al-ahwal
Jurnal Hukum Keluarga Islam

Al-Aḥwāl: Jurnal Hukum Keluarga Islam
ISSN: 2085-627X (p); 2528-6617(e)
Vol. 18, No. 1 (2025), pp. 155-174, DOI: 10.14421/ahwal.2025.18201

The Autonomy of Indonesian Islamic Court: Inventing and Refining 'Broken Marriage' as a Unilateral and No-Fault Divorce Ground

Al Farabi
Universitas Islam Negeri Raden Mas Said Surakarta, Indonesia
Email: alfarabi@iain-surakarta.ac.id

ABSTRACT

This article discusses important developments of marriage and divorce norms within the Islamic Chamber of the Supreme Court. Focusing on broken marriage ground, this article explores landmark decisions, Supreme Court regulations, Supreme Court circular letters, and yearly plenary meetings. In addition, interviews with judges and emerging discourse available in the quarterly magazine Peradilan Agama, from 2013 onwards, and relevant decisions by the Constitutional Court were also consulted. Employing a critical and chronological legal analysis, the discussion reveals a consistent trend of judicial law-making as apparent in the invention of 'broken marriage' as a unilateral and no-fault divorce ground to provide a better and more equal court access for both men and women. However, judges can still employ consideration of fault, especially when the 'fault' is relevant to a spouse's post-divorce rights. These legal breakthroughs show the autonomy of Islamic court, especially to bridge the gaps between a formal application of law and a sense of justice in society. The judges' autonomy is crucial as the more responsive attitude enhances their social recognition and the court's legitimacy before the society. In fact, accommodation is not the only logic that works as the judges have also been very careful to ensure that developments do not work against the established interpretation of law and 'core values' in Islam. This finding demonstrates that the Islamic courts have served as strategic loci not only for the development of law but also for the encounter of different normative systems.

[Artikel ini membahas perkembangan penting mengenai norma-norma perkawinan dan perceraian dalam Kamar Agama Mahkamah Agung. Dengan berfokus pada alasan perceraian karena "perkawinan yang pecah" (*broken marriage*), artikel ini menelusuri putusan-putusan penting, peraturan Mahkamah Agung, surat edaran Mahkamah Agung, dan hasil rapat pleno tahunan. Selain itu, wawancara dengan para hakim serta wacana yang berkembang dalam majalah triwulanan Peradilan Agama sejak 2013, dan putusan-putusan relevan dari Mahkamah Konstitusi juga dijadikan rujukan. Dengan menggunakan analisis hukum kritis dan kronologis, pembahasan ini mengungkap tren konsisten dalam pembentukan hukum oleh peradilan, yang tampak dalam perumusan "perkawinan yang pecah" sebagai alasan perceraian sepihak dan tanpa kesalahan (*unilateral and no-fault divorce ground*) untuk memberikan akses peradilan yang lebih baik dan setara bagi laki-laki dan perempuan. Namun demikian, hakim tetap dapat mempertimbangkan unsur kesalahan, terutama ketika "kesalahan" tersebut berkaitan dengan hak-hak pasca-cerai seorang pasangan. Terobosan-terobosan hukum ini menunjukkan adanya otonomi peradilan agama, terutama dalam menjembatani kesenjangan antara penerapan hukum secara formal dan rasa keadilan dalam masyarakat. Otonomi hakim sangat penting karena sikap yang lebih responsif meningkatkan pengakuan sosial dan legitimasi peradilan di hadapan masyarakat. Bahkan, akomodasi bukan satu-satunya logika yang bekerja, karena para hakim juga sangat berhati-hati memastikan bahwa perkembangan tersebut tidak bertentangan dengan interpretasi hukum yang sudah mapan dan "nilai-nilai inti" dalam Islam. Temuan ini menunjukkan bahwa peradilan agama telah menjadi lokus strategis bukan hanya bagi perkembangan hukum, tetapi juga bagi perjumpaan berbagai sistem normatif.]

KEYWORDS
broken marriage, autonomy of law, no-fault divorce, and Islamic core values

ARTICLE HISTORY
Received: 6 June 2025
Approved for Publication: 1 October 2025

TO CITE THIS ARTICLE
Al Farabi, "The Autonomy of Indonesian Islamic Court: Inventing and Refining 'Broken Marriage' as a Unilateral and No-Fault Divorce Ground" *Al-Ahwal: Jurnal Hukum Keluarga Islam* 18, no. 1 (2025): 155-174, https://doi.org/10.14421/ahwal.2025.18201.

Introduction

The Indonesian matrimonial affairs have been the subject of state control through several statutory reforms. The reforms have made marriage registration and judicial divorce mandatory; restricted polygamy; introduced a minimum marital age, and equal divorce grounds for wives and husbands; and formalised so called 'legal pluralism', by introducing state-sanctioned Islamic law and establishing an Islamic court exclusively for Muslims.[1] For the most part, the reforms had already been developing through judicial practice in the Islamic court. This is apparent in case law dating back to the colonial era, whenever judges creatively interpreted traditional *fikih*, *adat* (customary law) and *siyāsah* (state law) in their judgements.[2] Therefore, following Van Huis' line of argument, Indonesian family law for Muslims was a result of two aspects: legislative deliberation in parliament, and judicial tradition in the Islamic court.[3] They were crucial to the development of Indonesian family law. While the legislation provides a threshold that prevents judges referring to more conservative interpretations of Islamic family law, judicial tradition acquaints them with judicial law making.

1 Mark Cammack, "Islamic Law in Indonesia's New Order," *International & Comparative Law Quarterly* 38, no. 1 (1989): 53–73; Mark Cammack, "Indonesia's 1989 Religious Judicature Act: Islamization of Indonesia or Indonesianization of Islam?," *Indonesia*, no. 63 (1997): 143–68; Euis Nurlaelawati, *Modernization, Tradition and Identity: The Kompilasi Hukum Islam and Legal Practice in the Indonesian Religious Courts*, vol. 4 (Amsterdam University Press, 2010); Nani Soewondo, "The Indonesian Marriage Law and Its Implementating Regulation," *Archipel* 13, no. 1 (1977): 283–94; Stijn Cornelis van Huis, "Islamic Courts and Women's Divorce Rights in Indonesia: The Cases of Cianjur and Bulukumba" (Doctoral's thesis, Leiden University, 2015), http://hdl.handle.net/1887/35081.

2 John R Bowen, "Fairness and Law in an Indonesian Court," in *Dispensing Justice in Islam* (Brill, 2006); Daniel S Lev, *Islamic Courts in Indonesia: A Study in the Political Bases of Legal Institutions*, vol. 12 (Univ of California Press, 1972); Nurlaelawati, *Modernization, Tradition and Identity: The Kompilasi Hukum Islam and Legal Practice in the Indonesian Religious Courts*, vol. 4; Huis, "Islamic Courts and Women's Divorce Rights in Indonesia: The Cases of Cianjur and Bulukumba."

3 Huis, "Islamic Courts and Women's Divorce Rights in Indonesia: The Cases of Cianjur and Bulukumba."

In contrast with legislation, which is imposed top to bottom, judicial law-making is predominantly formed through dialogue between adjudicating judges and justice seekers in a courtroom. In the latter, judges cast themselves as interpreters of (Islamic) law, whereas justice seekers appear before the court to negotiate their respective interests and conditions. In this way, the state's Islamic court serves as an important place for the development of Muslim family law, considering the absence of substantive legislative reforms after the passing of Law 1/1974 on Marriage. However, as maintained by many studies, developments within the Islamic court are still 'less inventive', since the balance between the Islamic triangle, i.e. sharia, state law, and customary law,[4] is equally important and cannot be underestimated in the Indonesian context.[5] Featuring 'broken marriage' as grounds for divorce, this article seeks to investigate the role of Islamic court judges in reforming family law. This topic will be viewed in light of their role in maintaining the balance between the preservation of law and the need to consider social conditions when promoting reforms in the field of marriage and divorce among Muslims.

By exploring broken marriage ground within the Islamic Chamber of the Indonesian Islamic court, this article proves a consistent trend of judicial law making in the field of marriage and divorce law, as apparent in the 'invention' of broken marriage as a unilateral, no-fault, and all-encompassing ground for divorce. Employing broken marriage as a ground for divorce, judges promote a simpler and more equal divorce procedure for husbands and wives, as well as lifting the burden to find who is at fault from their own shoulders. However, judges can still employ consideration of fault, especially when the 'fault' is relevant to a spouse's post-divorce rights. In this manner, a question of fault is dealt differently from the general norm of broken marriage that continues to be treated as a unilateral and no-fault divorce ground. These judicial developments, as argued in this paper, demonstrate the 'autonomy' of Islamic court judges in exercising judicial law making, mainly to bridge gaps between a formal application of the law and a sense of justice within society that is informed by social norms, *adat* and religious provisions. In this respect, judges manage to reconcile two unfruitful schisms in the law, i.e. formalists versus instrumentalists,[6] by exercising their autonomy as its official interpreters.

This article is based on a critical legal analysis and studies. In this article, the topic of broken marriage will be discussed analytically, in a chronological way, by consulting the codified laws and then looking at how judges have shaped them. The materials for the discussion were mostly drawn from landmark decisions by the

4 Leon Buskens, "An Islamic Triangle: Changing Relationship between Sharī'a, State Law and Local Customs," *Isim Newsletter* 5, no. 8 (2000).

5 Lev, *Islamic Courts in Indonesia: A Study in the Political Bases of Legal Institutions*, vol. 12; Euis Nurlaelawati and Stijn Cornelis Van Huis, "The Status of Children Born out of Wedlock and Adopted Children in Indonesia: Interactions between Islamic, Adat, and Human Rights Norms," *Journal of Law and Religion* 34, no. 3 (2019): 356–82, https://doi.org/10.1017/jlr.2019.41; Huis, "Islamic Courts and Women's Divorce Rights in Indonesia: The Cases of Cianjur and Bulukumba."

6 Richard Terdiman, "Translator's Introduction: The Force of Law: Toward a Sociology of the Juridical Field," *UC Law Journal* 38, no. 5 (1987): 805.

Islamic Chamber of the Supreme Court (Mahkamah Agung Kamar Agama), Peraturan Mahkamah Agung (PERMA, or Supreme Court regulations), Surat Edaran Mahkamah Agung (SEMA, or Supreme Court circular letters), and Rapat Pleno Tahunan (yearly plenary meetings). Interviews with judges, emerging discourse available in the quarterly magazine Peradilan Agama, from 2013 onwards, and relevant decisions by the Constitutional Court were also consulted.

For analytical purposes, a brief elaboration on the concept of legal autonomy will be addressed first. The concept of autonomy is adapted from Bedner to mean:

> "...the condition in which legal institutions, constituting a legal system, are able to perform their tasks—and notably the systematic development of substantive rules and principles of law—in accordance with the procedural rules designed to guide them, without interference from outside actors based on non-legal grounds".[7]

To make this concept operational, Bedner draws on essential autonomy of law features from three great social traditions. First, the Weberian tradition: an autonomous law requires the presence of a 'cannon of interpretations', by which legal rules are linked to its underlying principles and concepts, in order to minimise the gap between formal-rational law and social reality. Second, Bourdieu's elements, applicable in either sociological or juridical fields: the functioning of an autonomous law lies in the division of labour between theoreticians and practitioners, with their own distinctive internal rules; together, they constitute *corpus juridique*, by which judges are guided when adjudicating similar cases.[8] Third, Luhmann's autopoietic theory: an autonomous law requires 'communication', by which "law reproduces its own elements by the interactions of its elements" and 'self-referential autonomy', and "laws are only regarded as norms because they are intended to be used in decisions, just as these decisions can only function as norms because this is provided for in laws".[9]

Equipped with this theoretical framework, Bedner concludes that legal institutions in Indonesia, notably Indonesian courts, generally lack the autonomy to perform the legitimating and stabilising functions ascribed to them by Western social theory. In his view, the state's Islamic court is an exception, because it has developed some of the required features to be 'relatively' autonomous. Islamic court judges have managed to bridge a gap between sanctioned law and the sense of justice within society that is informed by *adat* and religious provisions. They have also managed to bridge gaps in theoretical thinking, i.e. between that of scholars and the Supreme Court, and practitioners or the first instance court. The legal training received by Islamic court judges differs from that received by their counterparts in general courts, because it places emphasis on integrating Islamic doctrine and legal theories, and as well on having a platform for communication,

7 Adriaan Bedner, "Autonomy of Law in Indonesia," *Recht Der Werkelijkheid* 37, no. 3 (2016): 10–36.

8 Pierre Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field," *Hastings LJ* 38 (1986): 805.

9 Bedner, "Autonomy of Law in Indonesia"; Dimitris Michailakis, "Review Essay: Law as an Autopoietic System," *Acta Sociologica* 38, no. 4 (1995): 323–37; Joachim J. Savelsberg, "Reviewed Work: Law as an Autopoietic System by Gunther Teubner," *Contemporary Sociology* 23, no. 3 (1994): 411–12, JSTOR, https://doi.org/10.2307/2075352.

i.e. Mimbar Hukum magazine (Majalah Peradilan Agama, from 2013 onwards). While the presence of all these features is remarkable, the court still lacks autonomy from outside interference (particularly from Islamic authorities), due to its strong religious symbolism. Nonetheless, recent judicial innovations on the broken marriage grounds mean it can be argued that the Islamic court is an autonomous institution, capable of exercising judicial law making from within, unconstrained by outside interference.

The emergence of the Islamic court as an autonomous institution has witnessed the transfer of Islamic authority to Islamic court judges. The judges develop a platform for Islamic family law reforms by balancing theory (the existing norms of marriage and divorce) with practice (the sense of justice informed by *adat*, religious provisions, and social conditions). In this regard, judges cast themselves as prominent actors in exercising religious authority and reforming Islamic family law.[10] The discussion in this article looks closely at broken marriage to give an account of how Islamic court judges exercise their autonomy in reforming Islamic family law. The main reason for focusing on broken marriage is to select the most established judicial innovations on marriage and divorce in the Islamic courts. However, one should keep in mind that important developments are taking place in other topics as well. For this reason, the discussion on broken marriage must not be approached in isolation as they would 'always' correlate with other relevant topics such as *isbat nikah,* joint marital property, alimony, child support, *mahar* (bride price), and even inheritance.

The Invention of Broken Marriage as a Divorce Ground

In Indonesia, statutory (legislative) reforms have brought two significant changes to divorce. One requires a divorce to be judicial and accompanied by sufficient ground(s). The other differentiates between two competent courts on divorce: a state Islamic court for Muslims, and a general court for non-Muslims. In this regard, the divorce statute may be subsumed under the 'second phase' of reform—the categories employed to divide different trajectories of family law reform in majority-Muslim countries[11]—where judicial divorce and divorce ground(s) are made mandatory. Nevertheless, in a recent development within the Islamic court, Islamic court judges have stepped into the 'third phase' of reform, where a husband's facility to *talak* (unilateral repudiation) is balanced with a wife having more options for judicial divorce. The third phase of reform manifests in the invention of a broken marriage concept. This concept is the result of both inductive and deductive methods. It gradually evolved through judges' interpretation of divorce ground point (f) as unilateral and no-fault, and developed through several

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

11 Nadia Sonneveld, "Divorce Reform in Egypt and Morocco: Men and Women Navigating Rights and Duties," *Islamic Law and Society* 26, nos. 1–2 (2019): 149–78, https://doi.org/10.1163/15685195-00260A01; Lynn Welchman, *Women and Muslim Family Laws in Arab States: A Comparative Overview of Textual Development and Advocacy* (Amsterdam University Press, 2007).

criteria attached to this ground. The ground was then deductively linked to an underlying purpose for Indonesian marriage, i.e. realising a marriage based on mutual love and consent. Later, the judges refined the application of broken marriage by reapplying fault consideration to the consequence of such divorce, allowing them to deliver a nuanced and just judgement that is threatened by a strict application of a no-fault ground. Before addressing broken marriage, the following discussion elaborates on judicial divorce and divorce grounds in Indonesian (Islamic) family law.

1. Judicial divorce and different grounds for divorce

Article 39 of the 1974 Marriage Law stipulates in paragraph one that "a divorce must be conducted in court, after the court has attempted and failed to reconcile the parties", and in paragraph two that "there must be sufficient ground(s) for the breakdown of a marriage". The first paragraph makes divorce a state affair, by requiring it to be conducted in a competent court. The competent court refers to two different courts, i.e. the Islamic court and the general court. In Government Regulation 9/1975, the Islamic court is designated for Muslims or those who have concluded their marriages in accordance with Islamic religion, and the general court is provided for non-Muslims. The second paragraph requires a divorce lawsuit to be based on sufficient grounds. In the marriage law and its implementing regulations, divorce grounds comprise six conditions for all citizens and two additional conditions exclusive to Muslims:

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

Accordingly, a husband or wife may register a divorce at the competent court only when their respective spouse has violated at least one of these grounds. In this sense, the grounds are fault-based in nature and are available as 'exit' grounds for those who are not at fault for the breakdown of their marriage. These grounds apply to both spouses, except the *taklik talak* ground - point (g) - which is only relevant to wives. Nevertheless, a divorce petitioned for by a husband is distinguished from that petitioned for by a wife; namely, *talak* divorce for a husband and *gugat* divorce for a wife. The distinction revolves around different mechanisms and outputs available to the husband and wife in obtaining a formal divorce. The mechanisms refer to a wide range of divorce procedures, such as *talak* (a husband's unilateral right to repudiate), *khulʿ* (a consensual divorce), and *fasakh* (a divorce by judge[s]). The outputs refer to the consequences of the given procedures, such as a revocable divorce, an irrevocable divorce, and a final divorce.

First, regarding the mechanism of divorce, in *talak* divorce a husband seeks permission from the Islamic court to repudiate his wife, whilst in *gugat* divorce a wife requests that Islamic court judges terminate her marriage. This distinction is modelled after traditional *fikih* provisions, which give a husband the privilege of unilateral divorce (*talak*). However, this privilege is now subject to state control. A husband is still required to provide valid grounds, as prescribed in the marriage law, and can only then perform *talak* before an Islamic court. In certain cases, a husband is no longer entitled to perform *talak*, if he converts from Islam to another religion (*riddah* or *murtad*).[12] In *gugat* divorce there are two mechanisms available to a wife, i.e. *khulʿ* and *fasakh*. *Khulʿ* is consensual divorce, in which a wife agrees to pay compensation (*iwad*) to her husband in exchange for his talak. In Indonesia, *khulʿ* divorce may be obtained through regular *khulʿ*, *taklik talak*, *shiqāq*, and *fasakh*.[13] Each procedure is different, but they may all end up as khulʿ in the hands of judges. In view of this, Van Huis suggests that different forms of khulʿ are the result of a 'judicial tradition', developed by judges in their daily adjudication.[14] *Fasakh* is judges' prerogative right to terminate a marriage on their own. They often employ *fasakh* when a marriage is already beyond repair, but the husband has refused to pronounce *talak*.

Second, regarding outputs, *talak* divorce first generates *talak rajʿi*, and *gugat* divorce generates *talak bain ṣuġrā*. Whilst the former constitutes 'revocable' divorce, the latter is 'irrevocable' divorce. In a revocable divorce, the husband might reconcile with the divorced wife (*rujuk*) within a waiting period (*idah*).[15] In an irrevocable divorce, a husband is not entitled to *rujuk* and the only way to reconcile is via remarriage. There is also another type of irrevocable divorce, *talak bain khulʿi*. This type of divorce is adapted from *khulʿ* (consensual divorce), which in Indonesia appears in many forms: regular *khulʿ*, *taklik talak*, *shiqāq*, and *fasakh*.[16] In essence, *talak bain khulʿi* is irrevocable and equal to *talak bain ṣuġrā*. In Article 148 of the 1991 Compilation of Islamic Law, the result of a *khulʿ* divorce is a final divorce that is closed to appeal and cassation, but later, the Supreme Court ruled out this article through "Buku II Pedoman Pelaksanaaan Tugas" and made *talak khulʿ* similar to other divorce, and open to appeal and cassation.[17] In addition to revocable and irrevocable divorce, there is also 'final' divorce (*talak bain kubrā*),

12 A husband can still initiate divorce via gugat divorce, by requesting that Islamic court judges terminate his marriage through *fasakh*.

13 Stijn Cornelis Van Huis, "Khul 'over the Longue Durée: The Decline of Traditional Fiqh-Based Divorce Mechanisms in Indonesian Legal Practice," *Islamic Law and Society* 26, nos. 1–2 (2019): 58–82.

14 Huis, "Islamic Courts and Women's Divorce Rights in Indonesia: The Cases of Cianjur and Bulukumba"; Maaike Voorhoeve, "Judicial Discretion in Tunisian Personal Status Law," in *Family Law in Islam: Divorce, Marriage and Women in the Muslim World* (I.B.Tauris & Co Ltd, 2012).

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

16 Hisako Nakamura, *Conditional Divorce in Indonesia*, Occasional Publications 7 (Islamic Legal Studies Program, Harvard Law School, 2006), https://pil.law.harvard.edu/wp-content/uploads/2019/12/Conditional_Divorce_in_Indonesia_by_Hisako_Nakamura.pdf; Van Huis, "Khul 'over the Longue Durée: The Decline of Traditional Fiqh-Based Divorce Mechanisms in Indonesian Legal Practice."

17 Mahkamah Agung, "Buku II Pedoman Teknis Administrasi Dan Teknis Peradilan Agama," *Mahkamah Agung*, 2013.

where the couple is not ever allowed to marry each other again. As an example, a divorced couple is never allowed to remarry if they obtained their divorce through *lian* (accusing a spouse of committing adultery that is unproven) or *riddah* (converting from Islam to other religion) procedures. In this manner, the outputs of a divorce are determined by who registers the lawsuit, and on what grounds the lawsuit proceeds.

2. The evolution of 'continuous strife' as a ground for divorce

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

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

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

a. Debates on the nature of the 'continuous strife' ground

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

> In 1979, Siti Hawa filed a divorce suit against A. Rahman at Kuala Simpang Islamic court. The lawsuit was built on multiple grounds—i.e. dispute and discord, *taklik talak* violation, and domestic violence—seeking either talak or fasakh. During evidentiary sessions, the first instance court found that: (1) Conflicts had occurred for three years; (2) The husband had neglected his wife for four months, and had not provided her with maintenance support; and, (3) The husband had committed domestic violence. However, until the last session, the husband refused to pronounce talak. Given this, the court dissolved the marriage through fasakh by referring to a jurist's opinion in a classical fikih book, i.e. Kitab Bugyah. Later, this decision was overturned by the appellate court, which argued that: (1) There was no convincing evidence of dispute and discord, and the court could therefore not determine who was at fault; (2) If conflict were to be proven, the solution should be *shiqāq*, instead of *fasakh*; and, (3) Maintenance negligence that could provide a basis for fasakh was not supported by sufficient evidence, as the husband claimed his wife had refused to take a share of his salary. In judgement number 015K/Ag/1980, the Supreme Court considered that the evidence was sufficient and decided to grant Siti Hawa a divorce through fasakh, on the ground of irreconcilable continuous strife, point (f). This judgement formulates a legal principle: "a divorce lawsuit filed to an Islamic court and seeking fasakh must be accepted if the judges find 'sufficient evidence' for the occurrence of continuous strife and failed attempts at reconciliation."

This judgement demonstrates how Supreme Court judges have employed a lenient use of *fasakh*, mainly when a husband refuses to pronounce *talak*. This corresponds to Van Huis' argument that—through what he referred to as a 'judicial tradition'—the Islamic court had developed a lenient attitude towards *fasakh* long before the marriage law was passed.[18] This attitude enabled the court to extend its application of the *fasakh* procedure to a divorce lawsuit on the ground of continuous strife in point (f). The extended use of *fasakh* provides leeway for judges to terminate such marriages. In this judgement the Supreme Court started to treat divorce ground point (f) as unilateral, meaning it can be employed by either party, as long as the marriage is already irreconcilable. However, the Supreme Court did not make any explicit reference to whether this ground should be treated as fault or no-fault. Thus, it remained unclear whether it was necessary to determine who was responsible for the marital breakdown.

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

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

In examining divorce on the ground of continuous strife, the letter required (in its first point) the thorough investigation of an occurrence of dispute and discord. The first point emphasises the condition of the alleged conflict. In its second point, the letter signified two things: one emphasised the ground as fault-based, and the other as non-unilateral. By fault-based, the letter means that Islamic court judges are required to establish who was at fault. By non-unilateral, the letter means that

[18] Huis, "Islamic Courts and Women's Divorce Rights in Indonesia: The Cases of Cianjur and Bulukumba."

judgement on this ground is dependent on the establishment of fault. Suppose the accuser caused the fault; in that case, judges will reject the lawsuit. Suppose the fault was caused by the accused; in that case, judges may accept the lawsuit. In the third point, the letter compared this ground with a *shiqāq* ground requiring the involvement of (an) arbitrator(s), or *hakam*. Article 76 of Religious Court Law 7/1989 stipulates in paragraph one that "a divorce on the ground of *shiqāq* shall involve witnesses from the husband's and wife's families, or their relatives". In paragraph two, "after the hearings, the court may appoint (an) arbitrator(s) (*hakam*) from each party". All these restrictions aimed to make divorce on this ground more difficult.

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

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

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

> In 1981, Bambang married Halimah and registered their marriage at the Setiabudi Sub-District Office of Religious Affairs. They were happy together for 21 years, raising three children, until 2002 when the husband married a well-known singer religiously. Bambang moved in with his new wife, leaving his first wife and children. In 2006, Bambang repudiated Halimah out-of-court. In 2007, he filed a petition at the Central Jakarta Islamic Court, to gain permission to utter *talak*. The petition was registered on the ground of point (f), on continuous dispute and discord. The petitioner claimed that this condition was caused by principal differences between the original spouses. In his view, the differences prevented them from achieving the sanctioned purpose of marriage, by realising *sakinah* (serenity), *mawadah* (prosperity), and *raḥmah* (blessedness).[19] Nevertheless, Halimah tried to

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

> preserve her marriage by arguing that her husband was not entitled to this ground, because he was the one who had caused dispute and discord.

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

> First, the argument regarding the lack of any concrete events or legal facts to prove this ground was not reasonable, because they had been presented in general to the first instance court—the details were left for judges to reveal throughout the court hearings. Second, continuous disputes and separation began in 2002 and continued from that point onwards, proving that the marriage was beyond repair. Third, the situations were "an indisputable fact" of "the breakdown of their marriage". Fourth, retaining an already broken marriage is against *fikih* principles on 'realising greater benefits' (maṣlaḥah) and avoiding possible risks (*muḍarrah*). Fifth, the use of *hakam*—which was deemed exclusive for a *shiqāq* divorce procedure—should be viewed as an additional means, rather than a procedural inconsistency.

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

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

allows affirmative action to protect wives as a disadvantaged group. In many cases a divorce will readily be granted through an all-encompassing sentence of "if continuous dispute and discord occurs between the spouses, and there is no longer hope of living peacefully together within a household', which disregards the interests of a wife who actually prefers to save her marriage. Meanwhile, a fault partner, notably a husband, could freely release himself from marital duties.

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

> First, the judges interpret Article 1 of the 1974 Marriage Law that stipulates: "A marriage is a 'physical' and 'non-physical' contract between husband and wife, aiming to realise 'a happy and long-lasting family' that is based spiritually on 'the almighty God'". A physical contract means that a marriage shall be based on mutual consent. In contrast, a non-physical contract refers to Article 33 of the 1974 Marriage Law: that a marriage contract shall be based on mutual love. The phrase 'a happy and long-lasting family' as the purpose for marriage shall be interpreted in accordance with Article 30 of the Marriage Law 1/1974, which requires the principle to be mutually upheld by both sides, and projected as the basis of the Indonesian social structure. The phrase, "based spiritually on 'the almighty God'" shows the defining characteristic of Indonesian marriage: that it manifests not only living needs (*hajat hidup*), but also religious observance (*ibadah*). However, when mutual consent has been broken, either physically or spiritually, and there is no hope of realising the purpose of marriage, the marriage law provides leeway via divorce. In this sense, it would be unnecessary to establish who was at fault, because each party is allowed to review their own respective consent to the marriage.
>
> Second, The Constitutional Court argued that Article 39 (2) Point (f) on continuous strife does not oppose Article 28D (1) of the 1945 Constitution. The ground offers leeway for an unhappy marriage and provides the legal certainty and justice required by Article 28D (1) of the constitution. Third, the court disagrees with the petitioner's proposition that Article 39 (2f) is against Article 28H (2) of the 1945 Constitution, because Article 28H (2) is designated for affirmative action, whilst the marriage law clearly states that a wife shares equal status with her husband. Therefore, the plea for a wife's affirmative right is deemed irrelevant. The judgement has established the ground as no-fault and projected it as leeway for each party to review his/her consent to their irreconcilable marriage. Nevertheless, judge M. Akil Mochtar held a different view to the majority of the judges. He argued that Article 39 (2f) on continuous strife is not constitutional, because the ground is in opposition to another purpose of the 1974 Marriage Law; namely, to make the occurrence of divorce difficult. For Muslims, he perceived that this ground is redundant to the existing institution of *shiqāq*, as stipulated in Article 76 of Religious Court Law 7/1989. Despite the objection from this particular judge, the majority of judges managed to decide that Article 39 (2) Point (f) is constitutional.

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

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

Simultaneous to the establishment of a unilateral and no-fault ground, the Supreme Court judges developed several criteria as thresholds for the ground. Later, they linked these criteria deductively to the underlying purpose and principle of Indonesian marriage—i.e. to realise a marriage as a physical and non-

physical (spiritual) contract that is based on mutual love and consent—in order to invent a broken marriage concept. This invention corresponds with the 2011 Constitutional Court decision that appeared to adopt the existing trend within the Islamic court. The Constitutional Court reinforced both Islamic court views on divorce ground point (f) being a unilateral and no-fault ground (as discussed in the previous section), and its invention of a broken marriage concept. In a recent development, judges from the Islamic Chamber of the Supreme Court went further, by reapplying fault consideration to the application of broken marriage. This consideration enables the judges to sense how a neglected or abused spouse feels, and to gain a general feeling of justice within society. By doing so, judges may deliver a nuanced judgement that would be impossible under the strict application of broken marriage as a no-fault ground. In this sense, broken marriage is indeed a modified version of divorce ground point (f) on continuous strife, although it has been further developed and refined into an all-encompassing ground for divorce.

a. Formulating the criteria for broken marriage

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

b. Deciphering the criteria for continuous strife

The earliest interpretation I could find, which defines the criteria for this ground, appeared in the case of Siti Hawa v. A. Rahman (mentioned above). In this case, the judges employed *fasakh*, as they found 'sufficient evidence' for continuous strife and failed attempts at reconciliation. In the judgement, the judges stated that "a lawsuit filed at a court and seeking *fasakh* must be accepted, should the judges find 'sufficient evidence' of the occurrence of continuous strife and 'failed attempts at reconciliation'". Given this legal formulation, the judgement deciphered two criteria, i.e. sufficient evidence and an irreconcilable marriage, for divorce ground point (f). In Circulation Letter 3/1981, aside from establishing this ground as 'non-unilateral' and 'fault-based', the Supreme Court requires, in point (1): "The arrangement of proper procedure, by conducting a thorough investigation into the occurrence of dispute and discord", and in point (3): "The arrangement of a

hearing session that involves family and close relatives, as mandated in Article 22 (2) of Government Regulation 9/1975". Point 1 was a mere statement of formulation of legal precedent in the Siti Hawa v. A. Rahman case. Point 2 compared this ground to a *shiqāq* ground. Yet, in recent guidelines disseminated in the Islamic court, a divorce on a *shiqāq* ground is distinguished from that petitioned for on other grounds (Mahkamah Agung RI, 2013, p. 163). Put simply, the distinction is the mandatory use of an arbitrator(s) or *hakam* institution in the *šiqāq* procedure.

In a later judgment, 044K/Ag/1998, Sampurni v. Sudayanto, the Supreme Court recognised family testimony as valid evidence to prove alleged continuous strife. This case took place in 1998, when Sampurni filed a divorce lawsuit against Sudaryanto at the Kediri Islamic court, on the ground of continuous strife. The judges' assembly examined this ground and granted her *talak*, on behalf of her husband. The appellate court overturned this decision, and only later did the Supreme Court reinforce the first instance court decision by granting her a divorce. The debates in this case questioned whether family testimony counts as valid evidence for the occurrence of dispute and discord. While the appellate rejected the use of family testimony as evidence, the first instance court and Supreme Court accepted it. This case shows how the Supreme Court has elevated the status of family testimony, both as valid evidence and as part of the compulsory procedure for the continuous strife ground. The same attitude appeared in Supreme Court Judgment 495K/Ag/2000, which enabled the use of family testimony in both *gugat* divorce and *talak* divorce.

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

c. Formulating the operational criteria for broken marriage

Judgement 038K/Ag/1990—the landmark decision for the unilateral and no-fault principles of divorce ground point (f)—mentioned a broken marriage term. Instead of questioning each one of the elements of ground point (f), which are

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

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

In the 2013 plenary meeting, the Islamic Chamber of the Supreme Court addressed broken marriage by formulating the following criteria: "1) There has been a (failed) attempt at reconciliation; 2) Good communication between the spouses no longer exists; 3) One of the parties, or both spouses, is/are neglecting their duties as husband and/or wife; 4) The spouses live separately, either under the same roof or in different domiciles; and, 5) There were other relevant findings during the trial, such as romantic affairs, domestic violence, gambling, etc".[20] These criteria are indeed a modified version of divorce ground point (f) on continuous strife. They also derive from point (b) on separation, and point (g) on the violation of *taklik talak*. Additionally, other grounds may be subsumed under the fifth criterion for broken marriage. The broken marriage ground transforms all the sanctioned divorce grounds into one single category of broken marriage. Mannan explains that this ground operates deductively. When judges encounter a marriage that was already broken and irreconcilable, they may employ these conditions to deduce a conclusion about whether or not a divorce lawsuit is accepted or denied.[21] In this way, other grounds were practically relegated to being merely complimentary.

However, a broken marriage ground still lacks definite criteria for the minimum period of separation. Is it modelled after the minimum period of separation, as set out in the marriage law or compilation? The marriage law sets a

20 Supreme Court Circular Letter Point (4) 4/2014.
21 Agung, "Buku II Pedoman Teknis Administrasi Dan Teknis Peradilan Agama."

minimum period of two consecutive years as a distinctive ground for divorce. The 1991 Compilation of Islamic Law introduces two criteria for the separation period in Article 116 (g) on the *taklik talak* violation, i.e. three months for maintenance negligence (in point [2]) and six months for a general lack of responsibility (in point [4]). As quoted by Van Huis, Judge Abdul Manan explains that a three-month separation is enough.[22] In a recent interview, Judge Edi Riyadi said that the Supreme Court had not developed a consensus on this issue. However, he maintained that the minimum period is more than three years, overall. Whilst Manan is likely to draw his criterion from one of the requirements set out in the *taklik talak* violation ground, Riadi set a much more extended period than the threshold that is stipulated by the existing provisions.[23] More recently, in the 2022 plenary meeting, the Islamic Chamber of the Supreme Court sets a clearer minimum period of separation: i.e. 12 months for a negligence case and six months for a continuous strife case.[24] Further research into case law is nevertheless required, in order to shed light on which view corresponds to actual practice.

Refining broken marriage and reapplying fault consideration

Nowadays, the broken marriage ground is increasingly popular. This ground constitutes the majority of divorce grounds tried before an Islamic court. Its popularity outstrips the other divorce grounds, including *taklik talak*, which was once very popular amongst neglected wives. For example, in the Arga Makmur Islamic court there are a total of 365 judgements of Mukomuko origin for the period from 2016 to 2017. Out of this total there are 303 broken marriage cases and only 62 cases of *talik-talak* violation. The number shows how broken marriage cases outnumber *taklik talak* three times over, let alone how they outnumber other grounds that are disappearing from the court record. Van Huis suggests that divorce grounds listed in Article 39 (2) points (a-f) of the 1974 Marriage Law are no longer in use, having been replaced by a single ground, i.e. broken marriage.[25] The Supreme Court applies broken marriage not only to lawsuits on the continuous strife ground, but also to lawsuits on other grounds. In Judgement 266K/Ag/2010 the Supreme Court decided a lawsuit ex officio, which was filed on the ground of *talik-talak* violation through broken marriage. This trend concerns some learned jurists and scholars, regarding the possible harms emerging from a strict application of broken marriage as no-fault. To address this concern, the Supreme Court has started to refine the application of broken marriage, first by requiring that all the indicators be seen as 'cumulative' and, second by reapplying fault consideration especially when the 'fault' is relevant to a spouse's post-divorce rights.

In its 2018 plenary meeting, the Supreme Court started modifying Circular Letter 4/2014 on broken marriage, by requiring that Islamic court judges prove

22 Huis, "Islamic Courts and Women's Divorce Rights in Indonesia: The Cases of Cianjur and Bulukumba."
23 Interview and correspondence with Supreme Court Judge Dr. H. Edi Riyadi, SH. MH, in Jakarta, 31 May 2019.
24 Supreme Court Circular Letter Point 1 (b) 1/2022.
25 Huis, "Islamic Courts and Women's Divorce Rights in Indonesia: The Cases of Cianjur and Bulukumba."

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

In a recent development, the Supreme Court started to reapply fault consideration to broken marriage. The reason behind this move is growing concern about the strict application of broken marriage as no-fault. Judge Husseini, as Van Huis cited, suggested that the increasing popularity of broken marriage as a no-fault ground has gradually transformed the Islamic court into a mere divorce registration office (*kantor isbat cerai*), referred to only for divorce formalisation. Without establishing who was at fault, the court was perceived as disregarding the feelings of a neglected or abused spouse and, in general, the feeling of justice in society.[26] In response, the Supreme Court judges started to reapply fault consideration to broken marriage divorces. In this manner, a question of fault is dealt differently from the general norm of broken marriage that continues to be treated as a unilateral and no-fault divorce ground. In other words, the broken marriage ground is still 'unilateral' in nature, and the person responsible for the breakdown of the marriage can use this ground. Yet the judges, mainly to secure or protect an injured party (the victim), can still employ fault consideration to such cases. This development appeared in Judgement 266K/Ag/2010, which is summarised below:

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

[26] Huis, "Islamic Courts and Women's Divorce Rights in Indonesia: The Cases of Cianjur and Bulukumba."

appealed for cassation at the Supreme Court, arguing that firstly he was still in love with her under any situation and condition, and second, that their joint marital property should be divided equally between husband and wife. In the judgement, the Supreme Court rejected this petition, considering that the marriage was already broken, regardless of whether he was still in love or not. The judges also reinforced the existing division of joint marital property by constructing the following legal formulation: "a wife shall receive ¾ of the marital property, because she gained the property, and the husband had not provided his children and wife with maintenance costs (*nafkah*) for 11 years".

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

Put it more generally, these developments show how judges from the Islamic Chamber of the Supreme Court has not only invented broken marriage but also refined its application. They refined it by starting to treat all the indicators of broken marriage as cumulative and reapplying fault consideration. Concerning the 2011 Constitutional Court judgement the Supreme Court adopted the decision on their existing interpretation of broken marriage. The Supreme Court also developed the ground even further, by refining its application. Nevertheless, the rationale for comparing a marriage to a regular contract, which enables a husband or a wife to review their respective consent to the marriage, is indeed a more secular interpretation than the current stance. Further research is required, in order to see how judges from the Islamic court perceive such secular interpretations.

Concluding Remarks

The discussion of broken marriage demonstrates increasing judicial discretion in the Islamic court. In doing so, the judges interpreted the divorce ground of continuous strife as unilateral and no-fault. They also linked this interpretation to one of the purposes of Indonesian marriage, i.e. to realise a harmonious marriage. If a marriage is already broken, it becomes impossible to attain this purpose, and it is therefore unnecessary to maintain the marriage. Given this interpretation, increasing divorce caseloads can be addressed using a more practical procedure. These developments show how Islamic court judges emerge as an authoritative body for exercising judicial law making, by reforming Indonesian family law. Judicial developments on broken marriage demonstrate the autonomy of the Islamic court. This autonomy manifests in the role of judges from this court in exercising judicial law making and referring to existing legal precedent in order to tackle similar cases. In judicial law making, judges have developed substantive reforms to Indonesian Islamic family law from within, without interference from 'non-legal' actors on the outside. Moreover, they also manage to communicate these developments through a platform of Majalah Pengadilan. In this manner, Islamic court judges emerge as state-sanctioned interpreters of Islamic law and promoters of the Islamic court as a domain for their *ijtihad* or lawmaking.

Another important point to note is the way in which Islamic court judges have adapted Constitutional Court judgements to serve their own tradition. Concerning broken marriage, the 2011 Constitutional Court judgement compares a marriage with a physical contract with a marriage with a non-physical contract. In this manner, a marriage union is based on mutual consent and love. Otherwise, each party is allowed to review their respective consent to the union. This judgement introduces a completely secular rationale to the institution of marriage, but its use in this case is a mere restatement of the existing concept of broken marriage. Instead of adopting Constitutional Court judgements in their entirety, Islamic court judges have adapted them to fit existing developments in their court. In this way, the judges are likely to maintain the balance between the religious nature of Indonesian family law and the possible restrictions placed on its application. This attitude confirms Nurlaelawati and Van Huis' view that reforms of 'core' Islamic family law will attract resistance from Islamic court judges.[27] In fact, this attitude may threaten legal unity, since the Constitutional Court is also part of the Indonesian judiciary. For the time being, it can be inferred that the Islamic court has been autonomous.

References

Agung, Mahkamah. "Buku II Pedoman Teknis Administrasi Dan Teknis Peradilan Agama." *Mahkamah Agung*, 2013.

Bedner, Adriaan. "Autonomy of Law in Indonesia." *Recht Der Werkelijkheid* 37, no. 3 (2016): 10–36.

Bourdieu, Pierre. "The Force of Law: Toward a Sociology of the Juridical Field." *Hastings LJ* 38 (1986): 805.

Bowen, John R. "Fairness and Law in an Indonesian Court." In *Dispensing Justice in Islam*. Brill, 2006.

Buskens, Leon. "An Islamic Triangle: Changing Relationship between Sharī'a, State Law and Local Customs." *Isim Newsletter* 5, no. 8 (2000).

Cammack, Mark. "Indonesia's 1989 Religious Judicature Act: Islamization of Indonesia or Indonesianization of Islam?" *Indonesia*, no. 63 (1997): 143–68.

Cammack, Mark. "Islamic Law in Indonesia's New Order." *International & Comparative Law Quarterly* 38, no. 1 (1989): 53–73.

Huis, Stijn Cornelis van. "Islamic Courts and Women's Divorce Rights in Indonesia: The Cases of Cianjur and Bulukumba." Doctoral's thesis, Leiden University, 2015. http://hdl.handle.net/1887/35081.

Lev, Daniel S. *Islamic Courts in Indonesia: A Study in the Political Bases of Legal Institutions*. Vol. 12. Univ of California Press, 1972.

Michailakis, Dimitris. "Review Essay: Law as an Autopoietic System." *Acta Sociologica* 38, no. 4 (1995): 323–37.

Nakamura, Hisako. *Conditional Divorce in Indonesia*. Occasional Publications 7. Islamic Legal Studies Program, Harvard Law School, 2006.

[27] Nurlaelawati and Van Huis, "The Status of Children Born out of Wedlock and Adopted Children in Indonesia: Interactions between Islamic, Adat, and Human Rights Norms."

https://pil.law.harvard.edu/wp-content/uploads/2019/12/Conditional_Divorce_in_Indonesia_by_Hisako_Nakamura.pdf.
Nurlaelawati, Euis. *Modernization, Tradition and Identity: The Kompilasi Hukum Islam and Legal Practice in the Indonesian Religious Courts*. Vol. 4. Amsterdam University Press, 2010.
Nurlaelawati, Euis, and Stijn Cornelis Van Huis. "The Status of Children Born out of Wedlock and Adopted Children in Indonesia: Interactions between Islamic, Adat, and Human Rights Norms." *Journal of Law and Religion* 34, no. 3 (2019): 356–82. https://doi.org/10.1017/jlr.2019.41.
Savelsberg, Joachim J. "Reviewed Work: Law as an Autopoietic System by Gunther Teubner." *Contemporary Sociology* 23, no. 3 (1994): 411–12. JSTOR. https://doi.org/10.2307/2075352.
Soewondo, Nani. "The Indonesian Marriage Law and Its Implementating Regulation." *Archipel* 13, no. 1 (1977): 283–94.
Sonneveld, Nadia. "Divorce Reform in Egypt and Morocco: Men and Women Navigating Rights and Duties." *Islamic Law and Society* 26, nos. 1–2 (2019): 149–78. https://doi.org/10.1163/15685195-00260A01.
Terdiman, Richard. "Translator's Introduction: The Force of Law: Toward a Sociology of the Juridical Field." *UC Law Journal* 38, no. 5 (1987): 805.
Van Huis, Stijn Cornelis. "Khul 'over the Longue Durée: The Decline of Traditional Fiqh-Based Divorce Mechanisms in Indonesian Legal Practice." *Islamic Law and Society* 26, nos. 1–2 (2019): 58–82.
Voorhoeve, Maaike. "Judicial Discretion in Tunisian Personal Status Law." In *Family Law in Islam: Divorce, Marriage and Women in the Muslim World*. I.B.Tauris & Co Ltd, 2012.
Welchman, Lynn. *Women and Muslim Family Laws in Arab States: A Comparative Overview of Textual Development and Advocacy*. Amsterdam University Press, 2007.