 2019a). In essence, *talak bain khulʿi* is irrevocable and equal to *talak bain ṣuǵrā.* In Article 148 of the 1991 Compilation of Islamic Law, the result of a *khulʿ* divorce is a final divorce that is closed to appeal and cassation, but later, the Supreme Court ruled out this article through "*Buku II Pedoman Pelaksanaaan Tugas*" and made *talak khulʿ* similar to other divorce, and open to appeal and cassation (Mahkamah Agung RI, 2013). In addition to revocable and irrevocable divorce, there is also 'final' divorce (*talak bain kubrā)*, where the couple is not ever allowed to marry each other again. As an example, a divorced couple is never allowed to remarry if they obtained their divorce through *lian* (accusing a spouse of committing adultery that is unproven) or *riddah* (converting from Islam to other religion) procedures. In this manner, the outputs of a divorce are determined by who registers the lawsuit, and on what grounds the lawsuit proceeds, as depicted in the following table.

[51] However, his divorce becomes final once *talak* has been pronounced three times (*talak bain kubrā*). The husband could then only remarry his wife if she had married and then divorced another man (*muḥallil*).

Who	Divorce Grounds	Types	Available Options	Outputs	
Husband (*Talak* Divorce)	a. Committing adultery and incurable addiction	fault-based	*talak*	*talak raǧ'i*	revocable
			lian	*talak bain kubrā*	irrevocable
	b. Neglecting spouse for two consecutive years without legitimate reason	fault-based	*talak*	*talak raǧ'i*	revocable
	c. Imprisoned for a minimum period of five years	fault-based	*talak*	*talak raǧ'i*	revocable
	d. Committing domestic violance	fault-based	*talak*	*talak raǧ'i*	revocable
	e. Suffering from an incurable disease that prevents the fulfilment of duties	fault-based	*talak*	*talak raǧ'i*	revocable
	f. Continuous strifes that cause the breakdown of marriage	unclear	*talak*	*talak raǧ'i*	revocable
			šiqāq	*talak raǧ'i*	revocable
	h. Converting from Islam (*riddah* or *murtad*) that causes the breakdown	fault-based	*talak*	*talak bain kubrā*	irrevocable
Wife (*Gugat* Divorce)	a. Committing adultery and incurable addiction	fault-based	*talak*	*talak bain khuli'i*	irrevocable
			fasakh	*talak bain sughrā*	irrevocable
			lian	*talak bain kubrā*	irrevocable
	b. Neglecting spouse for two consecutive years without legitimate reason	fault-based	*talak*	*talak bain khuli'i*	irrevocable
			fasakh	*talak bain sughrā*	irrevocable
	c. Imprisoned for a minimum period of five years	fault-based	*talak*	*talak bain khuli'i*	irrevocable
			fasakh	*talak bain sughrā*	irrevocable
	d. Committing domestic violance	fault-based	*talak*	*talak bain khuli'i*	irrevocable
			fasakh	*talak bain sughrā*	irrevocable
	e. Suffering from an incurable disease that prevents the fulfilment of duties	fault-based	*talak*	*talak bain khuli'i*	irrevocable
			fasakh	*talak bain sughrā*	irrevocable
	f. Continuous strifes that cause the breakdown of marriage	unclear	*talak*	*talak bain khuli'i*	irrevocable
			fasakh	*talak bain sughrā*	irrevocable
			šiqāq	*talak bain sughrā*	irrevocable
	g. Taklik-talak violation	fault-based	*talak*	*talak bain khuli'i*	irrevocable
			fasakh	*talak bain khuli'i*	irrevocable
	h. Converting from Islam (*riddah or murtad*) that causes the breakdown	fault-based	*fasakh*	*talak bain kubrā*	irrevocable

Figure 2.3.1.1: Muslims' divorce grounds, procedures, and outputs

2.3.2 The evolution of 'continuous strife' as a ground for divorce

The 1974 Marriage Law requires a divorce lawsuit to meet at least one sanctioned ground. One particular ground for divorce, i.e. point (f) on continuous strife, tends to generate debate. The ground stipulates that a husband or wife may register a divorce "if continuous dispute and discord occur between the spouses, and there is no longer hope of living peacefully together within a household."

If the stipulated condition has already been met, is it necessary to determine who was at fault? Suppose the answer is 'yes'; in that case the ground is fault-based, which gives rise to another question: Is the person who caused the dispute and discord allowed to use the ground? In other words, is the ground unilateral or non-unilateral?

Suppose the answer to the first question above is 'no'; in that case, the ground is both unilateral and no-fault. The lack

of a clear answer to these questions has generated different attitudes amongst Islamic court judges. Some judges rejected divorce lawsuits made on this ground, if the lawsuit was filed by the person who had caused the conflict (*non-unilateral and fault-based*). Some judges accepted such cases, but still determined who was at fault (*unilateral and fault-based*). Still others received such cases without necessarily feeling burdened to find out who was responsible for the dispute and discord (*unilateral and no-fault*). To address this issue, Islamic court judges (notably those from the Islamic Chamber of the Supreme Court) gradually developed a stable interpretation of the ground through their judgements, plenary meetings, and circular letters, and by implementing guidelines and regulations. Initially, they treated the ground as fault-based, and then they started to interpret it as no-fault. Later, they established the ground as no-fault, and this was reinforced by the Indonesian Constitutional Court judgement number 38/PUU-IX/2011.

2.3.2.1 Debates on the nature of the 'continuous strife' ground

Debates about the nature of the continuous strife ground in point (f) appeared in the *Siti Hawa v. A. Rahman* case. In this case, an appellate court overturned a decision from a first instance Islamic court, because the respective courts held different views on whether it was necessary to determine who was responsible for the alleged dispute and discord. Whilst the first instance court perceived that finding out who was at fault was necessary, the appellate court perceived that it was also important to determining whether the lawsuit would be accepted or rejected (*non-unilateral*). Only later in the cassation did the Supreme Court reinforce the first instance court decision, by granting divorce through a *fasakh* procedure, on the ground of continuous strife. The details of this case are as follows:

> In 1979, Siti Hawa filed a divorce suit against A. Rahman at Kuala Simpang Islamic court. The lawsuit was built on multiple grounds—i.e. dispute and discord, *taklik talak* violation, and do-

mestic violence—seeking either *talak* or *fasakh*. During evidentiary sessions, the first instance court found that: (1) Conflicts had occurred for three years; (2) The husband had neglected his wife for four months, and had not provided her with maintenance support; and, (3) The husband had committed domestic violence. However, until the last session, the husband refused to pronounce *talak*. Given this, the court dissolved the marriage through *fasakh* by referring to a jurist's opinion in a classical *fikih* book, i.e. *Kitab Bugyah*. Later, this decision was overturned by the appellate court, which argued that: (1) There was no convincing evidence of dispute and discord, and the court could therefore not determine who was at fault; (2) If conflict were to be proven, the solution should be *šiqāq*, instead of *fasakh*; and, (3) Maintenance negligence that could provide a basis for *fasakh* was not supported by sufficient evidence, as the husband claimed his wife had refused to take a share of his salary. In judgement number 015K/Ag/1980, the Supreme Court considered that the evidence was sufficient and decided to grant Siti Hawa a divorce through *fasakh*, on the ground of irreconcilable continuous strife, point (f). This judgement formulates a legal principle: "a divorce lawsuit filed to an Islamic court and seeking *fasakh* must be accepted if the judges find 'sufficient evidence' for the occurrence of continuous strife and failed attempts at reconciliation."

This judgement demonstrates how Supreme Court judges have employed a lenient use of *fasakh,* mainly when a husband refuses to pronounce *talak.* This corresponds to Van Huis' argument that—through what he referred to as a 'judicial tradition'—the Islamic court had developed a lenient attitude towards *fasakh* long before the marriage law was passed (van Huis, 2015, p. 82, 2019a). This attitude enabled the court to extend its application of the *fasakh* procedure to a divorce lawsuit on the ground of continuous strife in point (f). The extended use of *fasakh* provides leeway for judges to terminate such marriages. In this judgement the Supreme Court started to treat divorce ground point (f) as unilateral, meaning it can be employed by either party, as long as the marriage is already irreconcilable. However, the Supreme Court did not make any explicit reference to whether this ground should be treated as fault or no-fault. Thus, it remained unclear whether it was nec-

essary to determine who was responsible for the marital breakdown.

In 1981, Supreme Court judges observed that an increasing number of judgements were being decided on divorce ground point (f). In their view, the judgements were often drawn hastily, without 'proper' procedure, and this led them to circulate letter 3/1981. The letter required judges within the Islamic Chamber of the Supreme Court:

> (1) To arrange a proper procedure for this ground, by conducting a thorough investigation of the occurrence of dispute and discord; (2) To establish who was at fault and decide accordingly, a lawsuit filed by the person who caused the dispute and discord shall be rejected; and, (3) To arrange a hearing session involving family and close relatives, as mandated in Article 22 (2) of Government Regulation 9/1975.

In examining divorce on the ground of continuous strife, the letter required (in its first point) the thorough investigation of an occurrence of dispute and discord. The first point emphasises the condition of the alleged conflict, and this will be discussed further in the broken marriage section. In its second point, the letter signified two things: one emphasised the ground as fault-based, and the other as non-unilateral. By fault-based, the letter means that Islamic court judges are required to establish who was at fault. By non-unilateral, the letter means that judgement on this ground is dependent on the establishment of fault. Suppose the accuser caused the fault; in that case, judges will reject the lawsuit. Suppose the fault was caused by the accused; in that case, judges may accept the lawsuit. In the third point, the letter compared this ground with a *šiqāq* ground requiring the involvement of (an) arbitrator(s), or *hakam*. Article 76 of Religious Court Law 7/1989 stipulates in paragraph one that "a divorce on the ground of *šiqāq* shall involve witnesses from the husband's and wife's families, or their relatives". In paragraph two, "after the hearings, the court may appoint (an) arbitrator(s) (*hakam*) from each party". All these restrictions aimed to make divorce on this ground more difficult.

In the 1990s the Supreme Court observed a reverse situation, in which judicial divorce was being sought for marriages that were already broken. However, such lawsuits were often filed by the person responsible for the breakdown of their marriage. This situation was problematic for Islamic court judges. On the one hand, they felt obliged to dissolve such irreconcilable marriages, just as they had done before, as reflected through their lenient use of the *fasakh* divorce procedure. On the other hand, they were required to uphold the 1981 Circular Letter restrictions, notably on the non-unilateral and no-fault principles of the continuous strife ground. To address this issue, the Supreme Court passed judgement number 038K/Ag/1990, in 1991. In this judgement, which is known as 'Bustanul Arifin's jurisprudence', the judges interpreted the continuous strife ground as no-fault. The judgement stated: "When (Islamic court) judges are convinced that a marriage is already broken, it is no longer relevant to find out who caused the dispute and discord. Blaming one side is not the best solution, and it most likely has a bad impact on the spouses and their descendants". This judgement repealed Supreme Court Circulation Letter 3/1981, which interpreted the continuous strife ground as non-unilateral and fault-based. Since then, the ground has been treated as unilateral and no-fault.

2.3.2.2 The 2011 constitutional court judgement on unilateral and no-fault divorce

In 2011 the Constitutional Court reinforced the existing Islamic court interpretation of divorce ground point (f). In judgement number 38/PUU-IX/2011, the Constitutional Court treated this ground as unilateral and no-fault. Before discussing this judgement further, it is necessary to provide background in the form of the *Bambang v. Halimah* case, as follows:

> In 1981, Bambang married Halimah and registered their marriage at the Setiabudi Sub-District Office of Religious Affairs. They were happy together for 21 years, raising three children, until 2002 when the husband married a well-known singer religiously. Bambang moved in with his new wife, leaving his first wife and children. In 2006, Bambang repudiated Halimah out-of-

> court. In 2007, he filed a petition at the Central Jakarta Islamic Court, to gain permission to utter *talak*. The petition was registered on the ground of point (f), on continuous dispute and discord. The petitioner claimed that this condition was caused by principal differences between the original spouses. In his view, the differences prevented them from achieving the sanctioned purpose of marriage, by realising *sakinah* (serenity), *mawadah* (prosperity), and *raḥmah* (blessedness).[52] Nevertheless, Halimah tried to preserve her marriage by arguing that her husband was not entitled to this ground, because he was the one who had caused dispute and discord.

On 16 January 2008 the first instance court accepted this petition and allowed the husband to repudiate his wife. The husband was also sentenced to pay one billion rupiah—six hundred million rupiahs in expenses to the repudiated wife during the waiting period (*idah*), and four hundred million rupiahs as a consolation gift (*mutah*)—and charged 506,000 rupiahs for court fees. On 24 September 2008 the Court of Appeal overturned this judgement in favour of the wife's objection to the divorce. The judges maintained that the husband: (1) failed to present concrete events or legal facts, and (2) failed to indicate the differences in 'principle' which, according to his claim, had caused (3) continuous dispute and discord between the spouses. The husband appealed for cassation at the Supreme Court, but on 4 August 2009 the court reinforced the appellate court decision by rejecting the husband's divorce petition. The husband responded by filing another legal action, i.e. *Peninjauan Kembali* (judicial review), to the Supreme Court. He developed his prepositions, to include:

> *First*, the argument regarding the lack of any concrete events or legal facts to prove this ground was not reasonable, because they had been presented in general to the first instance court—the details were left for judges to reveal throughout the court hearings. *Second*, continuous disputes and separation began in 2002 and continued from that point onwards, proving that the marriage was beyond repair. *Third*, the situations were "an indisputable fact" of "the breakdown of their marriage". *Fourth*, retaining an already broken marriage is against *fikih* principles on 'realising

[52] Marriage Law 1/1974, in Chapter II *jo*. Article 3 of the Second Book of KHI.

greater benefits' (*maṣlaḥah*) and avoiding possible risks (*muḍarrah*). *Fifth*, the use of *hakam*—which was deemed exclusive for a *šiqāq* divorce procedure—should be viewed as an additional means, rather than a procedural inconsistency.

Having reviewed these arguments, the Supreme Court accepted them. Accordingly, the Supreme Court formulated three considerations: 1) Both the fighting and the separation were sufficient facts for this ground; 2) The failure of *hakam* to reconcile this couple was evidence that there was no hope for them continuing to have a harmonious marriage; and 3) The Supreme Court has developed a stable corpus of case law on broken marriage that corresponds to the no-fault principle. In judgement 67 PK/AG/2010 the Supreme Court granted the husband permission to repudiate his wife. The court also raised the consolation gift from IDR. 400.000.000 to IDR. 900.000.000, so that in total the husband had to provide 1.5 billion rupiahs to his ex-wife, excluding court fees of IDR. 2.500.000.

Disappointed with this judgement, Halimah brought the ground of continuous strife – in Article 39 (2) point (f) of the Marriage Law 1/1974 - to the Constitutional Court for judicial review. She claimed that the ground is against Article 28D (1) and 28H (2) of the Indonesian Constitution 1945. Article 28D (1) stipulates that "each person has the right to recognition, security, protection and certainty under a 'just' law that treats everybody as equal before the law". Article 28H (2) states that "each person has the right to facilities and special treatment, to obtain the same opportunities and advantages for reaching equality and justice". The petitioner perceived that point (f) of this ground lacks 'normative regulations' that protect the interests of a victim, notably wives. She maintained that this is against Article 28D (1) of the constitution, which guarantees protection, certainty, and justice for each person, and against Article 28H (2) of the constitution, which allows affirmative action to protect wives as a disadvantaged group. In many cases a divorce will readily be granted through an all-encompassing sentence of "if continuous

dispute and discord occurs between the spouses, and there is no longer hope of living peacefully together within a household', which disregards the interests of a wife who actually prefers to save her marriage. Meanwhile, a fault partner, notably a husband, could freely release himself from marital duties.

In Judgement 38/PUU-IX/2011, the Constitutional Court rejected this petition. The judgement summary comprises the following points:

> *First*, the judges interpret Article 1 of the 1974 Marriage Law that stipulates: "A marriage is a 'physical' and 'non-physical' contract between husband and wife, aiming to realise 'a happy and long-lasting family' that is based spiritually on 'the almighty God'". A physical contract means that a marriage shall be based on mutual consent. In contrast, a non-physical contract refers to Article 33 of the 1974 Marriage Law: that a marriage contract shall be based on mutual love. The phrase 'a happy and long-lasting family' as the purpose for marriage shall be interpreted in accordance with Article 30 of the Marriage Law 1/1974, which requires the principle to be mutually upheld by both sides, and projected as the basis of the Indonesian social structure. The phrase, "based spiritually on 'the almighty God'" shows the defining characteristic of Indonesian marriage: that it manifests not only living needs (*hajat hidup*), but also religious observance (*ibadah*). However, when mutual consent has been broken, either physically or spiritually, and there is no hope of realising the purpose of marriage, the marriage law provides leeway via divorce. In this sense, it would be unnecessary to establish who was at fault, because each party is allowed to review their own respective consent to the marriage.
>
> *Second*, The Constitutional Court argued that Article 39 (2) Point (f) on continuous strife does not oppose Article 28D (1) of the 1945 Constitution. The ground offers leeway for an unhappy marriage and provides the legal certainty and justice required by Article 28D (1) of the constitution. *Third*, the court disagrees with the petitioner's proposition that Article 39 (2f) is against Article 28H (2) of the 1945 Constitution, because Article 28H (2) is designated for affirmative action, whilst the marriage law clearly states that a wife shares equal status with her husband. Therefore, the plea for a wife's affirmative right is deemed irrelevant. The judgement has established the ground as no-fault and projected it as leeway for each party to review his/her consent

to their irreconcilable marriage. Nevertheless, judge M. Akil Mochtar held a different view to the majority of the judges. He argued that Article 39 (2f) on continuous strife is not constitutional, because the ground is in opposition to another purpose of the 1974 Marriage Law; namely, to make the occurrence of divorce difficult. For Muslims, he perceived that this ground is redundant to the existing institution of *šiqāq*, as stipulated in Article 76 of Religious Court Law 7/1989. Despite the objection from this particular judge, the majority of judges managed to decide that Article 39 (2) Point (f) is constitutional.

This 2011 Constitutional Court judgement reinforced the existing Islamic court judicial tradition which treated the divorce ground of continuous strife point (f) as unilateral and no-fault. The judgement also prioritised mutual consent and love as an underlying purpose and principle of Indonesian marriage, over another purpose and principle of Indonesian marriage, i.e. to control the occurrence of divorce, by making it judicial and accompanied by (a) sufficient ground(s). More importantly, the judgement provided a solid support for the invention of a broken marriage concept for Indonesian divorce, which will be discussed in the following section.

2.3.3 The invention of 'broken marriage' as unilateral and no-fault

Simultaneous to the establishment of a unilateral and no-fault ground, the Supreme Court judges developed several criteria as thresholds for the ground. Later, they linked these criteria deductively to the underlying purpose and principle of Indonesian marriage—i.e. to realise a marriage as a physical and non-physical (spiritual) contract that is based on mutual love and consent—in order to invent a broken marriage concept. This invention corresponds with the 2011 Constitutional Court decision that appeared to adopt the existing trend within the Islamic court. The Constitutional Court reinforced both Islamic court views on divorce ground point (f) being a unilateral and no-fault ground (as discussed in the previous section), and its invention of a broken marriage concept. In a recent development,

judges from the Islamic Chamber of the Supreme Court went further, by reapplying fault consideration to the application of broken marriage. This consideration enables the judges to sense how a neglected or abused spouse feels, and to gain a general feeling of justice within society. By doing so, judges may deliver a nuanced judgement that would be impossible under the strict application of broken marriage as a no-fault ground. In this sense, broken marriage is indeed a modified version of divorce ground point (f) on continuous strife, although it has been further developed and refined into an all-encompassing ground for divorce.

2.3.3.1 Formulating the criteria for broken marriage

To elucidate how the criteria for broken marriage were formulated, it is necessary to refer to the exact wording of divorce ground point (f) on continuous strife. The ground enables a husband or wife to register a lawsuit "if continuous dispute and discord occur between the spouses, and there is no longer hope of living peacefully together as one household". This ground requires: an 'occurrence' of dispute and discord; that conflict occurred 'continuously'; and that these two conditions are preconditions to the 'breakdown' of the marriage. However, each element is still general, and this gives rise to the following questions: *First*, does a physical quarrel determine an occurrence of dispute and discord or does the demise of proper communication suffice? *Second*, does the word 'continuous' carry a threshold for a minimum period of dispute and discord? Is it modelled after the minimum period of separation, as stipulated by either the Marriage Law or the 1991 Compilation? *Third*, are there any criteria for the breakdown of marriage, in order to conclude that a marriage is beyond repair? These questions have generated different interpretations, which have appeared in the corpus of case law, plenary meetings, circular letters, and implementing regulations.

Deciphering the criteria for continuous strife

The earliest interpretation I could find, which defines the criteria for this ground, appeared in the case of *Siti Hawa v. A. Rahman* (mentioned above). In this case, the judges employed *fasakh*, as they found 'sufficient evidence' for continuous strife and failed attempts at reconciliation. In the judgement, the judges stated that "a lawsuit filed at a court and seeking *fasakh* must be accepted, should the judges find 'sufficient evidence' of the occurrence of continuous strife and 'failed attempts at reconciliation'". Given this legal formulation, the judgement deciphered two criteria, i.e. sufficient evidence and an irreconcilable marriage, for divorce ground point (f). In Circulation Letter 3/1981, aside from establishing this ground as 'non-unilateral' and 'fault-based' (see the discussion on point [2] in Section 2.3.2.1), the Supreme Court requires, in point (1): "The arrangement of proper procedure, by conducting a thorough investigation into the occurrence of dispute and discord", and in point (3): "The arrangement of a hearing session that involves family and close relatives, as mandated in Article 22 (2) of Government Regulation 9/1975". Point 1 was a mere statement of formulation of legal precedent in the *Siti Hawa v. A. Rahman* case. Point 2 compared this ground to a *šiqāq* ground. Yet, in recent guidelines disseminated in the Islamic court, a divorce on a *šiqāq* ground is distinguished from that petitioned for on other grounds (Mahkamah Agung RI, 2013, p. 163). Put simply, the distinction is the mandatory use of an arbitrator(s) or *hakam* institution in the *šiqāq* procedure.

In a later judgment, 044K/Ag/1998, *Sampurni v. Sudayanto*, the Supreme Court recognised family testimony as valid evidence to prove alleged continuous strife. This case took place in 1998, when Sampurni filed a divorce lawsuit against Sudaryanto at the Kediri Islamic court, on the ground of continuous strife. The judges' assembly examined this ground and granted her *talak*, on behalf of her husband. The appellate court overturned this decision, and only later did the Supreme Court reinforce the

first instance court decision by granting her a divorce. The debates in this case questioned whether family testimony counts as valid evidence for the occurrence of dispute and discord. While the appellate rejected the use of family testimony as evidence, the first instance court and Supreme Court accepted it. This case shows how the Supreme Court has elevated the status of family testimony, both as valid evidence and as part of the compulsory procedure for the continuous strife ground. The same attitude appeared in Supreme Court Judgment 495K/Ag/2000, which enabled the use of family testimony in both *gugat* divorce and *talak* divorce.

Another effort to define the point (f) ground appears in the pragmatic use of mediation findings as evidence to determine the occurrence of continuous strife and failed attempts at reconciliation. Article 5 (1) of Supreme Court Regulation 1/2016 stipulates that mediation is a 'closed session', meaning that mediation records cannot be disclosed. In Article 35 the regulation draws a sharp line between mediation and litigation, stating that mediation records must be destroyed, and the mediator him/herself cannot be accepted as a witness in the case. However, Article 5 (2) states that conveying a report to judges about who is not acting in good faith and who is responsible for the failure of mediation is not a violation of the closed nature of the mediation process. In an interview with a member of the Islamic Chamber of the Supreme Court, judge Edi Riyadi argues that mediation reports are a fact worth considering throughout the evidentiary process, particularly in divorce cases. The use of (failed) mediation reports has not formally widened the criteria for evidence, but in practice it has equipped judges with solid facts to prove the occurrence of continuous strife. Even when a defendant is absent (*verstek*), meaning there was no mediation, the judges could still employ his or her absent as a strong indication that one of the spouses is no longer committed to reconciling, and that the marriage is beyond repair.

Formulating the operational criteria for broken marriage

Judgement 038K/Ag/1990—the landmark decision for the unilateral and no-fault principles of divorce ground point (f)—mentioned a broken marriage term. Instead of questioning each one of the elements of ground point (f), which are difficult to measure, the judgement requires judges to determine whether a marriage is already broken or not. This judgement is indeed the breakthrough which introduced the broken marriage term, although definitive criteria remained undeveloped. In Judgement 285K/Ag/2000 the Supreme Court started to develop three operational criteria to determine the breakdown of a marriage: (1) The marriage was concluded without the consent of the plaintiff's family; (2) The couple no longer lived under the same roof for a 'certain' period and; (3) The couple's family failed to reconcile them. The presence of these criteria determines whether a marriage was already broken, but the criteria are quite casuistic, and the minimum period of separation still remains unclear.

Nevertheless, in this decision the Supreme Court has tried to develop some operational criteria for the continuous strife ground, point (f). This breakthrough was reinforced by the 2011 Constitutional Court ruling that linked this ground deductively to an underlying purpose for Indonesian marriage; namely, mutual love and consent. When mutual love and consent to marriage no longer exists, it implies that the marriage is already broken. Given this approach, a broken marriage is defined through via two different methods: inductive and deductive. It was inductively shaped through case law and deductively inferred from a 'teleological' interpretation of the underlying principle and purpose of Indonesian marriage and divorce law (see the discussion in Section 2.3.2). In this manner, both the Islamic and Constitutional Court judges showed a preference for the purpose of marriage (namely, mutual consent and love), rather than the purpose of controlling the occurrence of divorce.

In the 2013 plenary meeting, the Islamic Chamber of the Supreme Court addressed broken marriage by formulating the following criteria: "1) There has been a (failed) attempt at reconciliation; 2) Good communication between the spouses no longer exists; 3) One of the parties, or both spouses, is/are neglecting their duties as husband and/or wife; 4) The spouses live separately, either under the same roof or in different domiciles; and, 5) There were other relevant findings during the trial, such as romantic affairs, domestic violence, gambling, etc".[53] These criteria are indeed a modified version of divorce ground point (f) on continuous strife. They also derive from point (b) on separation, and point (g) on the violation of *taklik talak*. Additionally, other grounds may be subsumed under the fifth criterion for broken marriage. The broken marriage ground transforms all the sanctioned divorce grounds into one single category of broken marriage. Mannan explains that this ground operates deductively. When judges encounter a marriage that was already broken and irreconcilable, they may employ these conditions to deduce a conclusion about whether or not a divorce lawsuit is accepted or denied (*Majalah Peradilan* Agama 2013, 50). In this way, other grounds were practically relegated to being merely complimentary.

However, a broken marriage ground still lacks definite criteria for the minimum period of separation. Is it modelled after the minimum period of separation, as set out in the marriage law or compilation? The marriage law sets a minimum period of two consecutive years as a distinctive ground for divorce. The 1991 Compilation of Islamic Law introduces two criteria for the separation period in Article 116 (g) on the *taklik talak* violation, i.e. three months for maintenance negligence (in point [2]) and six months for a general lack of responsibility (in point [4]). As quoted by Van Huis, Judge Abdul Manan explains that a three-month separation is enough (van Huis, 2015, pp. 241–243). In a recent interview, Judge Edi Riyadi said that the Supreme Court

[53] Supreme Court Circular Letter Point (4) 4/2014.

had not developed a consensus on this issue. However, he maintained that the minimum period is more than three years, overall. Whilst Manan is likely to draw his criterion from one of the requirements set out in the *taklik talak* violation ground, Riadi set a much more extended period than the threshold that is stipulated by the existing provisions.[54] More recently, in the 2022 plenary meeting, the Islamic Chamber of the Supreme Court sets a clearer minimum period of separation: i.e. 12 months for a negligence case and six months for a continuous strife case.[55] Further research into case law is nevertheless required, in order to shed light on which view corresponds to actual practice.

2.3.3.2 Refining broken marriage and reapplying fault consideration

Nowadays, the broken marriage ground is increasingly popular. This ground constitutes the majority of divorce grounds tried before an Islamic court. Its popularity outstrips the other divorce grounds, including *taklik talak*, which was once very popular amongst neglected wives. For example, in the Arga Makmur Islamic court there are a total of 365 judgements of Mukomuko origin for the period from 2016 to 2017. Out of this total there are 303 broken marriage cases and only 62 cases of *talik-talak* violation. The number shows how broken marriage cases outnumber *taklik talak* three times over, let alone how they outnumber other grounds that are disappearing from the court record. Van Huis suggests that divorce grounds listed in Article 39 (2) points (a-f) of the 1974 Marriage Law are no longer in use, having been replaced by a single ground, i.e. broken marriage (van Huis, 2015, p. 241). The Supreme Court applies broken marriage not only to lawsuits on the continuous strife ground, but also to lawsuits on other grounds. In Judgement 266K/Ag/2010 the Supreme Court decided a lawsuit ex officio, which was filed on the ground of *talik-talak* violation through broken marriage. This trend concerns

[54] Interview and correspondence with Supreme Court Judge Dr. H. Edi Riyadi, SH. MH, in Jakarta, 31 May 2019.

[55] Supreme Court Circular Letter Point 1 (b) 1/2022.

some learned jurists and scholars, regarding the possible harms emerging from a strict application of broken marriage as no-fault. To address this concern, the Supreme Court has started to refine the application of broken marriage, *first* by requiring that all the indicators be seen as 'cumulative' and, *second* by reapplying fault consideration especially when the 'fault' is relevant to a spouse's post-divorce rights.

In its 2018 plenary meeting, the Supreme Court started modifying Circular Letter 4/2014 on broken marriage, by requiring that Islamic court judges prove the indicators of a broken marriage. The 2018 plenary meeting formulates a guideline, which reads as follows: "Judges should be careful about granting a divorce, because it will terminate a sacred marriage, turning something legal into something illegal, and having not only a wide impact on social structure but also consequences in this world and the hereafter (*dunia* and *akhirat*). For these reasons, divorce should be accepted if a marriage is already broken, and the indicators are proven". This letter shows that the Supreme Court's primary concern is not acceptance of the broken marriage ground. Instead, the court emphasises proper use of this ground. In this way, the Supreme Court tries to refine the application of broken marriage by requiring the indicators to a broken marriage to be proven. However, it is hardly possible to infer that all the indicators shall be seen as cumulative. Whilst the nature of these indicators remains unclear, the Supreme Court is well aware of the necessity of proper and cautious use of these indicators. Further research is required, to observe the judges' attitude towards all the indicators.

In a recent development, the Supreme Court started to reapply fault consideration to broken marriage. The reason behind this move is growing concern about the strict application of broken marriage as no-fault. Judge Husseini, as Van Huis cited, suggested that the increasing popularity of broken marriage as a no-fault ground has gradually transformed the Islamic court into a mere divorce registration office (*kantor isbat cerai*), referred to

only for divorce formalisation. Without establishing who was at fault, the court was perceived as disregarding the feelings of a neglected or abused spouse and, in general, the feeling of justice in society (van Huis, 2015, pp. 242–243). In response, the Supreme Court judges started to reapply fault consideration to broken marriage divorces. In this manner, a question of fault is dealt differently from the general norm of broken marriage that continues to be treated as a unilateral and no-fault divorce ground. In other words, the broken marriage ground is still 'unilateral' in nature, and the person responsible for the breakdown of the marriage can use this ground. Yet the judges, mainly to secure or protect an injured party (the victim), can still employ fault consideration to such cases. This development appeared in Judgement 266K/Ag/2010, which is summarised below:

> On 8 April 1995 Sutrisno Baskoro married Tri Hastuti. From their marriage they had two children, a 13-year-old son and a 10-year-old daughter. However, dispute and discord had occurred frequently since the third year of their marriage. This conflict reached its peak on 9 November 2008, when the husband evicted the wife from their house. For a long time prior to her eviction the wife had not been being provided with *nafkah* (maintenance support) - since 1997. Besides, their joint-marital property (*harta-sepencarian*) came from her income as a lecturer and consultant in a private university in Yogyakarta. On 20 August 2009 she filed a single lawsuit at the Bantul Islamic Court, asking for a divorce on the ground of *taklik talak* violation, custody rights, due maintenance support, and the sharing of joint marital property. After examining the lawsuit, the court finally granted her an irrevocable divorce (*talak bain ṣuġrā*), custody rights to her second child, monthly support of 2,750,000 rupiah for her second child until the age of 21, and a ¾ share of the marital property.
>
> In response, the husband filed an appeal at Yogyakarta Islamic appellate court. The court nullified the decision of the first instance court, deciding to decrease the amount of child support from 2,750,000 to 750,000 rupiah per month, but reinforcing the rest of the decisions. Still unsatisfied, the petitioner appealed for cassation at the Supreme Court, arguing that firstly he was still in love with her under any situation and condition, and second, that their joint marital property should be divided equally between husband and wife. In the judgement, the Supreme Court rejected

this petition, considering that the marriage was already broken, regardless of whether he was still in love or not. The judges also reinforced the existing division of joint marital property by constructing the following legal formulation: "a wife shall receive ¾ of the marital property, because she gained the property, and the husband had not provided his children and wife with maintenance costs (*nafkah*) for 11 years".

In a more recent judgement, 88/Ag/2015, the adjudicating judges allocated a third of the joint marital property to the husband and two-thirds to the wife, considering that the disputed property included her *harta-pusaka* (a matrilineally-inherited property among Minangkabau's Muslim society). In fact, there is a lack of stable case law on the division of joint marital property, but these cases demonstrate that the Supreme Court has started to introduce nuanced interpretations to the equal share of joint-marital property promulgated by the law.

Put it more generally, these developments show how judges from the Islamic Chamber of the Supreme Court has not only invented broken marriage but also refined its application. They refined it by starting to treat all the indicators of broken marriage as cumulative and reapplying fault consideration. I will revisit judgement numbers 266K/Ag/2010 and 88/Ag/2015 in Chapter 4 (Section 4.4.3) when discussing a dispute about joint marital property in the Arga Makmur Islamic Court, in order to assess judges' awareness of this development, notably pertaining to a greater share for a neglected wife. Concerning the 2011 Constitutional Court judgement (see Section 2.3.2.2 of this chapter), the Supreme Court adopted the decision on their existing interpretation of broken marriage. The Supreme Court also developed the ground even further, by refining its application. Nevertheless, the rationale for comparing a marriage to a regular contract, which enables a husband or a wife to review their respective consent to the marriage, is indeed a more secular interpretation than the current stance. Further research is required, in order to see how judges from the Islamic court perceive such secular interpretations.

2.4 Concluding Remarks

The discussion of *isbat nikah* and broken marriage demonstrates increasing judicial discretion in the Islamic court. The judges extended forms of retroactive validation to an unregistered marriage through lenient use of *isbat nikah*. At the same time, they refined the application of *isbat nikah* by establishing certain limits to avoid its arbitrary use. In terms of broken marriage, the judges interpreted the divorce ground of continuous strife as unilateral and no-fault. They also linked this interpretation to one of the purposes of Indonesian marriage, i.e. to realise a harmonious marriage. If a marriage is already broken, it becomes impossible to attain this purpose, and it is therefore unnecessary to maintain the marriage. Given this interpretation, increasing divorce caseloads can be addressed using a more practical procedure.

These developments show how Islamic court judges emerge as an authoritative body for exercising judicial law making, by reforming Indonesian family law. The significance of these developments has been twofold, concerning both the increasing role of legal precedent in shaping Indonesian Islamic family law, and the shift of religious authority to perform *ijtihad* (or *recthvinding*) within Islamic family law, away from traditional *ulama* towards Islamic court judges. These developments confirm Van Huis' argument that, aside from legislation, Indonesian Islamic family law reforms have been the result of a judicial tradition wherein the roles of judges from the state Islamic court are decisive (van Huis, 2015, p. 85, 2019a).

Judicial developments on *isbat nikah* and broken marriage demonstrate the autonomy of the Islamic court. This autonomy manifests in the role of judges from this court in exercising judicial law making and referring to existing legal precedent in order to tackle similar cases. In judicial law making, judges have developed substantive reforms to Indonesian Islamic family law from within, without interference from 'non-legal' actors on the outside. By employing precedent and judicial policy, the judges

not only extend but also refine the application of *isbat nikah*, and invent broken marriage as a unilateral and no-fault ground for men and women. Besides, the judges can disseminate these developments within their institution through different means of communication, such as circular letters, books of guidelines, and the quarterly magazine, *Peradilan Agama*, which are all accessible online. Moreover, Islamic court judges manage to keep their distance from non-legal actors, by cleverly incorporating the authority of traditional *ulama* to perform *ijtihad* on Islamic family law into their legal community. Their incorporation of religious authority appears in the case law discussed above. In this manner, Islamic court judges emerge as state-sanctioned interpreters of Islamic law and promoters of the Islamic court as a domain for their *ijtihad*.

Another important point to note is the way in which Islamic court judges have adapted Constitutional Court judgements to serve their own tradition. Concerning *isbat nikah*, a 2012 Constitutional Court decision allows a child born outside wedlock to establish a legal relationship with his or her biological father. This judgement introduces a concept of biological fatherhood, which is against an equivalent concept in Islam, i.e. a marriage-based *nasab.* In view of this, Islamic court judges adapted the ruling to suit the existing development of *isbat nikah*, by distinguishing a child's 'legalisation' from their 'acknowledgement'. In this manner, the legalisation of a child is conditional on an *isbat nikah* judgement on his or her parents' marriage. An exception applies for the child of a religious marriage, but that type of marriage is an informal polygamy. In this case, the child may obtain legalisation through a separate child origin petition (*asal usul*). Other than these conditions, a child's relationship to his or her biological father may only be acknowledged, not legalised. Concerning broken marriage, the 2011 Constitutional Court judgement compares a marriage with a physical contract with a marriage with a non-physical contract. In this manner, a marriage union is based on mutual consent and love. Otherwise, each party is allowed to

review their respective consent to the union. This judgement introduces a completely secular rationale to the institution of marriage, but its use in this case is a mere restatement of the existing concept of broken marriage.

The ways in which the Constitutional Court judgements have been adapted has shed light on the other side of their autonomy. Instead of adopting Constitutional Court judgements in their entirety, Islamic court judges have adapted them to fit existing developments in their court. In this way, the judges are likely to maintain the balance between the religious nature of Indonesian family law and the possible restrictions placed on its application. This attitude confirms Nurlaelawati and Van Huis' view that reforms of 'core' Islamic family law will attract resistance from Islamic court judges (Nurlaelawati & van Huis, 2020). Alternatively, judges might become more lenient, as happened when the Constitutional Court judgement on the constitutionality of restrictions on polygamous marriage was incorporated. However, this attitude may threaten legal unity, since the Constitutional Court is also part of the Indonesian judiciary. For the time being, it can be inferred that the Islamic court has been autonomous. Next, we will look at how the judicial developments manifest in practice, by presenting the experience of the people of Mukomuko, on the west coast of Sumatera.