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Rethinking the Implementation of Child Support Decisions Post-divorce Rights and Access to the Islamic Court in Cianjur, Indonesia

Stijn Cornelis van Huis
PhD researcher
Van Vollenhoven Institute for Law, Governance and Development
Faculty of Law
Leiden University, the Netherlands

s.c.van.huis@law.leidenuniv.nl

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Abstract

Most academic works on the Islamic court in Indonesia present a rather positive view on its functioning in practice. However, most research is based on court decisions in the trial phase only, and so what is often lacking is an analysis of what happens in the post-trial phase. For instance, do the persons concerned actually execute the court order? Secondly, as regards post-divorce rights consensus seems to converge on three fronts; that spousal and child support are rights that can protect women and their children from impoverishment after a divorce; that it is essential for women to have access to a proper process at an appropriate forum such as the Islamic court in the case of Muslim women; that this implies that the decisions of the court are enforceable and executed. However, as established in the course of my fieldwork the situation in Cianjur as regards post-divorce rights is far more complex than the existing literature suggest. In this article I make two arguments. First, the causal relation between access to the Islamic court for divorced women and their protection from impoverishment is not self-evident and therefore one cannot sideline cultural factors. Second, to understand whether divorced women experience injustices, how they seek redress, and how their access to justice can be improved, it is necessary to conduct (socio-legal) empirical research that is not solely limited to court cases, but representative of all divorce cases in the society concerned as well.

Keywords

Post-divorce rights, Islamic court, Indonesia

1. Introduction

With a population of 240 million Indonesia is the world's biggest Muslim country and the third largest democracy after India and the USA. Indonesia has a plural legal system which implies that as regards family law, different laws apply to different socio-cultural identities. Muslims in Indonesia (constituting about 86 percent of the population),¹ must bring a divorce to the Islamic court to have it officially recognised by the state. The Islamic courts apply a unified form of Islamic family law, based on the scholarship influences of *maddhab*, an Indonesian School of Islamic Law (Hooker & Lindsey 2002). Indonesian family law for Muslims recognises spousal and child support rights and women can request the Islamic court to determine a monthly amount of (child) support in a court decision (see Section 3).

The principal argument of this article emerges from the finding that although a portion of Muslim women living around the poverty line face real difficulties after divorce, a substantial majority of them find their own self-supporting means without realising the right of support they are entitled to. Women know they have a right to child support and spousal support, yet prefer other safety nets that are available to them. My claim in this article is that if in their daily practice poor Muslim women do not regard post-divorce support rights and entitlements sufficiently important to spend time and money in a court process to pursue those rights, then the common assumption about the link between post-divorce rights and the welfare of divorced women should be reconsidered.

There may well be other reasons responsible for the low number of request for support than difficulties in accessing the legal system. The task of a researcher, then, is to enquire why the legal problem is not a social problem, or in this case study, why is support not of particular importance to most divorced women in Cianjur? What are the cultural factors that might play a role in this? Whilst acknowledging that access to Islamic courts is important for obtaining a state-recognised divorce (which enables women to register a remarriage, which in turn can improve, at least in theory, their access to birth certificates, inheritance rights, etc.), what in the end is questioned is whether with regards to post-divorce rights better access to Islamic courts will have a significant effect for the women in Indonesia who live just above or under the poverty line.

Before proceeding to the substance of this enquiry, it is important to emphasise that the purpose of this study - the implementation and enforceability of court orders on post-divorce rights - is based on the claim that access to Islamic courts is only useful to divorced women if their decisions on post-divorce rights can be honoured and enforced. Following this introduction, the article is organised in four subsequent sections. Section 2 focuses on the relevance of the implementation of court decisions on child support and spousal alimony. In section 3, the discussion turns to the Islamic court of Cianjur. My aim here is present the findings of the field research on how the law concerning Muslim post-divorce rights is applied by judges and the extent to which court decisions on spousal and child support are executed in practice. Section 4 explores the relevance of a quantitative study on local child and spousal support practice based on initial research findings. Section 5 presents the results of this quantitative study. It concludes that in the

context of child and spousal support in heterogeneous societies, knowledge of the interplay of local culture and sociological factors are essential, which implies that a methodology that incorporates socio-legal research is imperative.

2. Focus on Implementation of Court Decisions

In what follows, I sketch the reasons why I chose implementation of court decisions on child support and spousal alimony as subject of my field research. The main argument behind the choice of subject is that court orders on post-divorce support must be executed to be of main importance to the financial situation of mothers and their children. In the course of 2008 I started to design a research plan for my case study concerning access to justice in the framework of the programme *Building Public Demand for Legal and Judicial Reform 2007-2010: Strengthening Access to Justice in Indonesia* carried out jointly, by the World Bank and UNDP country missions to Indonesia in partnership with the Van Vollenhoven Institute at Leiden University, Netherlands. The goal of the programme is to contribute to better access to justice for the poor and the disadvantaged. In her study on access to justice to Islamic courts in Indonesia Sumner states that:

‘The legality of marriage and divorce affects the inheritance rights of children, as well as the legal responsibility for the financial care of former spouses and any children of the marriage. Divorce, like the death of a breadwinner, is thus often a tipping point for families living on the edge of the poverty line.’ [...] Effective family law systems aim to provide outcomes that reduce the incidence of children and former spouses living in poverty following divorce. Whether the poor are able to access formal family law systems in the first place is therefore a key element in determining whether such systems can contribute to the alleviation of poverty’ (Sumner 2008: 7-8).’

In other words what Sumner points to is that legality of marriage is important to women as inheritance and post-divorce rights can be better guaranteed in possible future disputes with former spouses. However, this requires a good functioning legal system. Women who are denied marriage-based rights and likely to be entrapped in poverty should have access to an appropriate forum that can ensure proper redress of their grievance. In case of Indonesian Muslim women, the competent legal institution is the Islamic court. Sumner, as well as other authors (Bowen 2003, Cammack 2007) holds positive views about the functioning of the Islamic courts in Indonesia. Cammack even calls them ‘a relative success story in the otherwise dysfunctional legal system’ (2007:168). The positive views on the Islamic court performance seem to support the argument that a better access to this institution will contribute to poverty alleviation since judges are likely to grant women their post-divorce rights.

However, my argument is that to address the real life problem divorced women face, which is impoverishment, court decisions alone are not enough. In their analyses of the Islamic court all abovementioned researchers somewhat undervalue the importance of execution of Islamic court decisions.² To the women concerned, court decisions only matter if they really get the money involved. Implementation is a vital precondition to achieve ‘realistic legal certainty’ (Otto 2002) and thus should be part of any research on

access to justice and related assessments on the rule of law situation in any given country. Court decisions have to be executed by former spouses and - if not executed - be enforceable. Using an example from Maryland, USA, Kisthardt stresses the importance of enforceability of spousal support decisions and their effect on the claiming behaviour of women:

‘A study in Maryland found that courts made very few alimony awards even though a majority of the marriages studied had lasted more than ten years and at the time of the divorce the average income of the husbands was almost double that of the wives. What was striking was the number of cases in which the economically dependent spouse did not seek an award. The authors concluded that this was due in large part to the reluctance to expend money on litigation costs without the likelihood of any beneficial result.’ (2008, p.65)

In other words, if decisions cannot be enforced, it is illogical for women to turn to the court - and they won't. To determine whether in Indonesia the causal relation between access to the courts, via post-divorce claims, to poverty reduction is valid, my research overwhelmingly focuses on execution and enforceability of court decisions concerning post-divorce rights. This is because the causal relation can only exist if court decisions on spousal and child support are honoured and enforced.

2.2 Cianjur as Field Site

Much research on Islamic administration of justice in Indonesia concentrates on the oppositions and interplay between at least three different normative systems: state law, Islamic law and *adat* (customary) law. These oppositions allow for forum-shopping or selecting the most favourable forum for redress in relation to an actual problem.³ I chose to select a location where Islamic norms are strong, and *adat* based rules relatively weak. My aim was to assess whether in such a location, on a topic where relatively few oppositions between the normative systems of the state and Islam exist (see Section 3), decisions of a state legal institution like the Islamic court would be accepted by all parties and executed accordingly. And if not, whether enforcement is sought for by the justice seeker and redress obtained.

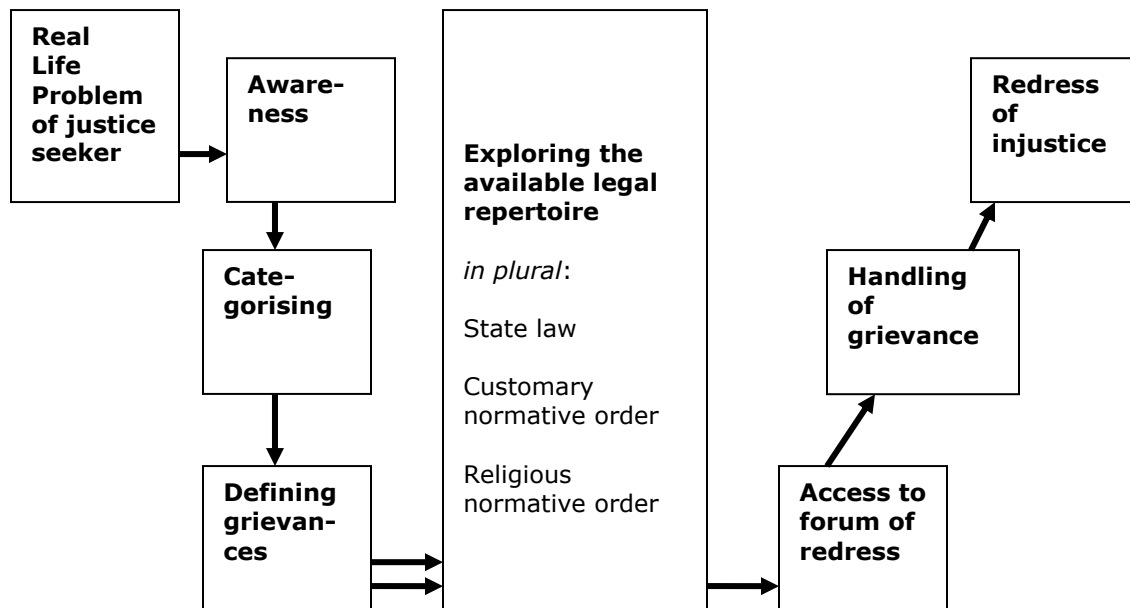
The district of Cianjur in West Java was selected as a research location. Cianjur, where about 99 percent of the population of 2.4 million is Muslim,⁴ presents itself as a strongly practising Muslim district. To underline this, the district government has passed several Islamic inspired by-laws mostly directed to civil servants and concerning Muslim dress codes and codes of behaviour.⁵ Additionally, customary law seemed relatively weak compared to other primarily Muslim ethnic groups in Indonesia. Cianjur is an area that ethnically is primarily Sundanese. According to Nurlaelawati (2010), in relation to inheritance matters, Sundanese people in Cianjur and Rangkasbitung generally divide the estate according to Islamic rules and not customary norms, whilst in most Muslim regions of Indonesia inheritance is more a matter for customary law. This division of the estate according to Islamic rules could be an indication that in Cianjur customary law is relatively weak as compared to Islamic law.⁶

Furthermore, according to research and in contrast with the Javanese, Sundanese women are traditionally expected to remain at home after marriage and gender-relations are more patriarchal (Hancock 2001). Thus, child and spousal support has the potential to be an important safety net for families losing the sole male breadwinner because of a divorce. This patriarchy, however, does not mean women could not initiate divorce. In Sundanese custom and tradition the process of divorce is relatively easy. Divorced women are not so stigmatised and remarriage is common as attested by the statistical incidences of divorcees remarrying soon after the dissolution of their previous marriages (Jones 2001). It is worth noting, however, that as elsewhere in Indonesia, the gender situation in Sundanese dominant communities is changing especially where industrialisation is taking a firm hold (Hancock 2001). Cianjur is a non-industrial rural area and its main economical activity is still rice farming and rice-trade, suggesting that changes in the progress of gender-relations would manifest more slowly than in industrialised areas. However, my findings were that the socio-economical relations between the sexes in Cianjur are dynamic. For instance, in the last decade numbers of Cianjurese women that emigrate to become domestic workers are increasing exponentially (see Dewi Novirianti 2011 (in this issue)). The opportunities for women to generate an income in Cianjur and elsewhere are increasing. However, given the strong adherence to Islam and the fact that Cianjur still is a predominantly agrarian society, I found Cianjur a suitable location to conduct my research on the implementation of child and spousal support decisions of the Islamic court.

2.3 Formulation of Research Question

In October 2008, researchers from the Van Vollenhoven Institute working on the Access to Justice Programme held a workshop in the Indonesian capital, Jakarta, to synchronise their individual case studies. The rationale was to harmonise the variety of themes thereby provide frames of reference and comparable linkages. The Rolax analytical framework (see Bedner and Vel 2010 in this issue) was introduced and proposed as a tool for structuring all the case studies. Researchers were asked to formulate research questions that adequately reflect the justice seeker perspective as embodied in the Rolax analytical framework in Figure 1 below.

Figure 1: The Rolax framework



Given that my research focuses on the execution and enforceability of Islamic court decisions the main part of it is situated at the right hand side of the Rolax scheme of Figure 1. Its representation in the Rolax schema shows an interface between handling of grievances by the Islamic court and the redress of injustice. Does the court decision get materialized in the end? Having appropriately situated my research in the schema, I subsequently formulated my key research question as follows:

What are the factors that influence the extent to which women who have been denied spousal support and child support gain access to fair, effective and accountable redress at the Islamic court of Cianjur?

The desk study described above led to a research plan which involved an examination of a representative sample of court files on child and spousal support. With this information I embarked on tracing the women involved and thereafter sought to conduct interviews with them on the execution of the spousal and child support by their former husbands. In addition, I sat through court hearings with the view to observing the way claimants are treated as individuals and the handling of their claims by the Islamic court of Cianjur. Before discussing my assessment of the proceedings at the Islamic court, I will briefly outline Indonesian family law for Muslims on spousal and child support. This will help provide context to aspects of the study.

3. Muslim Child and Spousal Support Rights in Indonesia

In the context of spousal and child support rights as recognized in Indonesian family law for Muslims, there are three questions pertinent to the access to justice discourse. First, do women have access to a proper process? Second, to what extent are court decisions executed by ex-husbands of women claimants? And third, what is the mode of execution of decisions and scope of their enforceability?

3.1 *Islamic Norms In National Law*

Post-divorce rights for Muslim women are based on Indonesian interpretations of Islamic family law (Hooker 2008, Nurlaelawati 2010) that are unified and nationalised through the Marriage law (No. 1/1974) and a Compilation of Islamic law⁷(Cammack 1997). Women have the right to file a claim on post-divorce rights in the claim or counter claim of the divorce case, with no extra costs charged. These post-divorce rights for Indonesian Muslim women consist of child custody, joint marital property, child support and a regime of spousal support rights. This regime includes four specific obligations of the husband: (i) a consolation gift (*nafkah mutah*); (ii) financial support during the obligatory waiting period of the wife (*nafkah iddah*); (iii) clothing (*kiswah*); (iv) provision of housing during the obligatory waiting period of the wife (*maskan*).⁸In the jurisprudential practice of the Islamic court of Indonesia these obligations are constituted as a unit and converted into monetary terms to be settled in a one-off payment executed at the Islamic court before divorce takes effect.

It is worth noting that the regime on spousal support rights is relevant only if the divorce is not yet irrevocable or *raji'i*.⁹ A divorce is irrevocable (*ba'in*) in three cases. First, if the waiting period of 90 days of the wife in which she is not allowed to remarry has passed; second, when it is the third time that a divorce is uttered before court (and the previous ones were reconciled during the waiting period); and third, in cases where the law stipulates an immediate definitive divorce. The latter is the case with all divorces initiated by women. Therefore, in practice, Muslim women in Indonesia only have spousal support rights in men-initiated divorces and only for the duration of the waiting period of 90 days. When the wife's disobedience (*nusyuz*) is established by the Islamic court she loses these spousal support rights.

With regards to child support a father is always obliged to provide for his children, no matter who among the spouses initiated the divorce and to whom custody of the children is designated. The Islamic court is competent to establish the amount of child support to be paid after a request of one of the parties, whilst considering the financial capacity of the father. The Compilation of Islamic Law further stipulates that the mother will get custody of children under 12 years of age and for those above 12 years custody is determined by the children's choice. Thus, after a divorce generally women will take care of the younger children. And these women with children have clear spousal and child support rights under Indonesian Islamic law.

In short, compared to for instance USA or Europe, spousal support rights for Muslim women in Indonesia are limited. Child support rights are better guaranteed and thus Islamic court decisions concerning child support can, at least in theory, be of value with regards to the welfare of mothers and children. With this framework in mind, I proceeded with the set outline of my research plan. This required first to obtain official accreditation that allowed me to, with the assistance of Syaiful Rijal al-Fikri, begin a series of engagements ranging from attendance of court hearings, dialogue with claimants to interviews with judges and lawyers. What all these engagements did was to provide a broad picture of the actors, challenges and operational mechanism of the Islamic court.

2.2 *Application of Spousal and Child Support Legislation*

As regards the application of legislation concerning spousal support by judges of the Islamic court of Cianjur the picture that emerged from court room observations and court-file analyses of the years 2006, 2007 and 2008, was very positive. In divorces initiated by the husband (*cerai talak*) the Islamic court sustained, in all cases, the counterclaim on spousal support of the wife. There is no case in which, based on disobedience of the wife (*nusyuz*), the spousal support request was refused. The fact that there was not one case in which the court established a wife to be disobedient, indicates that in this regard, interpretation of substantive rules by the Islamic court of Cianjur placed favourable consideration to the wife's perspective. This was a fascinating finding considering that court files show that husbands lodged numerous claims of wives abandoning houses without permission, or to perform their 'marital duties.' In traditional Islamic law interpretations, these claims may well be construed as instances of spousal disobedience. Yet, in the cases I analysed such circumstances were not considered sufficient grounds for the court to refuse the spousal support claim of the wife.

However, in wife-initiated divorces (*gugat cerai*), which account for more than 80 percent of the cases,¹⁰ the wife acquires no right on spousal support and she can only request a decision on child support. Like spousal support, child support claims are always sustained. Judges will underline the importance of the welfare of the children and a sustained bond of both parents with the children. In line with the Compilation of Islamic Law, after divorce the obligation to provide for the children is considered to remain a responsibility of the father. A more thorough analysis of child and spousal support cases distorts this positive picture slightly. For instance, in 2007 in all cases but one, the amount of spousal support instructed to be paid by the husband was lower than what the wife had requested. Moreover, the Islamic court of Cianjur in all but one case followed the husband's statement on what he is able to pay.

Proceedings from the cases observed and studied suggest that decisions determining the amount of support to be paid are usually not particularly based on evidence, but rather negotiated in the courtroom.¹¹ During these negotiations, the balances of bargaining power are unequal given that a wife usually accepts what her husband says he is capable of paying. As one woman puts it, 'I thought I better take this money than get no money at all.' Where negotiations fail, the responsibility falls on the court to make a decision. For

reasons that will be explained in the next sections, in such cases the judges tend to lean towards the husband's statement on his financial capability.

2.3 *Execution of Court Decisions*

As mentioned above, the main focus of the research was not court decisions on spousal and child support, but their execution and enforceability. In order to effectively carry out the research, I had to obtain access to court files to retrieve information on court clients, which in line with procedural requirements included a support claim in their applications. Subsequently I paid visit to female claimants to interview them about the subject of support payment by the ex-husband. Admitted this was fraught with challenges. Divorced people tend to move and retracing them can be difficult. However, with some effort, and based on qualitative research I am able to draw some conclusions on the execution of court decisions on spousal and child support. This I summarise below.

The financial obligations arising from the regime of spousal support rights have to be paid (and are paid) at the Islamic court and therefore a decision of the Islamic court concerning spousal support rights, is always executed. However, for child support, payment by the husband - if at all - generally have an irregular pattern, nor is it according to the amount established in the court decision. Women do consider that situation as an infringement on a right, or more precisely, as a sin, but seldom take legal action and therefore surrender the opportunity to ask the court to enforce the decision. The court itself has never seen an execution request in spousal or child support cases and judges were not sure how they would proceed if such request were to be made. In an interview on the matter with one of the judges, he made it very clear that he considered that current Indonesian family law for Muslims does not include sanctions for non-payment of child and spousal support. When further asked why the court does not apply the foreclosure mechanism like it has applied in other cases where people fail to pay their debts, he noted that this was 'too heavy a measure' (*berlebihan*).

This legal practice of non-execution and unenforceability has consequences for the court process itself. Judges at the Islamic court of Cianjur in most cases take into account the fact that if a support decision is not executed women will not seek enforcement of the court decision. Therefore, judges strive for and negotiate an agreement on support in the court room, or even advice the spouses to resolve support matters outside the court room. They argue that there is a bigger chance that an ex-husband will execute a support decision on which he has expressed agreed upon.¹² In practice, this stance of the court means that husbands have a stronger negotiating position than wives as analyses of court files found that the amount of support negotiated usually follows what the husband is willing to pay and not what he ought to pay. An exception to this situation is that of wives of civil servants. Civil servants form a separate legal category,¹³ and to them enforcement can be better guaranteed.

Civil servants' ex-wives can ask the employer to transfer the legally established amount (one-third of the total salary) of child support from the ex-husband's salary to their own account. The women interviewed who had done so, in the end were successful in

obtaining the legally established monthly amount of child support. In civil servant cases judges generally will sustain a child support claim of 1/3 of the salary of the former husband (although technically judges at the Islamic court are not competent to establish child support in civil servants cases; the employer and the administrative courts are the appropriate forums). The civil servant case shows that if the former husband has a fixed salary and execution mechanisms are in place, this has effects on the court process itself. Support amounts established in court decisions are not negotiable and thus husbands lose their advantage in the court room.

In sum, at this stage of the legal process the judges do implement the rules according to the discretion they possess to establish the amount of support based on the capacity of the husband. Yet, the propriety of the process comes under pressure as their reasoning is too much influenced by the problem of enforceability and less by actual proof of financial capacity. Civil servant cases are a notable exception, which shows that if foreclosure of a salary by the employer is possible, support decisions can be enforceable.

The findings above can produce valuable insights on the rules, actors and factors that affect the extent of access to justice of the women who have been denied their right to support as established in a court decision of the Islamic court of Cianjur. Registration of marriage and divorce is of little economic importance for divorced women living around the poverty line as long as support decisions by the Islamic court are not executed and cannot be enforced in the implementation stage. Their financial rights that exist in principle cannot be actualised in practice - even if written in black and white in a court decision. Moreover, the finding that a special legal category of civil servants produces different results as regards enforceability of (in particular child) support, of course, is intriguing material for a legal scholar. Nonetheless, for reasons of representativeness I decided to broaden the research.

4. Problems With Representativeness

In my original research plan I had not anticipated that people in Cianjur would solve divorce matters much more often informally than through the court. Data concerning divorce cases filed to the court were not representative of all divorces that occurred in practice. Therefore, I began to doubt the research's representativeness as compared to social practice.

4.1 *Few Spousal and Child Support Cases at the Islamic Court of Cianjur*

Child and spousal support cases at the Islamic court are relatively few. In 2007, only 27 of the 445 divorce cases (5 percent) included support claims (see Table 1) and no separate request for execution of a court decision on support was filed at all. Moreover, court personnel hinted that around 75 percent of all divorces in Cianjur, were conducted out-of-court, and thus remain unregistered and unrecognised by the state. This is a much larger amount of unregistered divorces than the 50 percent Cammack et al (2007) have calculated for all of Indonesia. If the hint proved to be true it would mean that only a very

small amount, that is around 1 percent of the total divorces in Cianjur, result in a child or spousal support decision by the Islamic court.

Based on the 2007 statistics I decided to rethink the research plan, and to review the relation of my research plan with the support situation in Cianjur. I thought over the consequences of three problems that were prominent. First, the problem that most Muslim couples seemed not to divorce before the Islamic court as stipulated by the marriage law, but out-of-court – even if they have marriage certificates. Although from a legal perspective I was researching the appropriate forum of redress, I wondered, if indeed 75 percent of the divorces in Cianjur are unofficial divorces as the Islamic court had hinted, whether the sheer number implies that many women divorce unofficially by conscious choice. What are the reasons for those women not to go to court?

Second, just before I began fieldwork in Indonesia, Sumner's report (2008) on Islamic courts in Indonesia was published. The report's main finding is that the satisfaction rate of Islamic court-users is very high: between 70 and 80 percent. This was not at all reflected in my findings on satisfaction about the execution of court decisions on - especially - child support by the ex-husband. Most women were dissatisfied as they could not obtain the established amount of support. The Islamic court is certainly functioning well in providing women an almost equal right to men in initiating divorce. But can the Islamic court also be called an appropriate forum for women seeking child and spousal support?

Third, of the women that do go to court to divorce and thus could have made a support claim, only 5 percent make use of this legal possibility. As mentioned before, a wife can include a request for a court decision on her post-divorce rights in the claim or counterclaim of the divorce case. There are no extra costs or extra court hearings involved in such. The question that inevitably emerges from this is why don't women make the claim? To adequately engage these questions I decided to broaden the scope of my original research plan to include local practice regarding child and spousal support into my case study. I decided to conduct a survey under (officially and unofficially) divorced women with children in Cianjur to learn more about the support situation in local social practice and the women's legal knowledge and awareness. Only by obtaining a better understanding of the justice seekers' motives can we depict the reasons behind the low number of divorce cases and support cases filed in court.

5. The Alimony Survey

The main problem in conducting a survey that includes unregistered divorced women is the fact that 'unregistered' for a researcher often means 'hard to find.' Gathering data from such a 'hidden population' needs special, advanced sampling techniques.¹⁴ However, the targeted sampling method¹⁵ that I chose needed some adjustments to make it appropriate for an ad-hoc and small-scale survey with a sampling target of 120 respondents.¹⁶ Important in designing the survey were the results of a pre-study conducted in the framework of designing the survey that indicated that in local village records few divorced women (about 10 percent of all female headed households) are

registered as a family unit in the official category ‘female headed household.’¹⁷ Most within the latter category are widows, not divorcees. Where do all the divorced women and their children go?

5.1 Solving the Mystery of the Disappearing Broken Families

The answer according to informants at the village office is straight-forward: they are absorbed in their parents’ households. For these reasons, I asked the neighbourhood heads (*Kepala Rukun Tetangga*) on the whereabouts of these fatherless families, since they are the administrative institution at the lowest level of government and thus can be expected to best know changing compositions within families. In the end the targeted sampling group of ‘divorced Muslim women with children’ were divided in two groups. A group of 40 ‘female headed households’ and a group of 80 ‘living with parents / family’ totalling 120 respondents. They resided in 8 selected locations (4 villages, 4 town quarters) in three sub-districts in the north, middle and south of the district Cianjur

With the methodology in place, it was time to concentrate on the questionnaire and to formulate the separate questions. The survey was divided into five sets of questions. The first contained questions that make it possible to sub-divide the respondents in categories like age, income, number of children, education, divorced at the court or not, etc. A second set of questions was related to the rationalisation process by the justice seeker as schematised in the first part of Figure 1. This included questions about the legal knowledge and legal awareness concerning support rights; the sources of information (including from non-state normative systems) regarding post-divorce rights, family problems, and Islamic courts; and who or what institutions (including non-state) are approached to mediate in divorce-related problems. The third set included questions to find out the reasons why people don’t go to the Islamic court (the access barriers) and whether they had an option of alternative support arrangements. And of course also an ‘if they did go to court’-survey about the satisfaction regarding the claim-handling process at the Islamic court was included. Fourth, a last set of questions concerned implementation of both court decisions on support and informal support arrangements. Finally, these four sets of questions then were concluded with a single question: the extent to which the economical situation of the family after divorce has improved or worsened. The last question was to check the validity of the assumption implied in the earlier mentioned consensus that a divorce generally speaking will mean deterioration in the economical position of women with children.

With this survey I managed to get a better overview on the social practice of divorce and support in Cianjur as compared to the practice in the Islamic court. The results of this comparison are summarised in the next section.

5.2 Going to Court not Social Practice Among all Respondents

The first results that are of significance here, relate to differences between the characteristics of women that divorced at the Islamic court as compared to women that divorced out-of-court. The support survey clearly indicates that there are differences

between people divorcing out-of-court, which turned out to be common social practice in Cianjur, as compared to people that divorce at the Islamic court. This is in line with the conclusion of the Sumner report on access to the Islamic courts in Indonesia, that especially the lowest income group does not find their way to the Islamic court. In the province of West Java the poverty line is set on Rp155, 000 per person per month (for rural areas). The survey showed that on average divorced women (with children) in Cianjur have 2. 4 children and thus form a family that constitutes of 3.4 persons. This means that a division below and above the poverty line must be set around an income of Rp 500,000. When income groups are divided along this line a clear picture occurs. Of the out-of-court group only 21 out of 103 respondents (20 percent) had an income above Rp 500,000. For court clients this number is twice as high or 41 percent (7 out of 17). This suggests that income could be an important factor for women in deciding whether to go to court.

Education proves to be another important factor. Women who went to the Islamic court are on average better educated. 65 out of 103 (63 percent) of the out-of-court group had no more than primary education, against 35 percent (6 out of 17) of the Islamic court respondents. The court respondents all finished primary school, whilst 21 out of 103 respondents (20 percent) of the out-of-court group dropped out primary school. 7 out of 17 (41 percent) of the Islamic court respondents against 18 out of 103 (17 percent) of out-of-court respondents finished senior high school or higher education. Thus, women's level of education could be another key factor in the decision to divorce at the Islamic court or not. Although I realise that the Islamic court respondents group is small, these findings suggest that there is a relation between income and education and the chance that a divorce is concluded at the Islamic court.

Yet, although poverty and low education are less represented among court clients one must question whether those are the main factor in the people's non-compliance to the legal obligation to bring a divorce to court. One of the most revealing results of the alimony survey is the extent of non-compliance across all income groups in Cianjur – not only the poor. Court personnel had already hinted that probably three quarter of the people divorced out-of-court and thus unrecognised by the state. The survey indicates an even higher amount of 86 percent (103 out of 120 respondents) of out-of-court divorces. How can this be explained? A possible explanation is that in the Muslim normative system divorces conducted outside court are regarded as valid. Therefore, within their communities people can remarry without problem. Interviews indicate that many people even manage to get a second marriage officially registered at the Islamic registry (*Kantor Urusan Agama*) in spite of an unrecognised divorce. Research in Cianjur by Tirtawening Parekesit on registration practice of marriage and divorce confirms this indication.¹⁸

No matter how revealing they are, the abovementioned survey results are about divorce and not about spousal and child support practice. If people don't go to court, perhaps they arrange post-divorce support in informal ways. How many people make informal child support arrangements? Are there other alternative redress mechanisms, sourced in local cultural norms or Islam?

5.3 Child and Spousal Support Compared in and out of Court

As mentioned in section 4, in 2007 only 5 percent of the women who divorced at the Islamic court filed a spousal (2.7 percent) or child support (2.7 percent) claim in their divorce case. The alimony survey found that only 14 percent of the divorces are processed through the court. This suggests that all the support cases filed at the Islamic court of Cianjur in 2007 represent a mere 0.7 percent of the total number of divorced women in Cianjur. This means that the representativeness of the findings in the initial research plan indeed are questionable and that data on local practice regarding spousal and child support is essential in understanding support practice in Cianjur. The alimony survey provided some valuable data.

Informal arrangements on child support were made in 30 percent of the divorces. Although this is more than ten times higher than the percentage of child support requests at the Islamic court, it also shows that 70 percent of the divorced couples don't make child support arrangements at all. It could be the case that the better educated are better aware of their support rights. This is not the case. Right awareness regarding post-divorce rights is high among all women in Cianjur. Around 90 percent state that the ex-husband is legally obliged to pay spousal support and 95 percent that he should pay child support.

With regards to the question whether alternative forums exist the answer is negative. The arrangements generally are private arrangements settled between family members. For an overwhelming majority of women (95 percent), family and friends are the main locus for family affairs. Religious leaders were only mentioned by 5 percent.

Table1. Percentage spousal and child support agreements of total divorces

	Out of court (alimony survey 2009)	Included in Islamic court decisions (2007)
Child support	30 %	2.7 %
Spousal support	23 %	2.7 %

In relations to execution of these informal arrangements the same problem occurs as with decisions of the Islamic court. They are poorly executed. Only 11 percent of the informal support arrangements are executed according to the content, against 61 percent that are executed irregularly and 14 percent never.

Again one must be careful in drawing conclusions. The survey included questions about specific support (pocket money, school fees, medical costs, etc) by the ex-husband. Apparently many ex-husbands who don't make an agreement on child support do contribute to their children's upbringing. It appears that still more than 50 percent of the fathers regularly make such small contributions to the upbringing of their children. All in all in the eyes of the surveyed women these contributions are not considered sufficient enough to constitute proper child support. The latter view is also implicit in the high rate of dissatisfaction about the amount of the ex-husbands child support. Among the women

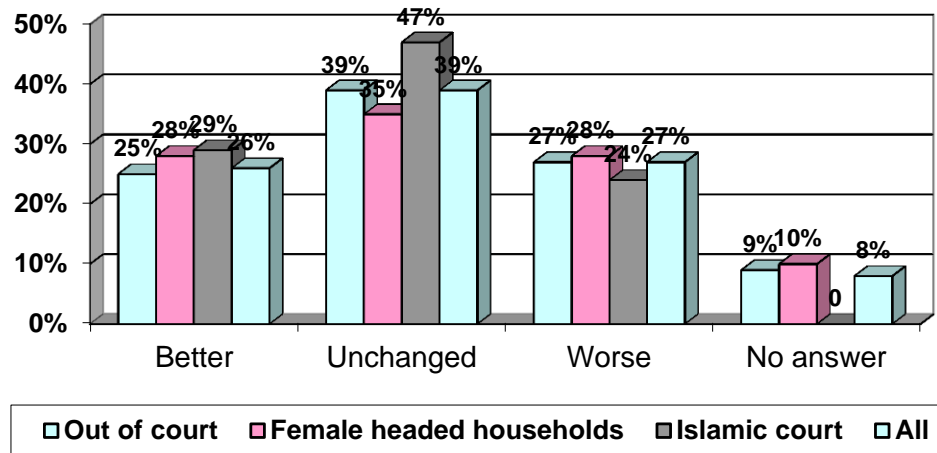
who divorced out-of-court 69 percent is dissatisfied against 7 percent satisfied. Remarkably, the most dissatisfied are women who went to the Islamic court (83 percent dissatisfied, 0 percent satisfied). Perhaps they expected more tangible results from the court process.

5.4 *Go Back to Start: Is the Problem a Problem?*

Well-arranged child support is not general social practice in Cianjur. Support provided by the ex-husband is perceived to be too little and too irregular. In theory, a better access to Islamic court could turn this situation around. Yet, as we have seen women that obtain court decision on support are not better off than women that arrange support out-of-court. This is partly due to the lack of enforceability of court decisions. Furthermore, only few women that do divorce at the Islamic court actually file for a support request. Some correlation with the abovementioned non-enforceability is possible but in my opinion cannot explain the mere 5 percent of support requests. Whether enforceable or not, free legal proof that you are entitled to a monthly amount of money will increase negotiating powers. Out-of-court support arrangements are more common but far from general practice and getting the arrangement materialised remains a problem. Why do women seldom ask for support? Below, I argue that the main factors seem not only to be negative reasons (e.g. practical, cultural and psychological barriers) but positive reasons as well: many divorced women with children can manage well economically without depending on child support of their ex-husband.

This brings us to the economical consequences of the divorce. One of the most important outcomes of the alimony survey is that in the respondents' own perception a divorce seems not to have major negative economical consequences for the women involved. 39 percent of the (officially and unofficially) divorced women state that there is no change in their economical position, 27 percent that their economical position is worse and 26 percent state that their economical position is better than before they divorced (see Figure 2). This means that in the perception of 65 percent of the women the divorce did not mean a worsened economical situation. No big differences can be depicted between women who went to court and those who divorced out-of-court.

Figure 2. Divorced women's perception of their economical situation after the divorce



Support by family is a main explanation for this unchanged or even improved position of most divorcees. Sundanese women can easily return to their parents. Among Sundanese it is general cultural practice that married couples live with the wife's family anyway until they are able to start their own family unit. For the Sundanese area around 50 percent of the married couples live with the wife's parents (Buttenheim and Nobles 2009). Moreover, research by Kreager and Schröder-Butterfill (2004) has shown the importance of the parents' contribution to their adult children. The latter concludes that contrary to the image that in non-western countries young adults take care of their elderly parents, in reality in Indonesia "in the majority of cases, the net flow of inter-generational support is either downwards – from old to young – or balanced" (Schröder-Butterfill 2004, p.497; see also Kreager and Schröder-Butterfill 2008). This means that, contrary to my initial assumption about the marginal place of local cultural norms vis-à-vis Islam, Sundanese custom is still of major importance. Although women know the safety net provided by national law in the form of support rights, in practice a big majority of women can rely on the safety net provided by Sundanese family norms.

A second explanation for the minor economical consequences of a divorce is the survey finding that around half of the divorced women work and generate their own income. There are no differences in numbers of working women between the out-of-court respondents and Islamic court respondents. If you can live independently, why should you go through the trouble of a court process? Thirdly, especially in the poor families women indicated that the former husband's contribution to the household was poor anyway and a missing husband can mean a mouth less to feed. One cannot expect from poor fathers that they are capable – even when willing - to pay support on a regular basis. As they are struggling to survive themselves their income is highly uncertain and often just sufficient for themselves and -if they are remarried – their new families. This can explain the fact that fathers give pocket money to their children rather than support.

6. Conclusion

The first argument I make in this article is that answering questions related to access to justice requires empirical research about the local community and among the people

involved. As I have described in considerable length above, in an early stage of my fieldwork I found that very few support cases were filed at the Islamic court. When few people bring their case to court a good socio-legal research should try to explain the reasons behind that practice. In order to do so, I had to broaden my field research design. The functioning of the Islamic court as regards post-divorce support rights can only be explained when the (post-trial) focus on the court process and the execution and enforceability of Islamic court decisions is complemented with (pre-trial) research about the constraints experienced by the potential justice seekers in accessing the court. Furthermore, the role of the Islamic court in society can only become visible in the light of alternatives that are available to the potential justice seekers. I had to research local cultural practices of voluntary post-divorce support in the local community concerned and therefore I designed a survey on the matter.

The above described research method, enabled me to formulate multiple factors that influence access to the Islamic court of Cianjur as regards post-divorce support rights for women with children. First, I found that execution of court decisions on child support is poor and that most court decisions are not executed nor enforced. This practice of non-execution of court decisions for some women might be a reason not to bring claims to the Islamic court. However, I have not found proof of this. What I did find is that the Islamic court stimulates out-of-court support agreements or negotiated court decisions in the court room. The reason for the above being that, the Islamic court anticipates that few ex-husbands in Cianjur will execute court orders in which the amount of support to be paid is higher than they are willing to pay voluntarily. The social practice of non-execution of court decisions thus indirectly influences the court process itself. Second, access barriers can prevent women to go to the Islamic court. For many women the court takes too much time, money and effort and psychologically it can be difficult for women to face the former husband and his family.

Third, are the socio-economical reasons. Whilst acknowledging the importance of practical barriers such as costs and distance to the court, I argue that lifting those access barriers will probably not change the support situation much for poor women in Cianjur. Non-execution of post-divorce support court orders is not due to a failing legal system as regards enforceability but has also to do with economical capacity of the ex-husband. In a country like Indonesia, poor people (that is including men) have a hard time finding sufficient income. It would not be realistic to promise women regular payments of post-divorce support after having obtained a court decision on the matter as long as the former husband has a hard time in supporting himself, or - in the case of remarriage - to provide for his new family. A large percentage of women file for a divorce at the Islamic court of Cianjur on economical grounds. When the husband could not provide well for his family when married how can you expect him to pay regular support after a divorce?

Practical and psychological access barriers, economical incapacity, non-execution and unenforceability of court decisions are all negative factors that hamper access to justice for divorced women with children. Positive factors, such as the existence of alternative safety nets, are easily overlooked. An important finding of the survey held in the framework of the field research is that in the perception of two-thirds of the interviewed women the economical situation remained more or less the same or even improved after

divorce. Cultural factors can explain this situation. In the cultural context of Cianjur, where it is common that after marriage the spouses (temporarily or permanently) come to live with the wife's parents, most women can rely on the safety net provided by their parents. Furthermore, women are quite independent economically as is reflected by the fact that half of the women work. Thus again, two-thirds of the interviewed divorced women managed very well and independently as they can do without support. They are not inclined to claim their post-divorce support rights, as they want to live independent from their ex-husband. The question is whether the ex-husbands involved are as well-off financially. Unfortunately, an assessment of the situation of the former husband was beyond the scope of this research.

The abovementioned factors that influence access to justice for women lead to the second argument of this article. In the local context of Cianjur there seems not to be a causal relation between access to the Islamic courts, via realisation of post-divorce rights through court decisions, to poverty alleviation. Islamic court decisions on post-divorce support are widely ignored, so in practice their impact on the financial position of women with children is minimal. Equally important, in Cianjur, many women work or can rely on support from their family. In this cultural context most women don't need their ex-husband's support and I cannot see why we should encourage them to claim post-divorce support at the Islamic court when those support court orders cannot be materialised in practice. In the context of spousal and support rights especially women who are divorced from spouses who live on the poverty line financially have little to expect or gain from a better access to the Islamic court.

End Notes

¹ The World Factbook, <https://www.cia.gov/library/publications/the-world-factbook/geos/id.html> (accessed January 24 2010).

² An example of a research that does consider the post-trial stage is Benda-Beckmann (1984).

³ See e.g. Keebet von Benda-Beckmann (1984), Bowen (2003), Prins (1951).

⁴ Data obtained from the table *Data keagamaan penduduk 2006-2007* [Religious data of the population 2006-2007], http://www.cianjurkab.go.id/pdf/Penduduk_Berdasarkan_Pemeluk_Agama.pdf, last accessed 11-12 2009.

⁵ For Cianjur see for instance the report of KOMNAS Perempuan (2009) on the often so-called 'local syariah legislation.' For Indonesia in general, see Bush (2008) and Buehler (2008).

⁶ The division of customary (*adat*) law and Islamic law is an artificial one and in Cianjur itself very much controversial. The controversy dates back to colonial times, more particularly Van Vollenhoven's reception theory that held that Islamic rules were only applicable if incorporated in *adat*. See e.g. Peter Burns (2004).

⁷ This was promulgated by Presidential Decree No.1 1991.

⁸ For a more comprehensive discussion on the Marriage law and the Compilation of Islamic law see, Katz and Katz (1975), Bowen (2003), Cammack (1997) and Nurlaelawati (2010).

⁹ For a comprehensive overview of traditional Islamic legal terms, see Nyazee (2000).

¹⁰ Analyses of the annual reports of the Islamic Court of Cianjur of the years 2006, 2007 and 2008.

¹¹ Peletz (2002) found the same for Malaysia.

¹² For the USA, Foohey 2009 found that in case of low-income groups a lower amount of support established by courts significantly increases the probability and the amount of support actually paid and thus is favourable to the well-being of children. The reasoning of the judges at the Islamic court of Cianjur that an agreed amount of support increases the probability that he will pay may be very sound. However, I cannot proof this hypothesis and more research is necessary.

¹³ Government regulation No. 10/1983 as amended by No. 45/1990.

¹⁴ See Watters and Biernacki (1987) .

¹⁵ See Watters and Biernacki (1987) .

¹⁶ This survey deviates from the targeted sampling method of Watters and Biernacki on three major points. First, survey locations are not random, but based on deliberate choice. Secondly, there were two targeted sampling groups consisting of a set amount of respondents. Third, no extensive sampling- frame was developed prior to the survey. Yet the preparation of the survey and the estimation of the sampling-group population were based on reliable qualitative and secondary data.

¹⁷ This pre-study was conducted in the village of Babakan Karet in the sub-district Cianjur.

¹⁸ See Tirtawening Parekesit's case study (2010) conducted in the same Access to Justice in Indonesia programme.

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