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

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The State Islamic Court: Examining Conflicts between *Semendo Adat* and State Law

5.1 Introduction

This chapter seeks to investigate access to the Islamic court at the local level. The discussion draws upon Chapter 2, on the autonomy of the Islamic court. As I mentioned earlier, the Indonesian state has introduced several reforms to its family law. Law 22/1946 administratively requires marriages, divorces, and *rujuks* (reconciliations) to be registered at the relevant office, i.e. an Office of Religious Affairs (*Kantor Urusan Agama,* KUA), for Muslims, or an Office of Civil Registry (*Kantor Catatan Sipil*), for non-Muslims. Law 1/1974 requires a marriage to be registered and a divorce to be based on a judicial decision, otherwise, neither will have the force of law. Law 7/1989 on Islamic Judicature enhances the status of the Islamic court (M. E. Cammack, 1997). The 1991 Compilation of Islamic Law (*Kompilasi Hukum Islam*, KHI) codifies a standardised interpretation of Islamic law for judges at the Islamic court (Nurlaelawati, 2010). In addition to increasing state control over a citizen's personal affairs, the reforms acknowledge family law and an Islamic court which are exclusively for Muslims. Yet, rather than forming the sole outcome of legislative deliberations, the reforms have predominantly been informed by 'bureaucratisation', and by 'judicialisation' processes (see Chapter 1, Section 1.4.1). To this day, judges from the Islamic court remain active in exercising judicial law making, as is evident in the 'extended' and 'refined' form of *isbat nikah* (a retroactive validation),[151] and in the broken marriage ground.

[151] The current *isbat nikah* is extended, because it may be applied to unregistered marriages after the passing of Law 1/1974. It has also been refined, because its application is now restricted, i.e. to being religiously valid and not an informal polygamy.

The latter developments demonstrate the autonomy of Islamic court judges in performing judicial reforms of marriage and divorce law. Through the new form of *isbat nikah*, Islamic court judges have managed to accommodate unregistered marriages, which are still pervasive in Indonesian society. Meanwhile, through the invention of broken marriage, the judges have managed to provide a 'unilateral' and 'no-fault' divorce ground and, more importantly, a simpler divorce procedure.[152] The judges have therefore exercised their autonomy, by bridging the gap between a formal application of law and a sense of justice within society. However, to examine this autonomy it is necessary to look at the judges' ability to navigate between the law and a sense of justice at the local level; notably, among a social group that observes non-state rules or norms. In Mukomuko, for example, the population is comprised of different groups, such as 'traditional *hulu-hilir* (upstream-downstream)[153] villagers' and migrants in several enclaves, and a mixture of the two in urban centres. While migrants may observe various rules from their place of origin, traditional villagers adhere to the *semendo adat*, which cannot be bypassed easily. Traditional villagers may escape the *adat* by abandoning their natal village, but their *kaum* (clan) will then be socially excluded from *kerja-baik* and *kerja-buruk*.[154] By narrowing the discussion to this particular group, this chapter seeks to understand the complex entanglement between local *adat* and state law.

To this end, the chapter looks primarily at marriage and divorce cases brought to the Islamic court by traditional villagers;

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[152] By 'unilateral', I mean that this ground may be used by either a man or a woman; and by 'no-fault', I mean that this ground lifts the burden to find who was at fault from the judges' shoulders.

[153] The traditional villagers refer to natives who reside at *hulu-hilir*, i.e. the former regions of XIX Koto, V Koto, and LIX Peroatin, and adhere to a *semendo adat*. Realising the colonial impression embodied to the terms of native and traditional, I still use these terms to distinguish these people from the remaining locals who reside permanently in Mukomuko but are not part of the *adat* community.

[154] *Kerja-baik-kerja-buruk* serves as a general guideline for how a community should deal with important events, such as births, marriages and deaths. These events are divided into two categories: One is *kerja-baik* (good events), e.g. birth and marriage, and the other is *kerja-buruk* (bad events), e.g. death. (For further elaboration, see Chapter 4, Section 4.2).

and, even though this rarely occurs, I found a few cases to explore. The cases usually involve a dispute about the distribution of marital property, embodied by a conflict between matrilineally-informed *adat* and the state's more patriarchally-inclined law. This conflict is inevitable, as a greater share of marital property is proffered to wives and children by *semendo adat* than by state law. An exception applies to divorce lawsuits concerning villagers who are state officials, i.e. civil servants, police, or military officers. These officials are subject to stricter regulation,[155] and their presence before the court is mostly for legal reasons, rather than to indicate a challenge to their *adat* and its institutional actors. This chapter also looks at how judges responded to their lawsuits. As I will show, judges made their decisions by sticking strictly to the law and the accepted developments within the Supreme Court—disregarding the parties' unique *adat* and sociocultural backgrounds. This chapter also looks at other types of actor, i.e. lawyers and informal case-drafters (*juru-ketik-perkara*),[156] who act as intermediaries or brokers between the parties and judges. As I will demonstrate, their brokerage roles have proven to be both 'constructive' and 'prospective' (Buskens, 2008, p. 153; Dupret & Drieskens, 2008, p. 9; Geertz, 1981, p. 173).

This exploration draws upon caselaw from 2016 to May 2021, at the Arga Makmur Islamic and Mukomuko Islamic courts. The caselaw consists of marriage-related and divorce-related cases involving *isbat nikah*, marriage dispensation, the distribution of joint-marital property, alimony, and/or child support. This exploration reveals that the encounter between the three main actors, i.e. the parties, judges, and brokers, was shaped by a conflict between the *semendo adat* and state law, even though

[155] Not only is a judicial divorce mandatory for such officials, but a failure to comply with this provision will be subject to more severe legal sanctions. Further, they must obtain permission from their superiors prior to divorcing, or their career will be at stake (Article 3 of Government Regulation 45/1990; Police Chief Regulation 9/2010 and Ministry of Defence Regulation 23/2008).

[156] At the Arga Makmur Islamic court, an informal case-drafter is a person offering a service to formulate a lawsuit or petition, for 100,000 to 150,000 rupiahs per case. Usually, the informal case-drafter is an acquaintance of one of the court employees, and they are supposed to equate to a *Pos Bantuan Hukum* (POSBAKUM, a legal aid centre), which would not otherwise exist in this court.

the latter always prevailed in court decisions. Hence, the Islamic court was not a promising forum for villagers who would usually refer to their *adat* (as a matrilineally-inclined Islamic law), and this partly explains the low number of incoming cases from this matrilineal community. Before delving further into this argument, some background to the establishment of the Mukomuko Islamic court will first be presented.

5.2 The 'Late' Establishment of the Mukomuko Islamic Court

In 1968 the Minister of Religious Affairs (the MoRA) issued Decree Number 195/1968, concerning the establishment of the Mukomuko Islamic court. The plan was to establish this court within the former *Kawedanan* of Mukomuko, which was a self-contained region.[157] However, at the time the region was only a sub-region of the *Kota Madya* (municipality) of Bengkulu, so the plan never materialised. Later, Mukomuko and the northern parts of Bengkulu became an autonomous regency, following the secession of Bengkulu province from South Sumatra via Government Regulation 23/1976. Yet, the capital of this new regency was not Mukomuko, but Arga Makmur, a rising transmigration region far southwest of Mukomuko (252.2 km, or seven hours from Mukomuko).[158] The new Islamic court was established at Arga Makmur, although its old name, 'Mukomuko Islamic court', was retained. Only later was the name of the court changed to 'Arga Makmur Islamic court', through MoRA Decree Number 72/1984. The court's jurisdiction included Mukomuko, up until the establishment of Mukomuko Islamic court in 2018.

The region, which obtained regional autonomy in 2003, therefore had to wait 13 years for the central government to create its Islamic court through Presidential Decree 15/2016.

[157] The *Kawedanan* was an administrative unit, beneath the regency but above several sub-regencies, which was led by a *wedana* who served the regent and oversaw the sub-regencies.

[158] The appointment of Arga Makmur as the capital can be attributed to the massive transmigration programme undertaken during the New Order era. This appointment sought to create a success story for the programme, which disregarded Mukomuko's sociohistorical background as a self-contained region (Soeprapto, 1989). Yet, the first regent of North Bengkulu (Letkol Syamul Bahri) was himself a native of Mukomuko.

Nonetheless, the court did not immediately start operating; Mukomuko had to wait a further two years for this to happen. Preparing the court to start functioning fully required the regional government (PEMDA) of Mukomuko to provide official vehicles, furniture, a residence, land, and a temporary rented building for the court. After satisfying these requirements, an Islamic court was officially established in the capital city of Mukomuko. The court became operational on 22 October 2018 and received its first case on 3 December 2018. Its establishment has significantly cut people's travelling distances to court, but some residents still consider the court's position at the far north of the region to be a barrier. People who reside at the *hulu* (upstream) and southerly villages, at a maximum distance of 124 km, still have to travel around four hours to reach the capital. This explains why, in February 2021, the Mukomuko Islamic court organised a circuit court at the southern sub-regency of Ipuh, which is 98 km from the capital. However, the initiative did not completely address the barrier, since the circuit was not arranged regularly due to the limited budget offered by the Supreme Court.

The 'late' establishment of the Mukomuko Islamic court raises the question of how people obtained a formal divorce prior to its establishment in 2018. In order to find out, it is necessary to distinguish between the period before the enactment of Marriage Law 1/1974 and the period after the marriage law came into force. Before 1974, people in Mukomuko could easily formalise their divorces at either the KUA of the North Mukomuko sub-regency or the KUA of the South Mukomuko sub-regency. However, after 1974 divorce lawsuits had to be filed at the Arga Makmur Islamic court, in the capital city of Bengkulu Utara. Within the second period, it is also necessary to distinguish between two periods: one before the adoption of the 'one-roof system' in 2004, and one after the adoption of the one-roof system. The one-roof system is a model of judicial governance which charges the Supreme Court not only with judicial supervision but also with court administration (Rositawati, 2019). The Supreme

court is now in charge of its own organisational, administrative and financial matters, including the judicial bodies beneath it (Article 13 of Law 4/2004). This system was adopted to realise the independence of the judiciary and make it free from intervention from the outside; notably, from the government and parliament (Rositawati, 2019, p. 255).

In the Islamic court, adoption of the one-roof system put an end to the dual authority over it, by the MoRA and the Supreme Court. It also resulted in better facilities, such as new buildings in the capitals of many regencies and increased salaries for judges, clerks, and court employees (van Huis 2015, 55–56). However, in Mukomuko the one-roof system served to alienate people from the Islamic court. Although the distance separating Mukomuko from Arga Makmur had long been a barrier to accessing the court, adoption of the one-roof system put a stop to every policy issued by the Arga Makmur Islamic court aiming to bring it closer to the Mukomuko population. Before the one-roof system, judges from this court could easily arrange a *sidang-luar-gedung* (an out-of-court session)[159] in Mukomuko, by collaborating with the local KUA in North Mukomuko and the South Mukomuko sub-regencies. Busral, a former employee and head of North Mukomuko KUA (1997-2004), told me that during his service he could easily invite the Arga Makmur judges to conduct a session at his office. He added, "…if there were at least five divorce cases, I would call the Arga Makmur Islamic court immediately, and judges from that court would arrive the following week."[160] During this period, the KUA employees worked hand in hand with the judges and court employees to address peoples' barriers to court access, by creating a demand-based circuit court.

Tarmizi, a former clerk and judge in an Islamic court, confirms this story.[161] During this period, judges and employees from

[159] A *sidang-di-luar-gedung* is a generic term that may apply to either an integrated session (*sidang terpadu*)—such as a mass *isbat* outside the Islamic court—or a circuit court (*sidang keliling*).

[160] Interview with Busral at Bandar Ratu Mukomuko, on 19 March 2017.

[161] Tarmizi served at the Arga Makmur Islamic court twice, in 2000 and from 2005 to 2010. He was appointed Vice Chairman of the court in 2007, and head of the court from 2008 to

the Arga Makmur Islamic court would arrange to visit Mukomuko after receiving a request (by phone) from the KUA of Mukomuko to conduct a *sidang-di-luar-gedung* (a circuit court). In the meantime, the local KUA had to ensure that everything was prepared, including the collection of litigation fees, recording a divorce petitioner's or plaintiff's basic information, summoning parties and witnesses, and guiding parties in preparing the required documents and evidence. Tarmizi told me, "we came with a blank file (*berkas perkara kosong*) and left with it full." On the due date, the proper procedures were followed, including a mediation session, although each step was simpler than the last.[162] The judges could thereby expedite the adjudication process by executing all the procedures in one session. However, he added, "it was also common to decide a case in more than one session. If so, we would decide the case in the next session at court. Although the parties might skip this session, they would not be considered absent. This was indeed against the law, but we had to prioritise their situation."

Such cooperation was possible for several reasons. At the time, the KUA and Arga Makmur Islamic court were administratively and financially part of the same institution, the MoRA, which facilitated mutual cooperation. More importantly, the court could adapt its financial expenses to situations particular to Mukomuko. For example, the court managed to allocate *biaya pemanggilan* (calling fees) for judges' accommodation throughout one circuit court period, while the local KUA became a 'broker' (or bridge) between the court and society. Nonetheless, this cooperation would not have been possible without the individuals who were behind it. Tarmizi and Darussalam - the head of North Mukomuko KUA (1990-1997) - happened to be cousins.

2010. Interviews and personal communications from 2015 to 2021.

[162] At the time, mediation was already mandatory, but the judges managed to combine it with other sessions without fearing that their decision would be declared null and void. Now – notably, after the passing of Supreme Court Regulation 1/2016 on mediation - mediation should be arranged in a separate session, or the decision will be declared null and void by appeal (See also *Surat Edaran Mahkamah Agung* [SEMA, the Supreme Court Circulation Letter] 3/2015 on Islamic Chamber, point 6).

As host, Darussalam used to prepare food and housing for judges and employees from the Arga Makmur Islamic court during their stay in Mukomuko. Given his popularity in Mukomuko,[163] Darussalam could lobby the local government to arrange a hostel for the guests. In addition, the judges and employees had originally had to ride for an hour on motorbikes to reach Lais, using public transport for the remainder of their trip to Mukomuko. Only later (around 2000) did they use a private car (owned by one of the judges), to make their journey more comfortable, minimise the expenses, and reduce time spent on the road.[164] Without these initiatives, regular and accessible circuit courts would have been impossible.

After the one-roof system came into force in 2005, cooperation between the court and Mukomuko's KUA started to decline. Due to insufficient funds, the circuit court was no longer available in the North Mukomuko KUA, surviving only in the South Mukomuko KUA. This decline can also be attributed to the adoption of the one-roof system, which centralised all organisational, administrative, and financial matters under the Supreme Court, disregarding all policies carried out by Islamic courts. As a result, the court's policy of financing visits to Mukomuko using litigation fees, and its unique cooperation with other state institutions in Mukomuko both had to stop. The situation worsened when judges discovered (in 2007) that the South Mukomuko KUA had doubled its court fees and put them in its own pocket, which ultimately led Arga Makmur Islamic court to terminate its cooperation with the KUA.[165] A year later, the circuit court resumed,

[163] Before becoming Chairman of the North Mukomuko KUA in 1990-1997, Darussalam served as an employee there for several years. During his service, he had mingled and maintained good communication with the locals, recognised by them as not only as a *penghulu* (a marriage registrar) but also as a *penceramah* (a preacher) and an *orang-tua* (an elder) of *Kaum Gresik* (a clan dominated by migrants). Interview with Darussalam, just a couple of months before his sudden death, at Gunung Silan, on 28 December 2015.

[164] Before use of this private car, the team from Arga Makmur Islamic court took one whole day to make the trip, and would commence a court session the following day. Now, they could start the session on the same day they departed from Arga Makmur. They also managed to reduce the transport fee for gasoline, and they allocated the remaining income from litigation fees to pay for their accommodation in Mukomuko.

[165] Tarmizi told me: "the petitioners and litigants initially refused to admit that they were charged twice the normal fee. However, after we threatened not to proceed with their case

in response to demand from the people, but this time it was not located at the KUA office. Instead, it took place at the sub-regency office (*kecamatan*) of South Mukomuko. However, the new circuit court was no longer demand-based, and the judges were no longer free to finance their visit using litigation fees. Coupled with the Supreme Court budget cut in 2009 (van Huis, 2015, p. 156), the new circuit court therefore became rare, happening no more than twice a year.

As a programme, the circuit court was dependent on a budget allocated by the Supreme Court, and it became 'identical' to a regular court session. The only difference was its location. The new circuit court also required a specific session for mediation, unless it was carried out via the *gaib* (*verstek*) procedure. The *verstek* procedure enables judges to adjudicate a lawsuit without the presence of a defendant, after the defendant has been properly summoned. Therefore, each case requires at least two sessions: i) an examination hearing and mediation; and, ii) an evidentiary hearing and decision session. Thus, the new form of circuit court was hardly a solution to the distance issue; each justice seeker still had to visit the court in Arga Makmur. In this respect, the new form of circuit court was not a continuation of former policy, before the adoption of the one-roof system. Unlike the former circuit court, which was a demand-based program, the present-day circuit court is a mere top-to-bottom programme, which disregards the particular situation in Mukomuko. For 18 years, the people of Mukomuko were increasingly 'isolated' from the Islamic court, until the establishment of their Islamic court at the end of 2018.

The establishment of the Mukomuko Islamic court in 2018 has ultimately brought the Islamic court closer to the people of Mukomuko. It was once accessible through the constant circuit court of Arga Makmur Islamic court, becoming less accessible following the adoption of the one-roof system. However, divorce

if they did not confess, they eventually told us the truth: that the KUA had doubled the fees." Interview with Tarmizi, at Rawa-Makmur Bengkulu, on 10 April 2017.

data during this period were not well documented, either in the KUA or in the competent court; therefore, I could not confirm this shift. What is obvious is that the one-roof system has indeed increased the facilities and institutional independence of the Islamic court. Yet, as Rositawati maintains, it has also resulted in an 'internally centralistic' and 'externally disconnected' judiciary (Rositawati, 2019, p. 256). Internally, this system centralises both the technical judiciary and court administration under the Supreme Court. Externally, the system isolates the Supreme Court from other state bodies. In Mukomuko, the negative aspect of the system manifests in the demise of the old form of circuit court (as routine), and in a decline in cooperation between the Islamic court and local Offices of Religious Affairs (KUA). The one-roof system has made the first instance court in Mukomuko heavily dependent on the Supreme Court, and has resulted in its disconnection from other state institutions. In other words, Mukomuko is an example of an ongoing process of 'formalism' (Haque, 2010; Riggs, 1962), where efforts to transform the Islamic court into an independent judiciary have made the court centralistic and exclusive.

Next, I will discuss how people of Mukomuko have accessed the Islamic court. The exploration includes: (1) a period from 2016 to 2017, when Mukomuko was under the jurisdiction of the Arga Makmur Islamic court; (2) a transitional period, in 2018; and (3) a period from 2019 until May 2021, when the Mukomuko Islamic court was in full operation.

5.3 Access to the Islamic Court

This section draws upon relevant cases and statistics from Mukomuko within the last six years. The data encompass both marriage-related and divorce-related cases at the competent courts, i.e. the Arga Makmur Islamic court and the Mukomuko Islamic court. The average rise in cases each year was relatively steady. An exception to this occurred in 2018, when the number of cases decreased by around 14.5%. This decline can be attributed

to a transition from the Arga Makmur to the Mukomuko Islamic court in that year; afterwards, the number of incoming cases began climbing again. Another feature of the court statistics concerns the origin of lawsuits, which were predominantly filed by migrants who lived either in transmigration and plantation enclaves or in emerging urban centres. However, this discussion will be based mostly on cases involving members of the matrilineal community, so as to understand how people who adhere to *semendo adat* navigate different forms of normative systems and institutions, and how judges respond to their unique background. In addition, this chapter looks at the roles of informal case-drafters and professional lawyers in formulating lawsuits. The main finding will be that court access is shaped by an ongoing structural conflict between the local *semendo adat* and the state's patriarchally-inclined law.

Types of Incoming Cases		Prior to the Establishment of Mukomuko Islamic Court				Transitional Period				After the Establishment of Mukomuko Islamic Court			All Cases	All Cases of Mukomuko Origin
		2016		2017		2018				2019	2020	2021 (May)		
		Non Mukomuko	Muko muko	Non Mukomuko	Muko muko	Non Muko muko	Muko muko	Mukomuko Islamic Court	Combined	Mukomuko Islamic Court				
1	*Isbat Nikah* Petition	101*	2	17	5	32	1	1	2	21	47**	20	244	**97**
2	*Isbat Nikah* Lawsuit						1		1		1		3	**2**
3	Marriage Dispensation (*Dispensasi Kawin*)	7	2	12	3	36	2		2	20	66***	32	182	**125**
4	Poligamy Lawsuit			1		1					1		3	**1**
5	Divorce by Wife (*Cerai Gugat*)	323	119	354	134	400	103	20	123	208	246	112	2130	**942**
6	Divorce by Husband (*Cerai Talak*)	139	52	176	70	153	40	14	54	90	88	35	885	**389**
7	Joint-Marital Properties (*Harta Bersama*)			3	2	2					4	1	12	**7**
8	Inheritance Lawsuits (*Kewarisan*)	2					*1*		*1*				4	**1**
9	Inheritance Petitions (*Penetapan Ahli Waris*)					2					1	2	5	**3**
Total		**572**	**175**	**563**	**214**	**626**	**148**	**35**	**183**	**339**	**454**	**202**	**3468**	**1567**

Figure 5.3.1: Incoming cases from Mukomuko in the last six years (2016–May 2021)

N.B. While a lawsuit is contentious, a petition is voluntary in nature.
* A mass *isbat* in North Bengkulu, in 2016, received 91 cases (*Laporan Tahun PA* Arga Makmur 2016, 63-4).
** A mass *isbat* on August 2021 received 20 cases (Fakhruddin, 2020).
**** This staggering rise follows the passing of Law 16/2019, which elevates the minimum marriage age for a woman to 19-years-old.

5.4 Marriage-Related Cases: Bridging *Adat* and State Marriage

Over the last six years, the competent courts for the people of Mukomuko have recorded a steady rise in marriage-related cases, each year. The cases focus on marriage-dispensation, *isbat nikah,* and joint-marital property. After the establishment of the Mukomuko Islamic court at the end of 2018, the number of marriage dispensations and *isbat nikah* cases began to skyrocket. In 2019, the former increased tenfold, i.e. from only two *isbat nikah* cases to 20, while the latter increased sevenfold, i.e. from only three *isbat nikah* cases to 21. In the following year, this number continued to increase. Marriage dispensation cases increased more than threefold, whereas *isbat nikah* cases multiplied by more than twofold. The rise in marriage dispensation can be attributed to the passing of Law 16/2019 on the elevation of the minimum marital age for women, from 16 to 19 years-old.[166] There were precisely 20 cases in 2019 and 66 cases in 2020. According to this trend, marriage dispensation became the only case category seeing a stable and significant rise, and most of the cases were accepted. The following figure shows the correlation between the staggering rise in marriage dispensation cases and the elevation of the minimum marital age for women. Nearly all the cases were brought by the prospective bride.

[166] Following the increase in a woman's average marital age in the last quarter of 2019, the yearly number of marriage dispensation cases rose exponentially. In 2019, marriage dispensation in the Islamic court increased by twofold, from 13,822 to 24,864 cases, nationally. In the following year, when Law 16/2019 had been in full effect for a year, the number increased threefold, to 64,196 cases (*Laporan Tahunan Badilag* 2017-2020).

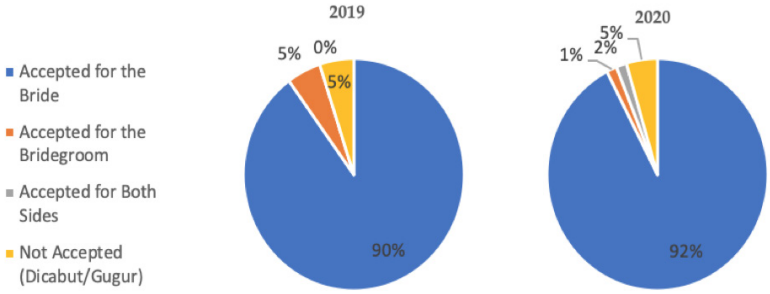

Figure 5.4.1: Marriage dispensation in the Mukomuko Islamic court

The rise in *isbat nikah* corresponds with recent judicial reform within the state Islamic court, on the extended and refined form of *isbat nikah*. Nowadays, judges from the Islamic court are more lenient regarding unregistered marriages. They are more likely to validate such marriages retroactively, via an *isbat nikah*, as long as the marriage is not against the law, i.e. it is neither an informal polygamy nor a religiously invalid marriage. Moreover, they formulate an implementing procedure that divides the *isbat nikah* into a petition (*permohonan*) and a lawsuit (*gugatan*).[167] While the former is voluntary or non-contentious, meaning it can be adjudicated by a single judge in a simplified court session, the latter is contentious and should be led by collegial judges in a complete procedure. This distinction can be seen, respectively: a) as an option for a 'less problematic' marriage; and b) as an option for an 'inherently problematic' marriage. In other words, a less problematic marriage, e.g. an unregistered marriage that is consensual and not against the limits set by the Islamic Chamber of the Supreme Court,[168] can be validated retroactively through the simplified procedure for an *isbat nikah* petition. Conversely, for

[167] The distinction between an *isbat* lawsuit and an *isbat* petition can be identified by a court registration number. However, their distinction is sometimes not clear, and in everyday use they are often referred to as *permohonan* (a petition). In the last six years, the categories have not been strictly followed and are available only in the 2017 and 2019 records (i.e. 2,373 *isbat* lawsuits plus 55,322 petitions in 2017, and 512 *isbat* lawsuits plus 60,231 petitions in 2019) for the whole of Indonesia. See the yearly reports of *Badan Peradilan Agama* (*Badilag*), for the period 2016-2020.

[168] An extensive discussion of judicial developments regarding *isbat nikah* can be found in Chapter 2. Simply put, these developments have extended the form of *isbat nikah* and refined its application, by introducing several limits; namely, being religiously valid, and not being an informal polygamy.

the purpose of a formal divorce, e.g. the division of joint-marital property, distribution of inheritance, and the like, the complete procedure of *isbat nikah* lawsuit will be followed, i.e. a contentious session with collegial judges.

In addition to the developments within the Islamic court, the yearly rise of *isbat nikah* can be attributed to the establishment of the Mukomuko Islamic court at the end of 2018 and a mass *isbat nikah* programme in mid-2020. From 2016 to 2018, before the establishment of the Mukomuko Islamic court, there were ten *isbat nikah* cases from Mukomuko, only one of which was registered as contentious. In 2016 the Regional MoRA Office in Mukomuko planned a mass *isbat nikah* programme. It identified 2,031 unregistered couples who were willing to participate, but unfortunately the plan was aborted due to lack of funds. When the Mukomuko Islamic court was in full operation, *isbat nikah* started to increase rapidly, reaching a total of 89 cases from 2019 to May 2021, only one of which was registered as contentious. In 2019 there were 21 cases, and this number continued to increase steadily in the following years. A staggering rise occurred in 2020, when the mass *isbat nikah* programme received 23 additional cases at once. Of a total of 99 *isbat nikah* cases in the last six years, only two were contentious.

Next I will present one marriage-related case involving traditional villagers, to show how the different actors were brought together in court. The featured case was primarily selected to narrow the analysis and shed light on how the actors got involved in a complex process of conflict between *semendo adat* and state law. For these purposes, the background to the case will be addressed first.

5.4.1 Nurdin v. the late Hamidah family: *isbat nikah* and debates on marital property

In 1968 H. Nurdin and Hj. Hamidah concluded a marriage before a local imam of Tanah Rekah, according to Islamic provisions. The bride's biological father acted as guardian, the bride-

groom gave a prompt bride-price (*mahar)* to the bride, and two male adults attended the procession as witnesses. The marriage procession was arranged in compliance with the *semendo adat* and led by the bride's *kaum* leader, but not registered. Even after the passing of the 1974 marriage law, which obliges registration, the couple did not make any attempt to register their marriage retroactively. In July 2017 Hamidah passed away, leaving her husband with no biological offspring. In fact, they had adopted Julita (32), Hamidah's niece, when she was eight months old, but the adoption was never legalised. Therefore, legally speaking, Julita was no more than a sororal niece. Still, Julita was always by their side, and took care of Hamidah as her own mother until her last days on her deathbed. The death of Hamidah caused deep grief and sorrow to the both Nurdin and Hamidah's families, but sadly this loss was soon overshadowed by a dispute between them concerning the distribution of inheritance objects from the late Hamidah.

Several months after this loss, Nurdin filed a report with the local police, accusing Julita of embezzling important documents and property. The police followed up with the local prosecutor, who then brought the accusation to Arga Makmur general court. This report disappointed Julita's family. According to *semendo adat*, half of Hamidah's joint-marital property belongs to the deceased wife's family, since the marriage ended with no biological children. Therefore, what Julita did should not have been seen as embezzlement. Instead (as was maintained), this was a daughter who had spent some of her parent's money, in order to fulfil her mother's needs in her final days. The trial continued and, on 23 April 2018, the court rendered verdict Number 61/Pid.B/2018/PN.Agm, which sentenced Julita to 3 months of imprisonment.

Disappointed in Nurdin, the deceased's siblings went to the Arga Makmur Islamic court to claim their share of the late Hamidah's inheritance. Initially, they were directed to validate their sister's marriage retroactively, through an *isbat* petition. The petition was formally filed by Ahmad (a pseudonym), 62, Ham-

idah's only brother. During the court session, Nurdin expressed regret (through his lawyer) that Ahmad had filed the lawsuit, but overall he did not object to validating his marriage retroactively. After six sessions, the judges awarded the petition on 24 April 2018, and instructed the petitioner to register Hamidah's marriage posthumously at the KUA of Mukomuko, in order to obtain a marriage certificate for her. Equipped with the certificate, Ahmad and his two other sisters filed an inheritance lawsuit to claim their inheritance share at the same court, on 21 May 2018. After failing to reconcile the parties through mediation, the judges proceeded with the inheritance lawsuit, which lasted 378 days and was recorded in an 111-page decision: Number 313/Pdt.G/2018/PA.Agm. Overall, there were 19 sessions, including one at their residence in Mukomuko (*descente*)[169], to verify the disputed objects at the location. In this manner, use of the Islamic court by Hamida's family was a direct response to their sororal niece being accused of embezzlement because, in their view, the property did not belong to Nurdin in its entirety.

The court session was intense, with protracted debates about the objects of inheritance. The plaintiffs argued that all the property acquired during Nurdin and Hamidah's marriage was the object of inheritance. This included: (1) immovable property, consisting of 12.15 ha of land and one 96 m^2 house; (2) movable property (vehicles) with a total monetary value of around 11 million rupiahs; (3) 48.6 g of gold jewellery; (4) 11 cows (valued at 10 million rupiahs); (5) the sale of palm oil fruit since the death of Hamidah (four-million rupiahs, per month); and, (6) various household furniture. In his answer, the defendant admitted (through his lawyer) that the plaintiffs were entitled to the inheritance. However, he objected to their demand by arguing that he had spent the majority of the claimed property on his living expenses. He also accused them of behaving unfairly by concealing some of the property under their control and not including it in their demand, i.e. two plots of land totalling 7,000 m^2, and a 100

[169] *Descente* is a legal term used in the Indonesian Islamic court to designate a court session which is held out-of-court, mainly to verify disputed objects at their exact location.

m^2 house. Nevertheless, he offered to let them keep some property they were already using, including 11,291 m^2 of land and two used motorbikes. Yet, the plaintiffs contested that this property was *harta-pusako* (matrilineally-inherited property) and it therefore belonged to their family, in any case. They persisted in their initial demand, including their share of the sold property, by turning down Nurdin's offer.[170] In response, Nurdin acknowledged their claim to the *harta-pusako*, but demanded that all the plants and buildings on them were included. In this sense, the parties expected the object of inheritance to include all the property acquired during the marriage.

The judges eventually decided to partially accept the lawsuit by establishing only half of the joint marital property as the object of inheritance and determining the rightful beneficiaries and their respective share of the inheritance. *First*, they validated only the proven objects as joint marital property, which included the 12.15 ha of land and its building, four vehicles, all the jewellery, one of the 11 claimed cattle, and some of the used furniture. Only then could they determine that half of the property was the object of inheritance whereas the other half belonged to the husband as his share from the joint marital property. *Second*, the judges established that the husband and Hamidah's siblings, including one of her sisters as co-defendant (*turut tergugat*), were the prospective beneficiaries of the inheritance. While the husband was entitled to half the inheritance object, the siblings were collectively entitled to the other half. The siblings should divide their share between them according to the 2:1 principle, i.e. two portions each for the male siblings, and one portion for each of the female siblings. As a result, the husband gained 5/10, the three sisters gained 1/10 each, and the only brother gained 2/10. This ruling also mentioned that the parties were supposed

[170] According to the inheritance law, Nurdin is entitled to half the inheritance, because the marriage had no offspring, whereas the other half belongs to the deceased wife's siblings (*asobah*). Therefore, excluding the disputed *harta pusako* objects and Nurdin's share, the siblings are supposed to get more than 3 ha of land (and the building on it), 12.15 g of gold jewellery, 28,750,000 rupiahs from vehicle sales, 19,683,300 rupiahs from cow sales, and some of the furniture.

to divide the inheritance by themselves (*natura*). Otherwise, they would be expected to auction the objects of inheritance and share the result. The judges also charged the parties 2,635,000 rupiahs each for the court session at their residence (the *descente* session), and charged the defendant 2,196,000 rupiahs, as the losing party.

In response, Nurdin filed an appeal at the Bengkulu appellate court. The court accepted his appeal and upheld the first instance court decision regarding the rightful beneficiaries and their respective shares in the property. Nonetheless, the court annulled the remaining decision concerning the object of inheritance. The judges argued that, in their claim (*petitum*), the plaintiffs did not specifically ask the court to establish the objects of the lawsuit as joint marital property, nor to distribute them between the prospective beneficiaries. They maintained in Decision Number 14/Pdt.G/2019/PTA Bengkulu that, "the first instance court decision was beyond the lawsuit (*ulta petita*) and therefore should be rejected". In fact, the plaintiffs did make a request to the judges in their claim, to establish and distribute the objects of inheritance. However, as previously mentioned, the plaintiffs who appeared before the court on their own were not aware of the distinction between objects of inheritance and joint marital property, according to Indonesian inheritance law for Muslims. Surprisingly, the defendant, who had employed a group of local lawyers, also shared in this confusion. In addition, the appellate court switched all the litigation fees for the first instance court to the plaintiffs, making them the losing party. They also charged them with the appeal fee of 150,000 rupiahs. This decision disappointed the plaintiffs, who had expected the court to offer a solution to the failure in consensual division of the inheritance.

As a last resort, the late Hamidah family petitioned a cassation to the Supreme Court on 29 October 2019. In response, the defendant filed a contra memory of cassation on 18 November 2019, asking the court to refuse the appeal for cassation. After

examining the petition, the supreme judges accepted this petition by annulling the lower courts' decisions, on the ground that the lower court judges (*judex facti*) had applied the law incorrectly. After re-examining the disputed objects (but not the verified objects), they concluded that, in their lawsuit, Hamidah's family members did not separate joint marital property from inherited property. Therefore, in its consideration, the lawsuit failed to meet one of the elements of inheritance, which is to clearly include: a benefactor (*pewaris*), beneficiaries (*ahli waris*), and inheritance objects (*objek waris*). According to these elements, the supreme judges ruled that the objects of the lawsuit were obscure (*obscuur libel*), and that the lawsuit should therefore be inadmissible (*niet ontvankelijk verklaard*, NO). Nevertheless, Nurdin now became the losing party, bearing all the litigation fees for the lower courts, including a cassation fee of 500,000 rupiahs. This decision could be seen as a 'deferred' victory for the plaintiffs, because they had to file a revised lawsuit from scratch, although no action had been taken by them before this research was concluded.

This case shows how one family's use of the Islamic court ended with no resolution. The reason for this failure was the judges' inclination not to sense their particular background as observers of the *semendo* tradition. The fact that the marriage ended with no biological child gives the wife's family the upper hand over the husband regarding joint marital property. Moreover, Julita being not only a sororal niece but also a culturally adopted daughter further enhanced the position of the late Hamidah family and its claim over Nurdin.[171] Even though the adoption was never legalised, it was Nurdin and Hamidah who consensually asked Julita's biological parents to adopt her. Nurdin did not object to this claim. His objection was to include all the

[171] In addition to the fact that Julita was culturally adopted, among traditional villagers it is also common for a sororal nephew or niece to call their aunt *ibu* (mother). During my fieldwork in 2017-2018 I was misled several times, when my interlocutors referred to someone as their mother, and they turned out to actually be the sister of their mother. Eventually, to avoid such misunderstanding, I decided to ask if the person they convincingly called *ibu* was their biological mother or their mother's sister. Such clarification was not necessary for a father's sister, who is usually called *ibu bako*.

joint marital property as inheritance objects, for which the first instance judges helped to verify the valid objects. Rendering the lawsuit inadmissible on the ground of *obscuur libel* was indeed an easy way for the supreme judges not to get involved in the complex situation, while at the same time not declining the lawsuit (which is prohibited, by law).[172] Butt confirms this trend as, "a regular use of technicalities to throw out applications" (Butt, 2019, p. 69). By delving into the strategies employed by the disputants, this case reveals a 'shopping' process toward the existing state institutions and different sets of normativity, such as the state law and the equivalent local *adat*.

5.4.2 Forum and discourse shopping

The case of *Nurdin v. Hamidah's family* shows a dispute resolution process involving several aspects, from *isbat nikah*, to joint marital property, to inheritance. The case also involved the invocation of different state institutions, notably the criminal and Islamic courts, following the failure of internal resolution within their family and their *adat* community. The case shows how the parties navigated different forums to realise their respective ends, and how functionaries of the different forums, mainly judges, responded to such expectations. As we can see, each party engaged in a process of 'forum shopping', notably in the state criminal court and the Islamic court. Conversely, functionaries in the existing forums responded to the dispute according to their respective competence and jurisdiction. Therefore, unlike the reciprocal process of 'forum shopping' and 'shopping forums' in Minangkabau in the 1970s (K. von Benda-Beckmann, 1981), the dispute between Nurdin and the late Hamidah family underwent a one-sided shopping process. The main argument here is that the parties were involved not only in forum shopping in the state courts but also in 'discourse shopping' within different legal repertoires, i.e. *semendo adat* and state

[172] According to Article 10 (1) of Law 48/2009, a court is prohibited to decline to examine, adjudicate, and decide a case brought before it on the ground that the law is either not available or unclear. Instead, the court is obliged to examine and adjudicate the case. This stipulation corresponds to *Ius Curia Novit* or *Curia Novit Jus* principles, which are popular among judges, and which mean judges are perceived to know all the law and therefore not allowed to decline any case brought before them.

law.[173] However, in disregarding the parties' quest to consider their *adat*, the judges *were* strictly constrained by the law and existing popular reform within the Islamic court.

The conceptual frameworks of forum shopping and shopping forums were first introduced to the study of disputes by Keebet von Benda-Beckmann. By examining dispute resolution in a Minangkabau village around the 1970s, she witnessed a reciprocal process between so-called forum shopping and shopping forums (K. von Benda-Beckmann, 1981, pp. 117, 145). Forum shopping refers to a process where disputants, "other than having a choice between different institutions" such as the *Adat* council and the state courts, would "base their choice on what they hope the outcome of the dispute will be, however vague or ill-founded their expectations may be". Meanwhile, shopping forums refer to a process where functionaries within the different institutions, mainly driven by political goals, "[try] to acquire and manipulate disputes" and "[fend] off the disputes which they fear will threaten their interests". This reciprocal process is "proceeded in the first place in terms of arguments over jurisdiction" and "evaluated in terms of procedural norms". Benda-Beckmann ultimately argued that the disputants, who shopped by considering the strength and limits of each forum, were exposed to a situation where the different functionaries and their respective forums were often not a choice at all, and certainly could not be easily bypassed at will. This two-way process of forum shopping and shopping forums was embodied in each dispute resolution. Apart from a few similarities, the situation is different in contemporary Mukomuko.

In Mukomuko, we can easily adapt the reciprocal concepts of forum shopping and shopping forums to the arrangement of

[173] The concept of 'discourse shopping' was coined by Biezeveld to mean a process where an actor in a dispute resolution "makes his own choice of argument and creates his own interpretation of facts, rules, and norms." In this manner, "not only do legal arguments play a role, but political, cultural, and historical arguments are used" (Biezeveld, 2004). Equipped with this conceptual framework, we can see from the featured case that the parties made their choices not only within existing forums, but also within different legal repertoires belonging to each forum.

a marriage. The previous chapter has demonstrated that traditional villagers conclude a marriage according to one or more existing type(s) of union, such as an informal union, a religious marriage, a *semendo* marriage, and a registered marriage. Each option, notably the *semendo* and registered options, has its own distinctive functionaries, such as *orang adat* for *semendo* marriage and KUA *penghulu* for registered marriage. Together, these options vary along a continuum scale, ranging from informal union as the least 'differentiated' institution, to registered marriage as the most differentiated institution (see Chapter 4, Section 4.3.1). Exposed to these options, traditional villagers get involved in a forum shopping process to determine which option best suits their situation. The functionaries within each forum would also get involved in the shopping forums for their respective need, which is made possible because the functionaries still exercise their authority. For instance, the members of *orang adat* would announce a social sanction for deviation from a *semendo* marriage, i.e. to be excluded from *kerja-baik* and *kerja-buruk,* and their involvement could not easily be bypassed by villagers.[174] However, encounters between the functionaries was not always binary. *Orang adat* members were usually in charge of administrative procedures for a registered marriage. Meanwhile, the KUA penghulu did not object to adaptations, often attending *adat* ceremonies to officiate a marriage, upon request by candidate spouses.[175]

When it comes to a dispute, the shopping process becomes one-sided. The difference, as drawn from the forum shopping and shopping forums theories, lies in two prerequisite factors that are self-evident. One concerns the existence of pluri-normative orders and institutions, and the other requires ongoing debate

[174] When a marriage is registered, the bride's *kaum* leader is usually the person who takes care of the N1-N7 forms (the administrative requirements for marriage) at the local KUA, on behalf of the bride and bridegroom. Interviews with Busral, and several KUAs in Mukomuko.

[175] Candidate spouses are charged 600,000 rupiahs to cover transport costs. Otherwise, a registered marriage will be free of charge, assuming that the candidates prefer to conduct their marriage at the KUA office.

on the competence and jurisdiction of a particular forum over the disputed subject(s) (K. von Benda-Beckmann, 1981, p. 145). Taking these factors into account, in the featured case I identify how *semendo adat* and state law coexist as 'differentiated' legal repertoires and institutions.[176] Yet, compared to a Minangkabau village in the 1970s, the situation in Mukomuko is now very different. Today, the competency and jurisdiction of state courts are no longer issues, as these are both fully established. Therefore, judges from the state courts will operate according to their own competence and jurisdiction, as assigned by law. Meanwhile, the *orang adat* will arrange an *adat* deliberation to resolve a dispute brought before it, but its role is becoming increasingly passive. This passive role, notably in divorce-related cases, can be attributed to the nature of divorce in *adat*, as neither *kerja-baik* nor *kerja-buruk.* In this manner, the involvement of *orang adat* in a dispute depends on the request made by the disputant(s). This is why the dispute between Nurdin and the late Hamidah family went through forum shopping, rather than shopping forums.

In forum shopping, the disputant 'shops' on one particular forum, or a collection of forums, to suit his or her needs. In other words, it is up to the disputant to select a forum themselves, no matter how ill-informed their expectations may be. With regard to the case, Nurdin preferred to bypass the *orang adat* and went to the local police, whereas Hamidah's family responded by filing an *isbat* petition and an inheritance lawsuit at the Arga Makmur Islamic court. Nurdin reported his foster daughter to the local police, in order to secure all the property for himself, for which the daughter was ultimately sentenced to imprisonment

[176] The term 'differentiated' is adapted from a concept in the sociology of law, i.e. differentiation, which means "the existence in a social group of secondary rules creating social roles for the performance of a particular task" (Griffiths, 2017, p. 103). By employing this concept, the *semendo* tradition is perceived as a living law that is differentiated from the remaining sources of social control over marriage and divorce, i.e. state law, religious law, or other customary laws. Together they operate on a continuum scale, from the ultimate zero point of 'less differentiated' to the infinite point of 'more differentiated'. I use this concept to avoid a binary approach, which often divides empirical laws (norms) into merely formal v. informal or legal v. non-legal, rather than treating them as a continuum scale (Abel, 2017; Griffiths, 2017; Platt, 2017). See also my operational adaptation from this concept in Figure 4.3.1.1, Chapter 4.

for three months. Conversely, the late Hamidah's family filed an inheritance lawsuit at the Islamic court and requested that the judges charge Nurdin with a crime (*pidana*) if he refused to distribute their share. This request for a criminal charge was beyond the competence of the court; therefore, it could easily be rejected. An equally ill-founded claim was the family's expectation that all the joint marital property would be included as objects of inheritance. Such a claim may be valid according to *semendo adat*, but not according to state law.[177] Unlike *adat*, Indonesian inheritance law only counts half of the joint marital property as inheritance objects. In this manner, the parties were not only involved in forum shopping, but also in 'discourse' shopping by employing different legal repertoires, i.e. *semendo adat* and state law (Biezeveld, 2004). In doing so, they expected the court to take their *adat* into account or at least to provide an arena for expressing their disappointment.

Another aspect of this case was the judges' stance toward *isbat nikah* and joint marital property lawsuits. In *isbat nikah*, the above lawsuit attracted suspicion from the defendant (*termohon*), but in essence he did not object, assuming that his marriage to the late Hamidah would be validated retroactively. Therefore, the judges could easily accept this lawsuit, since the petitioned marriage was the defendant's first marriage and it was religiously valid. Moreover, the marriage was concluded in 1968, when registration was not mandatory. However, intense debate surfaced when the late Hamida's siblings filed a lawsuit on the distribution of her inheritance. The debates revolved around the object of inheritance itself. The judges from the first instance court could easily establish the prospective beneficiaries and their respective share of the inheritance, according to Indone-

[177] According to *semendo adat*, the husband of a deceased wife is entitled to half of their marital property (*harta-sepencarian*), if there is no offspring from the marriage. Otherwise, three-quarters of the property shall be returned to the child(ren) and his wife's family (Interview with Ali Kasan, a former member of Mukomuko BMA, in 2005-2019, on 09 March 2017). A husband with offspring may receive half of the *harta-sepencarian*, if he arranges an agreement for an equal share with his wife during her lifetime (Articles 70, 71, and 72 of Undang-Undang Mukomuko Adatrecthbundel VI, 1913, pp. 345–346). For further explanation, see Chapter 4, Section 4.4.2.

sian inheritance law for Muslims. Yet, in determining the object of inheritance, they had to dig deeper to verify the disputed objects, by excluding *harta pusako* and some objects that no longer existed. Afterwards, they ruled that the joint marital property included all the verified objects, only half of which were objects of inheritance. Later, judges from the appellate court annulled this decision, considering that what the judges from the first instance court did – namely, offering their service to verify and determine the object of inheritance - was beyond their competence. As a last resort, judges from the Supreme Court rendered the lawsuit inadmissible for mixing inherited properties (*harta bawaan*) with the joint marital property.

In rendering their decision, the Supreme Court judges based their decision on unverified objects rather than on verified ones. They disregarded the efforts made by judges from the first instance court to 'educate' the parties, by assisting them in specifying the object of inheritance. They also made all expenses meaningless; notably, the *descente* session at Mukomuko. On top of that, the defendant himself admitted that he had concluded his marriage to the late Hamidah according to *adat*, for which he came to the bride's house empty-handed. One might wonder how the evidence, i.e. the verified objects, and defendant's confession and consent to relinquish his claim to the *harta pusako*, did not suffice. The judges might have been less careful when reading the 111-page decision by the first instance court, but it is clear from their reasoning that they did not consider the parties' sociocultural backgrounds. Otherwise, the judges would not have ruled the case inadmissible simply because the plaintiff did not distinguish property he had acquired during his marriage from inherited property. The supreme judges' attitude corresponds to Shapiro's proposition that "the universality of the right of appeal is a mechanism and reflection of the concentration of political power rather than a protection of individual rights"(Baumann, 1982, p. 643; Clark, 1983). In this sense, the appellate and supreme judges appeared to enforce the standard interpretation of inheritance

law, rather than protecting the individual and acknowledging the parties' particular backgrounds.

We can infer from this case that the parties were involved in a process of forum shopping and discourse shopping to secure their own interests, no matter how ill-founded their expectations might have been. This case also sheds light on a binary conflict between the parties, who observed their *semendo adat*, versus the judges, who in applying the law only dared to manoeuvre within the popular boundaries of the Islamic court. Of equal importance in this case is the judges' apparent ambivalence. They managed to validate the late Hamidah's unregistered marriage easily via an *isbat nikah*, but then rejected her family's lawsuit on the distribution of her inheritance. Dede Ramdani, a junior judge at the Belopa Islamic Court, confirmed this inclination. Unlike *isbat nikah*, broken marriage, and *taklik talak* violation, which are well-established (see Chapter 2, Section 2.3), judges from this court have not developed a stable stance toward property-related disputes. Even an informal case-drafter added that he was reluctant to assist prospective plaintiffs in drafting their lawsuits regarding the distribution of joint marital property or inheritance. Instead, judges - in collaboration with the public relations division - would pre-empt foreseeable errors from these types of lawsuits, by conducting a screening before they were registered.[178] However, this screening was not observable in Mukomuko. With the help of informal case-drafters, the judges in this region would accept all incoming cases without any screening. We will return to these informal case-drafters in Section 5.5.2 of this chapter.

5.5 Divorce-Related Cases: Types of Divorce and their Impacts

This section discusses divorce lawsuits from the Mukomuko Islamic court. The discussion includes the following subjects: (1) divorce, either by a husband (*cerai talak*) or by a wife (*cerai*

[178] Interview with judge Dede Ramdani, on 21 June 2021.

gugat); (2) joint marital property (*harta bersama*); and (3) spousal alimony, i.e. overdue maintenance (*nafkah māḍiyah*), a consolation gift (*mutah*), spousal support during a waiting period (*nafkah idah*), and child support. Discussion of these subjects begins with a statistical overview, and continues with some relevant cases. The statistics are sourced from the court's registry in the last six years, and the relevant cases draw upon incoming lawsuits from traditional villages. As we will see, the court records show an increasing number of divorce cases at the Islamic court. However, in the remaining divorce-related lawsuits use of the Islamic court remains nominal and not common. In addition to the statistics, the featured cases are those that I encountered during my fieldwork. The featured cases provide a picture of the situations which directed the villagers, who divorced mostly out-of-court (a statistical overview of this trend is available in Chapter 4), toward the Islamic court. Their experiences also shed light on how judges responded to the villagers' sociocultural background as adherents of the *semendo* tradition. Before delving into the cases, a statistical overview of divorce at the competent Islamic courts will be presented.

Before the establishment of Mukomuko Islamic court, in 2018, the rate of divorces from Mukomuko fluctuated from year to year. It increased 19.3% in 2017, but decreased by 13.2% the following year. Once the Mukomuko Islamic court was in full operation, the rate of divorces bounced back, with an 68.4% increase in 2019 and had another 12.1% increase in 2020. This rate was comparatively higher than the nationwide yearly rate for increases in divorce, which was under 10%.[179] Concerning the types of lawsuit, the ratio of divorces by a wife to divorces by a husband was 2: 1. This ratio stayed relatively stable from 2016 to 2019, but it was all about to change in 2020, when divorces initiated by wives outnumbered those initiated by husbands by almost three times. This shift corresponded to the national trend in

[179] From 2017 to 2020, 8% was the highest yearly increase in divorce lawsuits, nationwide. There were (respectively) 415,510 lawsuits in 2017, 444,358 lawsuits in 2018, 480,618 lawsuits in 2019, and 465,528 lawsuits in 2020 (*Laporan Tahunan Badilag* 2017-2020).

2017-2020, which steadily increased toward a 3:1 ratio.[180] In this respect, from 2017 to 2020 the yearly rises in divorce lawsuits in Mukomuko were higher than the national trend. Nonetheless, the average rate of divorce lawsuits in Mukomuko remained behind some other regions which had a higher rate in the corresponding year.[181] In any case, people's increasing use of the Mukomuko Islamic court in recent years, as shown by the figure 5.5.1 below, shows a positive trend in accessing the court. Moreover, nearly all the incoming lawsuits were awarded, and only a few were revoked or treated as inadmissible.[182]

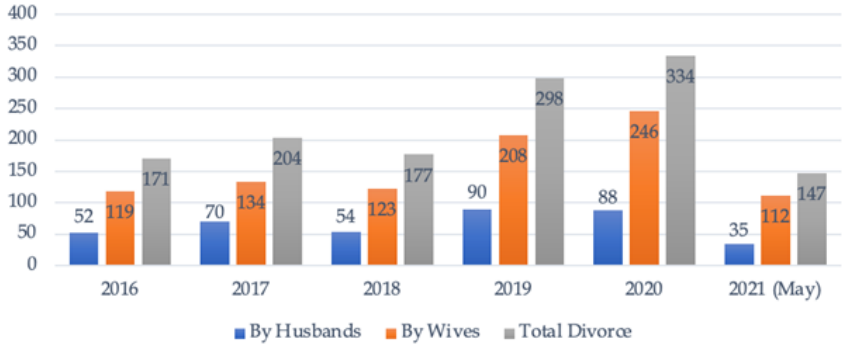

Figure 5.5.1: Types of divorce lawsuit over the past six years

Concerning joint marital property, only seven cases of this type were brought to the court, by either a husband or a wife. Two of the lawsuits were filed at the Arga Makmur Islamic court, and the remaining five were filed at the Mukomuko Islamic court. Two of the lawsuits were filed by traditional villagers, and the other five were filed by migrants. With regard to the results, only one case was granted, three cases were successfully reconciled

[180] There were precisely: (1) 301,573 to 113,937, or 2.6:1, divorce lawsuits in 2017; (2) 325,505 to 118,853, or 2.7:1, divorce lawsuits in 2018; (3) 355,842 to 124,776, or 2.8:1, divorce lawsuits in 2019; and, (4) 346,086 to 119,442, or 2.9:1, divorce lawsuits in 2020 (*Laporan Tahunan Badilag* 2017-2020).

[181] According to the 2020 data from the Central Bureau of Statistics, Central Java took first place, with a ratio of 88.9%, meaning that there were 89 divorces per 10,000 of the population, whereas Bengkulu, which includes the Mukomuko regency, was in 10th place, with a ratio of 65.6%.

[182] An estimation can be found in the competent court responses to incoming lawsuits from people in Mukomuko in 2016 and 2019. The estimation is included in Figure 5.3.2.2 of this chapter.

through mediation, two cases were (respectively) inadmissible and revoked, and the last case is now in an ongoing session. In the granted decision, which was filed by a native villager, the judges distributed joint marital property equally between the parties. However, in the successfully mediated cases, the judges upheld the parties' agreement through a decree, to support an overall equal share. Their attitude corresponds to the previous case of Syahril versus Yati (in Chapter 4), where the presiding judges actively intervened in the mediation process by suggesting that they distribute their joint marital property consensually, according to the 50:50 principle. Otherwise, as the mediating judge told them, they would "have to go through a costly and protracted session". In the case of *Nurdin v. Hamidah's family*, it appears that this suggestion was not without reason. Their conflict regarding the status of joint marital property, as also occurred in another case of this type,[183] was left unsolved.

Two more subjects I encountered during my research were spousal alimony and child support, which were often combined as one claim. Unlike a lawsuit on joint marital property, which 'must' be filed separately from a divorce lawsuit,[184] claims to spousal alimony and child support can be integrated into a divorce lawsuit. Obtaining the true number of such claims requires further inquiry of each incoming divorce case, since the court registry provides a particular category for these claims. In *cerai-talak*, a wife may claim spousal alimony and child support through a reconvention or counterclaim. In *cerai-gugat*, she may also include such claims in her lawsuit.[185] Moreover, judges in ei-

[183] A lawsuit on joint marital property, Number 78/Pdt.G/2017/PA.AGM.

[184] The Supreme Court issued a direction for justice seekers not to combine a divorce lawsuit with a lawsuit on joint marital property, assuming that it would slow down the adjudication process and increase appeal and cassation cases (*Buku II Pedoman Pelaksan Tugas* 2013, 162). Judge Edi Riadi criticised this discretion, since it was based merely on assumption, not on research. "There has been no research that proves an accumulative lawsuit would likely end in an appeal and cassation," he added. Interview with Supreme Court Judge Edi Riadi, at his office, on 21 May 2019.

[185] SEMA 3/2018, Point 3, in accordance with Supreme Court Regulation 3/2017, stipulates that a wife may claim spousal alimony (such as *mutah* and *idah* support) in a *cerai gugat* procedure, as long as the wife is not proven to be *nusyuz* or disobedient. For a thorough and nuanced analysis of the development of this concept, see (van Huis, 2015, pp. 244–246).

ther *cerai-talak* or *cerai-gugat* may also independently rule (*ex officio*) to grant a wife child support, once they are assured that the child is under the tutelage of the wife.[186] In Mukomuko, a close reading of the incoming divorce cases suggests that such an integrated claim was available only in some *cerai-talak* lawsuits, for which the petitioned wives appeared before the court (non-*verstek*) and made a counterclaim. What follows is a comparison of divorce lawsuits filed by husbands in two different periods, 2016 and 2019 (including how the lawsuits were decided), in order to show the occurrence of alimony and child support claims. In the 2016 period the competent court was in Arga Makmur, and in the 2019 period the Mukomuko Islamic court was fully operational.

Figure 5.5 2: Court decisions on 'cerai-talak' in 2016 and 2019

The pie charts show that there were six cases (11%) out of the 52 *cerai-talak* lawsuits in 2016 and four cases (6%) out of the 64 *cerai-talak* lawsuits in 2019,[187] which possibly contained counterclaims to spousal alimony and child support. However, a close reading of those lawsuits suggests that, within the corresponding years, there were only four cases with such counterclaims. Therefore, I can conclude that spousal alimony and child support were rarely claimed in Mukomuko. In the following section, I will present a divorce-related case brought by a traditional villager. In fact, the case was basically 'trouble-free, as there were

[186] The Supreme Court's 2016 Plenary Meeting of the Islamic Chamber, in Point 5 (SEMA 4/2016).

[187] Concerning *cerai gugat* in 2019, there was a difference between the court's *Laporan Tahun* (the yearly report) and the number of cases available via *Sistem Informasi Penelusuran Perkara* (SIPP, the information system for a lawsuit tracing). While *Laporan Tahun* mentioned 90 cases, the SIPP provided 64 cases, all of which are available to the public. To make this analysis possible, I referred to the SIPP version.

no fierce disputes involved and the parties eventually agreed to separate amiably. Yet, we can grasp from this case how a 'complete' divorce procedure manifests in practice, and it includes several out-of-court mediations, a counterclaim to spousal alimony and child support, and a great deal of divorce-related costs. Moreover, the case will serve as material for later analysis of the roles of different actors in writing a lawsuit and constructing legal truth.

5.5.1 *Suhar v. Tini*: law-abiding citizens and a complete divorce procedure

In 1995 Suhar and Tini got married and registered their marriage at the KUA of Gading Cempaka, Bengkulu. After spending a month in the bride's parents' house, they migrated to Ketahun, because Tini had been employed to teach at an elementary school in this region. After five years, they returned to Tini's parents' house, following the transfer of her work back to Bengkulu. Meanwhile, Suhar, who originally came from Mukomuko, worked as an employee in a private company in Bengkulu. Two years later the couple had their own house in Bengkulu. In 2006, Suhar passed a public servant selection to become a teacher at a public elementary school in his hometown, Mukomuko. Since then, the couple have lived separately: one in Mukomuko, and the other in Bengkulu. Tini once asked Suhar to transfer his job to Bengkulu, so that they could be closer. However, as Suhar told me, "this would have required a lot of cost and lengthy administrative processes, which I did not mind, but at the time we had just planted some oil palms, so I asked her to be patient until they had started producing".[188] This long-distance relationship survived up until the 20th year of their marriage, and in that time the couple had four children.

In 2014, a serious fight occurred between Suhar and Tini. The fight was caused by the presence of a third party, Tini's landlady, who was then Tini's adoptive mother (*ibu angkat*), and who

[188] Interview with Suhar at his maternal house, which is now his sister's house, in Talang Buai village, on 5 May 2017.

intervened in the couple's private affairs. A rumour was spreading within the community, suggesting that Tini was having an 'inappropriate' relationship with her adoptive mother. The inappropriate relationship likely meant a non-heterosexual romance, but I could not confirm this rumour as the husband preferred not to discuss it during our conversation. For this reason, Tini was brought to visit five different shamans, to get rid of the influence of her adopted mother, but these efforts all proved futile. There was also another rumour, accusing Suhar of having an affair with another woman during his stay in Mukomuko. Even though there was no confirmation of either of these rumours, the couple's marriage was already broken, culminating in their separation at the end of 2014. Before the separation, the couple arranged internal mediation (involving Tini's parents) three times, but this ultimately failed. Thus, Suhar returned to his parent's house in Mukomuko, and Tini and their children returned to her parents' house in the capital of Bengkulu. In the end, Suhar decided he wanted to formalise the separation by initiating a divorce in the Islamic court.

As he was a public servant, Suhar first had to obtain permission from his superiors, which took around ten months. In addition to three internal mediations (in a private setting), this long process comprised more mediations: i) at the *Dinas Pendidikan* (the regional office of education) for three months; ii) at the *Badan Kepegawaian Daerah* (BKD, the regional personnel agency) for three months; and, iii) at the regional inspectorate for one-and-a-half months. This process included a waiting period of two months for formal divorce permission from the regent. After going through all these processes, Suhar eventually managed to file a divorce petition at the Arga Makmur Islamic court on 11 April 2016. This petition was the last step for him, but it took another three months and several days for the judges to permit him to pronounce a *talak*. This judicial process took longer than usual, and involved more sessions, because the wife appeared before the court and made a counterclaim for overdue maintenance (*nafkah māḍiyah*), maintenance support during her

waiting period (*nafkah idah*), child support (*nafkah anak*), and a consolation gift (*mutah*). Their formal divorce would have been faster through a *verstek* procedure, which normally takes around a month and lasts for only three sessions.

Suhar and Tini had to attend six sessions together in the Islamic court, in addition to Suhar's two court visits: one was to register at the beginning of the process, and the other was for a divorce pronouncement (*ikrar talak*) at the end of the process. The judges dissolved Suhar and Tini's marriage on the grounds of broken marriage and the failure of internal mediation. However, the wife's presence required an additional court mediation session, and three further sessions to examine her counterclaim. After all these sessions, the judges accepted Suhar's petition and Tini's counterclaim, after adjusting the required amount of compensation to Suhar's ability. The amount granted comprised: 10,500,000 rupiahs, for 21 months of overdue maintenance support; 1,500,000 rupiahs, for three months of *idah* support; 5 g of gold (around 2,500,000 rupiahs) as a consolation gift; and one million rupiahs per month as child support for all their children, for at least the next 14 years, considering that the youngest child at the time was only seven-years-old. The full amount had to be paid before Suhar could pronounce the divorce before the judges' assembly. In other words, permission for the *ikrar talak* was made dependent on payment of the approved compensation.

Throughout the process, Suhar and Tini appeared before the court in person, unaccompanied by lawyers. In formulating his petition, Suhar was assisted by an informal case-drafter. The case-drafter was located near the court and tasked with drafting lawsuits for 150,000 rupiahs, per case. In the Arga Makmur Islamic court, the case-drafter was usually a relative or acquaintance of one of the court employees. In this case, the informal case-drafter's service was included in the down payment that Suhar made during registration. In other Islamic courts this service was offered free of charge by a *Pos Bantuan Hukum* (POSBAKUM, a legal aid centre), which was designated for justice seekers who

could not afford a lawyer (Law 50/2009, Article 60c).[189] Whichever route is pursued (i.e. using an informal case-drafter, a POSBAKUM, or a lawyer), a divorce lawsuit is 'constructed' to include the following elements: (1) the legal standing of the parties, comprised of identities and domiciles; (2) ground(s) for divorce, of which the main ground is usually either continuous strife or violation of *taklik talak*;[190] (3) a period of separation; and (4) an internal mediation failure. In this manner, an incoming (divorce) lawsuit will be framed to fit these elements, which then serve as background for the judges' decision.

In this case, the emphasis was not on the cause of the dispute, but the dispute itself and who had filed the lawsuit. The fact that the couple's relationship was already irretrievably broken sufficed for the judges to grant the husband permission to pronounce *talak*. Even Tini herself confirmed most of Suhar's claims. Meanwhile, the presiding judges did not count the wife's return to her parent as disobedience (*nusyuz*). As a result, Tini was entitled to *nafkah māḍiyah*, *nafkah idah*, *nafkah anak*, and *mutah*. In this respect, the judges' lenient attitude toward the *nusyuz* norm corresponds with the finding from van Huis on judges' nuanced attitudes toward *nusyuz* in the Islamic court, by narrowing the limits of *nusyuz* (van Huis, 2015, p. 244). In this respect, the judges (led by a female judge) reminded the petitioned wife of her rights to: (1) overdue maintenance; (2) maintenance support during her waiting; (3) child support; and, (4) a consolation gift from her husband (cf. judges' similar attitude from West Java in Nurlaelawati, 2018).

Suhar spent a considerable amount of money to obtain the formal divorce. Expenses consisted of both litigation and non-lit-

[189] This service fee is deducted from the court's yearly budget (*Daftar Isian Pelaksanaan Anggaran*, DIPA). To obtain assistance from a POSBAKUM, a litigant has to provide the following documents: *Surat Keterangan Tidak Mampu* (SKTM, a Statement of Insufficient Means); a social allowance receiver statement; and, a statement of inability to pay a lawyer (Supreme Court Regulation 1/2014).

[190] This emphasis corresponds with the recent development in the Islamic chamber of the Supreme Court, to simplify divorce grounds into either broken marriage (from the 1974 Marriage Law, Article 19f) or a *taklik talak* violation (from the KHI, Article 19h). Further discussion on these developments is included in Chapter 2.

igation fees. While the former comprises expenses deposited at court during registration, the latter covers the remaining costs spent throughout the process. Concerning the litigation fees, Suhar spent a sum of 366,000 rupiahs,[191] but the actual amount was 925,000 rupiahs, including a case-drafting service and additional summoning fees. The actual amount of the litigation fees therefore differs from the amount published by the judges in their decision.[192] In terms of non-litigation fees, Suhar spent around ten million rupiahs on his accommodation and the seven hour-long trips he made from Mukomuko to Arga Makmur.[193] This amount excluded additional non-litigation fees for presenting witnesses, and for their accommodation in Arga Makmur. This amount was much larger than what the local government had calculated for all Suhar's expenses during mediation and the other processes.

A year later, Suhar married a divorcee who already had two children. Recently, this new couple had their first baby. At the same time, Suhar has managed to maintain good communication with his children by Tini. Apart from providing monthly support for the children, Suhar also pays their education fees. Meanwhile, the children have paid several visits, spending holidays with their father in Mukomuko. This case is a par excellence story of a law-abiding citizen who went through a divorce and maintained good communication with his former wife and their children. Moreover, this case shows how different actors and issues pop up in everyday use of the Islamic court. Suhar and Tini's use of the court shows the actual cost of a formal divorce and demonstrates the defining roles of the informal case-drafter in constructing legal truth.

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[191] This amount includes 30,000 for registration, 50,000 for processing, 180,000 for summoning the petitioner, 95,000 for summoning the petitioned, 5,000 for editorial costs, and 6,000 for an official seal (*biaya materai*).

[192] In some other cases, where a justice seeker employed a professional lawyer, the fee amount turned out to be even more.

[193] Suhar recalled that he spent one million rupiahs on two short visits to the court for registration (at the beginning of the process) and for pronouncing *talak* (at the end of the process). He spent around nine million rupiahs (one and half million rupiahs each) on the six sessions in between.

5.5.2 Informal case-drafters and the construction of 'legal truth'

My first analysis of the case of *Suhar v. Tini* revolves around the construction of truth. It involves the translation of the multi-faceted reality of an incoming case into a single legal narrative, i.e. a highly polished lawsuit. In the Islamic court, this process begins as early on as the drafting of a lawsuit, and it includes the identities of the parties, the background to the divorce, and the claims.

The first element serves as a means to determine court jurisdiction over the lawsuit. It describes the absolute competence of the Islamic court by mentioning: whether or not the parties' religion is Islam; whether the parties are ordinary citizens or state officials;[194] and, whether their domicile is under the court's jurisdiction or not (i.e. the court's 'relative' competence). The second element concerns the parties' legal standing before the court, by emphasising that their marriage has been registered. This section also contains information about and background to the marital breakdown, such as divorce ground(s), a period of separation, or the failure of internal mediation. The background may contain dramatic stories,[195] but emphasis is 'always' placed on either continuous strife (broken marriage) or, especially in cases involving a neglected wife, *taklik talak* violation. The third element includes *primer* and *subsider* claims, which are both specific and general.[196] Together, all three elements transform ordinary language into a lawsuit.

In the Arga Makmur Islamic court specifically, the translation of ordinary language into legal terminology is primarily conduct-

[194] The latter, i.e. a civil servant or a military or police officer, requires additional permission from their superiors before their divorce can proceed.

[195] The background may contain several legally 'valid' accusations, such as an affair, a religious conversion, liquor consumption and gambling, domestic violence, etc., but it always includes either continuous strife (for an explanation, see Point F of Article 32 (2) of the Marriage Law) or violation of *taklik talak* (the KHI, Article 116h). Hence, it allows judges to decide an incoming lawsuit according to recent developments regarding broken marriage, as well as (especially in cases involving an abandoned wife) considering the existing option of *taklik talak* (see Chapter 2).

[196] The *primer* claim contains a specific request for divorce, whereas the *subsider* claim contains an open request to the judges to decide as fairly as possible (*seadil-adilnya*).

ed by an informal case-drafter. This role may also be performed by a lawyer, or (in other Islamic courts) by a POSBAKUM, even though the law allows an individual to formulate his or her lawsuit orally.[197] However, oral lawsuits barely exist in this court. In this respect, the drafters of cases serve as intermediaries or bridges between the litigant and presiding judges, and they assist the litigant in formulating his or her lawsuit so that the judges can apply relevant rules to it (cf. Dupret & Drieskens, 2008, p. 9). Their main role concerns framing ordinary events as legal facts, which will assist the judges throughout a process known as the legal characterisation of facts.[198] In other words, mainly by suggesting incorporation of either continuous strife or a *taklik talak* violation in the lawsuit background, the judges manage to adjudicate the lawsuit according to recent developments concerning broken marriage and *taklik talak* violation. In this manner, the case-drafters emerge as 'cultural brokers'(Geertz, 1960; Horikoshi, 1987), resembling the roles of *'udul* (professional witnesses) in a Moroccan context (Buskens, 2008); case-drafters transform everyday events into a legal narrative, just like professional witnesses who write legal marriage documents in Morocco. The following case of *Puja v. Kesuma* (pseudonyms) will illustrate how this process manifests in the Arga Makmur Islamic court.

> In 2011, after marrying Puja (25) in Serang Banten, Kesuma (26) left higher education in a private institution in Jakarta to seek a job. After six months, the couple decided to move to Kusuma's hometown, Mukomuko, where they spent the next two years. On the verge of the third year of their marriage a fierce quarrel occurred, as the husband accused his wife of having an affair. This accusation was the reason he took his wife to live with her parents in Java. Later, both Kesuma and Puja, who had lived separately for a year, concluded unregistered marriages to new partners. One was in Mukomuko, and the other was in Serang Banten.

[197] As of 2020, a POSBAKUM had not been established in Mukomuko, due to the lack of funding (Laporan Tahun PA Mukomuko 2020, 09).

[198] This process aims to distinguish an ordinary fact (*fakta peristiwa, feitelijke grond*) from a legal fact (*fakta hukum, rechterlijke grond*), before applying the relevant provision to it (Riadi, 2013, p. 37). In this manner, any emphasis on either continued strife or *taklik talak* violation in the case background allows the judges to adjudicate a case according to the preferred trend in the court.

In early 2017, right before the birth of his first child, Kesuma went to Arga Makmur Islamic court to legally dissolve his previous marriage. By concealing his current unregistered marriage, he managed to frame his lawsuit, with the help of an informal case-drafter, as follows. It included, *first*, the legal standing of the parties regarding their identities and domiciles. The marriage took place in Serang, and then the couple moved to their own home in Mukomuko. *Second*, the ground(s) for divorce: the emphasis was on continuous strife before the accusation of an affair. *Third*, the period of separation: three years and three months. *Fourth*, the failure of mediation.

At the first hearing, the judges accepted the application without Puja attending (*verstek*), because she now lives somewhere in Java, implying that the process would skip the mediation session; they then adjourned the session. The second session was held on 9 May 2017, to examine the lawsuit. This session revolved around the occurrence of conflict, the failure of internal mediation, and separation for a certain period, to prove that the marriage is beyond repair. Rather than verifying the constructed facts, the presiding judges directed the plaintiff to confirm all his claims, so that they could determine the breakdown of the marriage. In the final session, the judges permitted Kesuma to pronounce *talak*.

Throughout the process, the judges were not critical of dubious stories made up by the plaintiff and his only witness, Abdul (18). The witness was his nephew, and he accompanied the plaintiff to the court. During his examination, Abdul confirmed all the questions raised by the judges concerning the breakdown of his uncle's marriage. He convincingly told the judges about Kesuma's wife's infidelity, the failure of their internal mediation, and his own involvement in due process. His testimony is not logical in many ways, since it is not common to involve a child in such private matters. At the time, Abdul was a child aged 14. However, this testimony sufficed for the judges to grant a divorce on the ground of broken marriage, considering the enormous caseloads they faced daily. Later, Kesuma and Abdul admitted to me outside of court that their testimony was fabricated.

This case shows the role of an informal case-drafter in directing Kesuma to frame his lawsuit according to the broken marriage ground, rather than the accusation of an affair. Otherwise, he would have to go through the laborious *lian* (an adultery

accusation) procedure. According to Law 7/1989 on Islamic judicature, a *lian* divorce requires additional procedures for the accusation, the accused wife's rebuttal, and the pronouncement of *sumpah lian* (a sworn declaration). It also requires the presence of the accused wife who, in this case, happened to be absent. A simpler procedure may apply to a *lian* accusation by a wife, but the wife still has to deliver a *sumpah lian*, unless the accusation has been proven through a criminal court decision (Mahkamah Agung RI, 2013, pp. 163–165). This option was less preferable (not to mention impossible) for Kesuma, who went to court in search of a speedy process, to enable him to register his current informal marriage. The case-drafter not only assisted the litigant by advising the lawsuit option, but they also facilitated the judges who would base their decision on the lawsuit. Hence, the construction of a lawsuit is 'prospective' in nature, and comparable with the process of an *'adl* (professional witness) writing a marital document in Morocco, which serves as valid legal evidence for possible conflict in future (Buskens, 2008, p. 153). In the Indonesian Islamic court, this process guarantees that the lawsuit will be adjudicated on the ground of broken marriage.

With the help of informal case-drafters acting as brokers between litigants and judges, all incoming divorce lawsuits are formulated according to the ground of either broken marriage or *taklik talak* violation. From a total of 1,051 divorce lawsuits from Mukomuko in the last five years, 791 (75.27%) were treated as broken marriages and 179 (17.03%) were treated as *taklik talak* violations. The remaining 81 (7.70%) lawsuits were either revoked (49; or 4.66%) or unidentified (32; or 3.04%).[199] The numbers and percentages suggest that the grounds for divorce in those years were pretty much constructed, but that the constructed lawsuits still mentioned the real cause(s) of each divorce.[200] Taking Kesuma's case as an example, accusing his wife

[199] From an analysis of the incoming divorce lawsuits in the Arga Makmur and Mukomuko Islamic courts, from 2016 to June 2020.

[200] In 2016 the MoRA Research and Development Department commissioned a research team, in order to understand the recent staggering rise in divorces initiated by wives. This research concluded that the trend was driven mainly by disharmonious marriages and hus-

of having an affair was an underlying cause of the breakdown of his marriage, and this not only allowed the judges to grant him a divorce on the ground of broken marriage, it also proved effective in gaining their sympathy. In observing the *Puja v. Kesuma* case, I also got an impression from the judges' gestures that they would accelerate the process, after finding out that the dispute before them was triggered by an (unproven) affair committed by Kesuma's wife (cf. Nurdin, 2018 for the correlation between a wife's behaviour and a court's judgement in the Aceh Islamic court). This impression corresponds to the social stigma attached to an unfaithful wife (Wirastri & van Huis, 2021, p. 2), which in this case benefitted the husband.

If we now return to *Nurdin v. Hamidah's family*, we come across a similar process of translating ordinary events into legally valid language. This process was apparent in their *isbat nikah* and inheritance lawsuits, for which they obtained a lot of help from an informal case-drafter. With this help, the plaintiffs eventually managed to formulate their lawsuit to include three mandatory elements: the court's competence and jurisdiction, the plaintiffs' legal standing, and legally valid claims. Without these elements, the family's lawsuit would have been no more than legally ill-grounded expectations from a legally-illiterate group. Meanwhile, Nurdin relied mostly on a group of professional lawyers, who assisted him in formulating answers to the lawsuit. In this manner, both the informal case-drafter and lawyers assisted the parties in translating their claims and answers into legally valid language. Conversely, the presiding judges could easily grant the *isbat* lawsuit, since it was well drafted and legally eligible, i.e. it was concluded before 1974 and filed by a competent subject. Nonetheless, in the inheritance lawsuit the judges needed to undergo a protracted process of verifying the disputed objects, because the plaintiffs, certainly with the help of an infor-

bands' negligence (Kustini & Rosida, 2016, pp. xi–xii). The researchers did not consider that their conclusion was based on constructed causes and failed to capture the actual causes. In fact, had they delved deeper into the background (*posita*) of each case, where the actual causes were usually mentioned, they would have reached different conclusions.

mal case-drafter, failed to identify and formulate the inheritance objects according to the requirements of the law.

After a long process, the Supreme Judges in the inheritance dispute between *Nurdin v. the late Hamidah's* family eventually ruled that the lawsuit was inadmissible, simply because it was not clear what the disputed objects were. This rejection can be attributed to the fact that judges have not yet developed a firm position regarding inheritance-related cases. They share this limitation with the brokers, especially informal case-drafters who are not yet equipped with a standardised template for such cases and therefore could not avoid rejection. In the other cases featured here, the brokers' roles were crucial. In the *Syahril v. Yati* case, the lawyers were active in convincing the parties to distribute their joint marital property according to the 50:50 principle, instead of *semendo adat*. However, there was no lawyer in the *Suhar v. Tini* case, and the judges were active in reminding the wife of her right to spousal alimony. As a result, both the judges and brokers played a part in the construction of legal truth, which is prospective, but at the same time restricted to developments within the Islamic court. Their shared roles also contribute to a more general discussion, concerning the relationship between legal writing and everyday life (cf. Buskens, 2008; Messick, 1996). I will now turn to asking who goes to the Islamic court, and who actually the court serves.

5.6 Whose Court is this and Who Do the Competent Courts Actually 'Serve'?

As mentioned previously, the main users of the Islamic courts in Indonesia are non-traditional villagers. Chapter 3 illustrated how the contemporary people of Mukomuko are comprised of matrilineal communities within traditional *hulu-hilir* villages, transmigrants in their enclaves, and more diverse community groups in urban centres. Unlike the *hulu-hilir* villagers, who observe their *semendo adat* and rely predominantly on its institutional actors, the migrants feel a greater need for the

Islamic court for external support. A close reading of the domiciles of people bringing cases to the Islamic court confirms that the majority of in-court divorces were brought by people from migrant enclaves and urban centres. Within the jurisdiction of Arga Makmur Islamic court, the ratio between people from traditional villages and non-traditional villages bringing cases was, consecutively, 40:130 (23.53% to 76.47%) in 2016, and 42:162 (25.6% to 74.4%) in 2017. After the establishment of Mukomuko Islamic court, at the end of 2018, the ratio did not change significantly: in 2019, it was 65:192 (33.85% to 66.15%). This comparison suggests that the main users of the competent Islamic courts were those of migrant origin. The case of Talang Buai village, where I spent most of my time during fieldwork, confirms this. From 2016 until May 2021 there were only two in-court divorces from this village, both of which were filed by villagers who are civil servants.

Other users include state officials (i.e. civil servants, military and police officers) from a variety of ethnic and community backgrounds. According to the law this particular group is subject to a stricter divorce procedure, as state officials are legally required to obtain permission from their superiors before initiating a divorce.[201] However, in practice, this requirement can be bypassed in court if a state official is married to a non-state official. Supposing that this is the case, the state official can obtain a divorce without being given permission, by asking his or her partner to file the divorce via a *verstek* procedure. This option has developed for a reason. It prevents state officials from complicating divorce for their non-civil servant partners by refusing to arrange the permission. Specific to police officers, an easier procedure was formalised through SEMA 5/2014. This SEMA allowed judges from the Islamic courts to proceed divorce lawsuits involving police officers without necessarily confining themselves to obtaining permission. Instead, officers would be required to make a written declaration that they would bear out

[201] Article 3 of Government Regulation 45/1990; Police Chief Regulation 9/2010; and, Ministry of Defence Regulation 23/2008.

any possible consequences for not asking permission from his or her superior.[202] Figure 5.6.1, below, shows that there were 23 divorce lawsuits involving state officials from Mukomuko in 2016 and 2017. Twenty-one of the cases were awarded, and two were revoked. From the 21 cases awarded, only six contained permission from superiors. The remaining 15 were all filed without permission from superiors: eight (38%) by state officials, and seven (33%) by non-state officials.

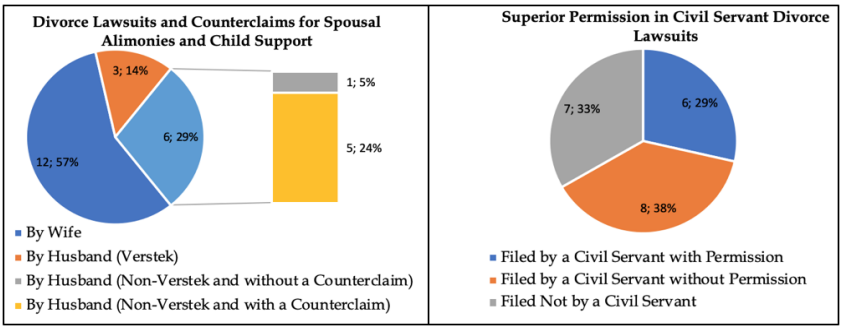

Figure 5.6.1: Divorce lawsuits among state officials in 2016 and 2017

In 2020 the Supreme Court refined the previous provision by circulating SEMA 10/2020, requiring judges not to process a divorce lawsuit brought by a member of the police or military, unless a letter of permission has been provided by their superiors. If there is no letter of permission, the presiding judges have to adjourn the session for six months. During the recess, as plaintiff the party is required to obtain a permission letter from his or her superiors, or as defendant, to notify his or her superiors. However, little is known about the impact of this provision in Mukomuko Islamic court, since the SEMA was only circulated at the end of 2020. Further research is therefore needed. A judge from the Mukomuko Islamic court told me that she had not encountered a single case from a member of the police or military from the beginning of 2021 until June 2021.[203] Strict application of permission from su-

[202] It includes possible sanctions, ranging from a demotion, a transfer, or a non-job, to a dismissal, as stipulated in Article 7 (4) of Government Regulation 53/2010 and its corresponding provisions.

[203] Interview with Laila, a judge at the Mukomuko Islamic court, on 21 June 2021. Another judge (Dede Ramdani) from the Beloka Islamic court confirmed the same. Unlike the pre-

periors only really occurs among the military. During my research at the Arga Makmur Islamic court, I found only one case, Number 114/Pdt.G/2019/PA.Mkm, where a military officer became the defendant and was not present during the session (*verstek*). The wife, as plaintiff, provided a permission letter from her husband's superiors. The military was therefore the first to apply permission from superiors, followed by police, then civil servants.

Another aspect of divorce lawsuit among state officials concerns counterclaims, made by wives, to spousal alimony and child support. A general norm applies in this instance, meaning that such a counterclaim may exist only when both parties appear before the court (non-*verstek*), the husband is the plaintiff (*cerai-talak*), and the wife has made a counterclaim (see Section 5.5 of this chapter). According to this general norm, only six cases (29%) out of the 21 awarded cases contained a counterclaim. Nonetheless, Figure 5.6.1, above, shows that only five out of the six cases contained counterclaims, by wives, to spousal alimony and child support. All five were awarded, but the amount granted was adjusted according to the husbands' ability, usually the amount he had agreed to during the court session (cf. van Huis, 2015). Therefore, no matter how few cases there were, I assume that counterclaims to spousal alimony and child support in Mukomuko were dominated by cases involving civil servants. Further, as I observed in court hearings, the presiding judge often played an important role in reminding the wives of their rights, while adjusting the amount agreed between the parties.

Traditional villagers who adhere to the *semendo* tradition also use the court. As already mentioned in the previous section, this user is not common, but I still found a few cases involving them. My featured cases, including those presented in the previous chapter, were mostly drawn from this category. Traditional villagers' use of the competent Islamic courts occurs mainly in marriage-related and divorce-related cases that involve a dispute

vious year, when the council had received five cases filed by members of the police or military, he did not encounter a single divorce case of this type from January until June 2021. Interview with judge Dede Ramdani, on 21 June 2021.

about the distribution of property, such as joint marital property and inheritance. Villagers go to court mainly after the failure of consensual resolution, either within their nuclear family or within their matrilineal clan and their *adat* at village level. Among such cases was that of the husband who challenged the *semendo adat* to obtain a greater share of the joint marital property (see, *Syahril v. Yati*). In another case, the court was expected to intervene after the parties failed to distribute inheritance objects consensually (see, *Nurdin v. The late Hamidah's* family). In this way, traditional villagers use the state Islamic court in 'extreme' cases. By extreme, I mean property-related disputes, notably between *semendo adat* and state law, after the parties have failed to reach a consensual out-of-court resolution.

5.7 Concluding Remarks

The previous section showed that the main users of the competent Islamic court in Mukomuko are migrants. Meanwhile, traditional villagers rarely bring their disputes to the court unless they are forced to, as has happened in lawsuits involving state officials, or in extreme cases, such as disputes about joint marital property, inheritance distribution, etc. While state officials are legally subject to stricter regulation when attending court, in extreme cases villagers are usually attempting to escape or challenge *semendo adat*. If this were not the case, the villagers would rely on internal resolution within their nuclear families or their *kaum* (clan). Therefore, compared to migrants, the lower number of judicial divorces among villagers does not necessarily indicate a lower number of disputes (especially divorces) that took place in everyday practices. Instead, this trend suggests an inherent conflict between the *semendo adat* observed by the villagers and the law imposed upon them by the state. This (structural) conflict mainly occurs in the court when different actors (i.e. parties and judges) are brought together, and brokers, such as informal case-drafters and lawyers who mediate between the parties and judges, should also be taken into consideration.

By narrowing the discussion to the villagers, this chapter shows that their reluctant use of the state Islamic court has occurred for a number of reasons. Among other things, problems arose as a result of the adoption of the one-roof system and the late establishment of the Mukomuko Islamic court. While the former alienated people from the Islamic court, the latter generated access issues relating to travelling distance and costs. Before the adoption of the one-roof system, villagers used to access the court via a regular circuit court, but after its adoption they had to travel to the Arga Makmur Islamic court. Only later did this situation ameliorate, after their own court was established at the end of 2018. In fact, there was an increase in incoming lawsuits after the establishment of Mukomuko Islamic court, but overall the villagers continued to resolve their disputes out-of-court. As already mentioned, this inclination can be attributed to a conflict between their matrilineal *adat* and the more patriarchally-inclined state law. This conflict posed a serious threat to villagers' *semendo adat* in property-related cases, especially for women. This is the reason why the invocation of the state court only occurred in extreme cases, usually brought by men in an attempt to obtain a greater share as a result of their property-related disputes.

Last but not least, the marriage-related and divorce-related dispute cases featured here demonstrate that each actor plays a role. Traditional villagers engaged with shopping processes to secure their interests. In doing so, they exercised forum shopping in state courts and discourse shopping within different legal repertoires. In forum shopping, they chose either the state Islamic court or the general court, no matter how ill-founded their choice might be. In discourse shopping, they referred not only to the state law but also to their own *adat*. Conversely, judges from the Islamic court responded to their lawsuits by sticking strictly to the law, manoeuvring only within established developments in the Islamic court, and disregarding the villagers' unique socio-cultural backgrounds. Otherwise, their judgment, as seen

in *Nurdin v. Hamidah's family,* will be liable to nullification by the higher courts. Between these actors sit the informal case-drafters and lawyers, whose role as 'broker' was constructive and prospective. They helped the parties to turn their lawsuits into a proper draft, while providing something for the judges to base their decision on. Although their assistance was crucial for anticipating possible errors, the brokers generally sided with the judges and acted as an extension of that role. Consequently, the outcome of this conflict was predominantly determined by judges, and the Islamic court emerged as being unsuitable for villagers.