



## Between no-fault and fault-based: Has Indonesia consistently adopted the fault-based divorce law system?

Hartini<sup>1</sup>, Ari Hernawan<sup>2\*</sup>, Dwi Haryati<sup>3</sup>, Haniah Ilhami<sup>1</sup>, Laras Susanti<sup>4</sup>, Nur Yaumil Hikmah<sup>5</sup>

<sup>1</sup> Islamic Law Department, Gadjah Mada University, Indonesia

<sup>2</sup> Civil Law Department, Gadjah Mada University, Indonesia

<sup>3</sup> Administrative Law Department, Gadjah Mada University, Indonesia

<sup>4</sup> Law School, University of Pittsburgh, the United States of America

<sup>5</sup> Master of Notary, Gadjah Mada University, Indonesia

\*Corresponding Author: [ari\\_hernawan@mail.ugm.ac.id](mailto:ari_hernawan@mail.ugm.ac.id)

### Abstract

**Introduction to the Problem:** Under the Indonesian Marriage Law of 1974, the requirement of specific acceptable reasons for divorce underscores the adoption of a fault-based divorce system. However, of the Law also includes "continuous disputes and endless quarrels between the spouses with no hope of reconciliation" as grounds for divorce provided by the Elucidation of Article 39 paragraph (2) letter f, which mirrors the Western no-fault-based divorce concept of irreconcilable differences. This apparent contradiction is intriguing for a comprehensive analysis of which divorce system Indonesia aligns with.

**Purpose/Study Objectives:** This article evaluates the contradiction between Indonesia's fault-based divorce system and the existence of grounds for divorce, which include "persistent disputes and endless quarrels between the spouses with no hope of reconciliation." This evaluation aims to confirm whether Indonesia has consistently adhered to the fault-based divorce law system.

**Design/Methodology/Approach:** This article utilizes normative juridical research by examining secondary data as the primary source. The research began with identifying legal principles governing divorce, followed by analyzing the historical development of regulations and legal considerations in judicial decisions. The data were qualitatively analyzed using conceptual, statutory, case-based approaches to provide a critical perspective.

**Findings:** This article reveals that the grounds of "persistent disputes with no hope of reconciliation" first appeared in 1933 under the Indonesian Christian Marriage Ordinance of 1933 under the terminology of *onheelbare tweespalt*. It was then adopted by the Marriage Law of 1974. Initially, all divorce reasons had to be grounded in the fulfilment of "persistent disputes with no hope of reconciliation," requiring the determination of the party most responsible for the breakdown of the marriage. However, this article concludes that there has been a gradual shift from necessitating



identifying fault in "persistent disputes with no hope of reconciliation" to simply recognizing the marriage's breakdown without attributing blame. This ground is now independently sufficient to establish an irreparable breakdown of the marriage.

**Paper Type:** Research Article.

**Keywords:** Fault-Based Divorce; No Fault-Based Divorce; Indonesian Divorce Law; Dispute; Marriage



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## Introduction

Divorce in Indonesia is regulated by Indonesia Law No. 1 of 1974 on Marriage (Marriage Law) and its implementation under Government Regulation No. 9 of 1975 on the Implementation of Law Number 1 of 1974 Regarding Marriage (Government Regulation No. 9 of 1975). The enactment of the Marriage Law was driven by the desire to align legal principles with the values and spirit of the Indonesian nation (Hafsari et al., 2023). The Marriage Law included several reforms, such as eliminating the secular aspects of marriage from the previous colonial law of Civil Code, providing legal protection for women and children, and upholding monogamy principles, equality rights and obligations of husband and wife, minimum marriageable age, requirement of marriage registration, and discouragement of divorce (Hadi et al., 2024).

During the colonial era, the principle of discouraging divorce, along with the efforts to prevent disguising divorce as other arrangements was reflected in the requirement to file a divorce in court, and valid and acceptable legal reasons must support it (Hermansyah, 2024). The reasons for divorce are provided in Article 19 of Government Regulation No. 9 of 1975 and reinforced by Article 119 of the Compilation of Islamic Law (CIL). Article 19 of Government Regulation No. 9 of 1975 specifies the following acceptable legal grounds for divorce: (a) One party commits adultery or becomes a habitual drunkard, drug addict, gambler, or engages in similar behaviors that are difficult to rehabilitate; (b) One party abandons the other for two consecutive years without permission, without valid reasons, or due to circumstances beyond their control; (c) One party receives a prison sentence of five years or more after the marriage has taken place; (d) One party commits severe cruelty or abuse that endangers the other; (e) One party suffers from a physical disability or illness that prevents them from fulfilling their obligations as a spouse; (f) Persistent disputes and endless quarrels occur between the spouses, with no hope of reconciliation.

Article 116 of CIL adopts the grounds provided by Article 19 above and serves as a guideline for divorce cases handled by the religious court (Abdurrahman, 1992).



Additionally, the CIL introduces two supplementary guidelines for divorce: (a) A husband violating the conditional divorce pledge specified as the *taklik talak* and (b) Conversion to another religion or apostasy that causes marital disharmony (article 116 CIL).

The requirement to provide specific acceptable reasons for divorce illustrates Indonesia's position as a country that has adopted a fault-based divorce system (Hartini et al., 2024). In this system, the law recognizes that the party seeking to dissolve a marriage must present specific reasons for dissolution, attributing blame to the other party for the breakdown of the marriage (O'Brien, 2004). The fault-based system requires that one spouse prove in court that the other spouse has committed a marital violation (Price, 1997). The fault-based divorce system is a restrictive legal framework aimed at protecting the institution of marriage (Muchlis, 2024). Divorce is granted only if one spouse's fault, such as adultery or cruelty, is proven and the other spouse is deemed to be blameless. Furthermore, the consent of the blameless spouse is required to approve the divorce in this system (Haq et al., 2023). Thus, even if both parties wish to divorce, they cannot obtain it unless they provide evidence substantiating fault (Fitri et al., 2023).

This perspective dominated the discourse on the divorce law system until the 1970s, when scholars began advocating for the removal of faults as the primary criterion for divorce (Wardle, 2012). Several arguments have been consistently presented to support eliminating "fault" from divorce law (Nakonezny et al., 1999). First, it has been observed that imposing "fault" requirements to make divorce more difficult, which does not effectively prevent the dissolution of marriages. Consequently, it is arguable that the law should establish processes that minimize the burden on all parties involved in terminating relationships. Second, the idea of eliminating the fault largely stems from the Christian view that the notion of marriage as an unbreakable union is increasingly incompatible with a secularized society. Therefore, compelling couples to remain in "empty shell" marriages, where partners are legally married but lack meaningful connections, can appear inappropriate. Third, given that family is often considered a private entity, a prevailing view holds that emotional matters should remain outside the public domain.

In response to these arguments, the no-fault divorce system was introduced, allowing divorcing couples to separate without presenting reasons before the court. Couples are not only required to confirm incompatibility between the two of them, but also that there are unbridgeable differences (Mukdin et al., 2022). Historically, the first modern no-fault divorce law was enacted in Russia in December 1917 following the October Revolution of the same year. The new government transferred jurisdiction over divorce from the Russian Orthodox Church to state courts, which could grant divorce upon the application of either spouse (Bolas, 1975, Dyuzheva, 1995).



Although initially embraced, several studies have documented the impact of eliminating fault from the divorce legal system. Parkman found that the welfare of divorced women and their children has declined under the no-fault system (Parkman, 2018). According to Parkman, no-fault divorce reduces the protection and bargaining power of spouses unwilling to dissolve their marriage. This loss of bargaining power has, in turn, reduced incentive for spouses to make specific contributions to their families (Parkman, 2018). Compared to the fault-based divorce system, the earlier system more effectively safeguarded married women who chose to prioritize motherhood and homemaking against the potential cost of divorce.

Drawing from the insights above, there are fundamental distinctions between these two systems. The Indonesian divorce legal system, which bases divorce grounds on a fault-based concept, presents contradictions by also regulating the reasons for "persistent disputes and endless quarrels between the spouses, with no hope of reconciliation" a feature characteristic of no-fault divorce. To address this contradiction, this article explores the historical development of divorce law and its application in judicial practices. The findings will serve as a foundation for determining whether Indonesia's divorce legal system strictly adheres to a fault-based framework.

### Methodology

This article utilizes a normative juridical research method, systematically examining the regulations governing specific legal issues. It analyses how these laws interact, identifies contradictions, and predicts future developments. Using literature-based research, the authors relied on secondary data as the main source in two forms: (1) regulations on divorce and their evolution and (2) Several Supreme Court Decisions on divorce cases.

To analyze religious court decisions, the authors first identified the legal principles underpinning divorce. These principles were examined with a particular focus on the legal considerations and foundational arguments (*fundamentum petendi*) presented in each decision. This analysis highlights judges' interpretation of the fault-based concept, specifically in cases where "persistent disputes and quarrels occur between the spouses with no hope of reconciliation."

This article subsequently employs an integrated conceptual, statutory, and case-law approach to critically examine and assess the extent to which Indonesia's divorce legal framework continues to operate under, and strictly conform to, a fault-based model of divorce. The data gathered throughout the research were subjected to qualitative analysis, and the results are presented in a descriptive manner so as to preserve analytical clarity, logical consistency, and coherence of interpretation.



## Results and Discussion

### **Fault-Based System and the Concept of *Onheelbare Tweespalt* in Indonesian Divorce Law**

From its historical formulation, while the marriage law predominantly adopts a fault-based divorce system, it also integrates the concept of *onheelbare teespalt* (Prewirohamidjojo, 1986). This term, which translates to “irreconcilable breakdown,” refers to continuous disputes rendering impossible reconciliation (Liza, 2022). This concept is explicitly reflected in one of the grounds for divorce under the Marriage Law, articulated as “continuous disputes and quarrels that make it impossible for the couple to live harmoniously as husband and wife.” Consequently, the concept of *onheelbare teespalt* forms a significant part of Indonesia’s divorce law system. Notably, this concept was not incorporated into the Civil Code.

However, the *onheelbare teespalt* principle is recognized in other legal instruments, particularly the Indonesian Christian Marriage Ordinance (*Huwelijks Ordonantie Christen Indonesiërs* S. 1933 No. 74). Article 52 of the Ordinance explicitly lists “disharmony and persistent disputes between husband and wife” as one of six recognized grounds for divorce. This ordinance primarily applies to Javanese, Minahasan, and Ambonese Christian Indonesians (Zainuddin & Madchaini, 2022).

When divorce cases cite these grounds, the court is required to record the couple’s statement regarding the existence and underlying circumstances of the dispute. Based on these statements, the judge evaluates whether the situation has reached a point where reconciliation is no longer feasible. This procedural requirement is detailed in Article 58 of the Ordinance. Through the adoption of *onheelbare teespalt* concept, Indonesia’s divorce law doctrine and jurisprudence have continued to evolve (Qamaruddin et al., 2024).

In terms of doctrine and jurisprudence, the practice of divorce law in Indonesia is not confined to a fault-based divorce system (Adicahya, 2024). This system has provided the foundation for several new legal principles introduced through jurisprudence (Sudarsono, 2005). For instance, the Supreme Court addressed the issue in Decision No. 3180 K/Pdt/1985, interpreting Article 19 (f) in connection with the Dutch legal term *onheelbare tweespalt*. In its decision, the Court emphasized that the concept of “irreconcilable continuous disputes (*onheelbare tweespalt*)” does not require proof of the causes of the disputes but rather an assessment of whether such disputes make reconciliation in the marital relationship impossible. This interpretation was later reaffirmed in the Supreme Court Decision No. 534 K/Pdt/1996, which simplified the evidentiary burden of establishing grounds for divorce.

However, these two landmark decisions were underpinned by distinct legal reasoning. The 1985 decision posited that the judge must determine the existence of continuous disputes, concluding that if such disputes are proven, reconciliation is unattainable. Conversely, the later decision shifted the focus to whether the marriage



has irreparably broken down, treating disputes as only one potential indicator of such breakdown. This distinction allowed the Supreme Court to consider other indicators, beyond disputes, as sufficient evidence of marital breakdown. Consequently, under Article 19 (f) of Government Regulation No. 9 of 1975, any proof demonstrating the irreparable breakdown of a marriage can fulfill the grounds for divorce. Thus, the Supreme Court has significantly expanded the interpretation of Article 19 (f).

When compared to its original source, the evolution of divorce law in Indonesia mirrors developments in the Netherlands ([Bahri & Elimartati, 2022](#)). Under the old Dutch Civil Code (hereinafter referred to as the 1838 Dutch Civil Code), the condition of *onheelbare tweespalt* (continuous disputes and quarrels) initially served as a legal basis for "separation of bed and board" (*scheiding van tafel en bed*) ([Aslamiah et al., 2023](#)). Only after such separation persisted for five years or more could it serve as grounds for filing for divorce ([Komisi Yudisial, 2024](#)). However, with the enactment of the new Civil Code (*Burgerlijk Wetboek*) in 1970, the Netherlands replaced this system with "*duurzame ontwrichting van het huwelijk*," which translates to "irreparable breakdown of the marriage" ([Chin-A-Fat, 2019](#)). Under this revised framework, both men and women were granted equal rights to request the dissolution of a civil marriage based on irretrievable breakdown ([Kroon, 2016](#)).

As seen in the development of Supreme Court jurisprudence in Indonesia, the evolution of divorce law in the Netherlands also experienced a shift from legal provisions that initially emphasized the judge's role in determining the existence of continuous disputes (or other reasons for separation and/or divorce) toward provisions that focused on the judge's role in determining whether a marriage has irreparably broken down, without relying on any specific indicator to measure when a marriage is deemed broken ([Komisi Yudisial, 2024](#)).

The absence of a specific indicator for determining when a marriage has irreparably broken down in the provisions of the 1970 Dutch Civil Code (*Burgerlijk Wetboek*) was accompanied by procedures designed to prevent impulsive divorces (*lichtvaardige echtscheiding*) ([Woelki, Cherednychenko, Coenraad, 2024](#)). These procedures included a one-year waiting period after a divorce was filed before the divorce process could begin and the requirement that divorce petitions be accepted only if the marriage had lasted two years or more (except in cases of special or urgent reasons for divorce) ([Dutch Law Institute, 2024; Komisi Yudisial, 2024](#)). The Dutch divorce system has also undergone changes, allowing for both fault-based and non-fault-based divorces. One recognized ground is Irretrievable Breakdown of the Marriage, which is the most common basis for divorce, which means that the marriage has deteriorated to such an extent that continuing it is no longer possible. This ground provides an objective measure for judges to determine whether the marriage is beyond repair.



At the same time, fault-based grounds such as adultery, domestic violence, or prolonged separation are also recognized. The divorce procedure may be initiated, individually or jointly, through the court. Another way of obtaining a divorce in the Netherlands is through administrative divorce. Several conditions apply: there must be no minor children involved, both spouses must agree to complete the procedure without court intervention, and the divorce must be handled with the assistance of a notary or divorce mediator. Once the spouses submit a written declaration to the civil registrar—signed by both parties and at least one lawyer, notary, or divorce mediator—all formal requirements are assessed. Once these conditions are met, the divorce is recorded in the civil registry, and the process concludes with the official registration of the divorce certificate ([Dutch Law Institute, 2024](#)).

### **Impact of Indonesian Constitutional Court Decisions on the Divorce Law System in Indonesia**

The establishment of the Constitutional Court is intrinsically linked to the demand for the effective implementation of constitutional legislation ([Chandranegara, 2021](#)). This effectiveness can only be ensured if an institution, other than the legislative body, is tasked with reviewing the constitutionality of legal products and invalidating them if deemed unconstitutional ([Kelsen, 2006](#)). To this end, a specialized institution, known as the Constitutional Court (*Mahkamah Konstitusi* or MK) ([Umar & Sofyan, 2023](#)), was established. The duties of the Indonesian Constitutional Court include handling cases involving judicial review of laws, disputes over state institution authorities, and disputes over election results ([Asshiddiqie, 2004](#)).

The landmark case in the Constitutional Court related to the concept of fault-based divorce occurred in 2011 with Constitutional Court Decision No. 38/PUU/IX/2011. This case reviewed the judicial provisions of the marriage law, specifically the phrase: "Continuous disputes and quarrels between husband and wife..." Filed by a petitioner named Halimah Agustina, she stated that she was previously the wife of Bambang Trihatmodjo. Their marriage took place on Saturday, 24 October 1981, and was registered at the Office of Religious Affairs (KUA) in Setiabudi Subdistrict, South Jakarta, as evidenced by Marriage Certificate No. 692/182/X/1981, dated 24 October 1981. Although the marriage started happily, it deteriorated in 2002 when disputes and quarrels began to arise after the husband's extramarital affair came to light. The petitioner stated that her husband abandoned their family and left their residence to live with his mistress.

The peak of the family's disharmony occurred on May 21, 2007, when the husband filed for divorce against his wife at the Central Jakarta Religious Court. The petition cited "frequent disputes and endless quarrels" as grounds for the divorce, asserting that these issues had left no hope for reconciliation in their marriage. Despite the wife's opposition to the petition, the religious court ultimately granted the husband's request for divorce (*talak*).



Subsequently, the petitioner (the wife) sought a judicial review of the constitutionality of Article 39 (2) (f) of the Marriage Law, particularly the phrase: "Between husband and wife, there are persistent disputes and quarrels." She contended that this provision violated her constitutional rights under Article 28D(1) regarding the right to recognition, guarantees, protection, and fair legal certainty, and the right to equal treatment before the law; and Article 28H(2) concerning the right to obtain special facilities and treatment in order to enjoy equal opportunities and benefits to achieve equality and justice. Her primary argument was that the Law failed to specify who caused the dispute and quarrel, thereby disproportionately harming the constitutional rights of the wives, including her case. She argued that this lack of clarity resulted in undue prejudice and detriment to wives' constitutional rights (Constitutional Court Decision No. 38/PUU/IX/2011). The Constitutional Court, however, denied her claim, reasoning that the condition of "persistent disputes and quarrels" constitutes a valid and legitimate basis for dissolving a marriage that no longer aligns with the objectives of matrimony (Constitutional Court Decision No. 38/PUU/IX/2011). The court emphasized that the Law must provide an avenue to resolve a marriage characterized by persistent disputes to prevent greater harm and ensure justice and legal certainty for the parties involved.

With this rejection, a legal principle can be drawn that the Court aligns its legal stance with the jurisprudence that has developed over time in Indonesia as this article has elaborated above. The court decision reflects that "continuous disputes and quarrels" frequently occur in a marriage; it is unnecessary to identify the party at fault when continuous disputes and quarrels are evident in the marriage. The presence of such conflicts alone is sufficient to demonstrate that the mutual agreement, which is central to the marital bond, has been irrevocably broken. Consequently, divorce is justified under such circumstances. This Constitutional Court decision also affirms that Indonesia's divorce law, is no longer solely based on the fault-based divorce system but has begun to adopt another system, namely the no-fault divorce system. Why is it so? Because, based on Constitutional Court Decision No. 38/PUU/IX/2011, the justices concluded that there is no need to find out who is at fault because the existence of continuous disputes and quarrels already proves that the marriage has broken down.

### **Supreme Court Regulation in Determining the Direction of the Divorce Law System in Indonesia**

The Supreme Court plays an important role in the judicial field through the issuance of various regulations aimed at ensuring the smooth administration of justice ([Panggabean, 2001](#)). The authority of the Supreme Court includes issuing regulations, requesting information related to judicial technicalities from all judicial environments and providing guidance, warnings, or admonitions deemed necessary for courts within its jurisdictions. Additionally, the Supreme Court Law stipulates that it may issue necessary regulations to ensure the smooth administration of justice if such matters are not adequately addressed in existing legislation ([Fauzan, 2013](#)).



The Supreme Court may issue various legal instruments, including Supreme Court Regulations (PERMA), Supreme Court Circular Letters (SEMA), Supreme Court Fatwas, and Decrees of the Chief Justice of the Supreme Court (SK KMA). PERMA refers to regulations issued by the Supreme Court directed at specific judicial bodies, containing provisions related to judicial procedural law. Meanwhile, SEMA comprises circular letters from the Supreme Court leadership to all judicial bodies, providing guidance on the administrative aspects involving judicial operations (Panggabean, 2001). A Supreme Court Fatwa reflects the opinion of the Supreme Court provided at the request of a state institution, whereas an SK KMA constitutes a decision made by the Chief Justice of the Supreme Court on specific matters.

The chamber system of the Supreme Court has been made to ensure the uniform application of the law and consistency in rulings through chamber plenary meetings. Each chamber of the Supreme Court conducts plenary sessions to address case substance, discussing legal issues (questions of law) arising from specific cases and the judicial panel's interpretation of those issues (the Decree of the Chief Justice of the Supreme Court No. 142/KMA/SK/IX/2011). Guidelines for the chamber system are outlined in the Decree of the Chief Justice of the Supreme Court No. 213/KMA/SK/XII/2014. These guidelines outline the criteria for cases to be discussed in chamber plenary meetings: (1) Judicial review cases that may overturn cassation decisions or decisions with permanent legal force, particularly when differing opinions exist among the panels handling the cases. (2) Interrelated cases handled by different judicial panels where potential rulings may differ or conflict. (3) Cases requiring a broader interpretation of legal issues and/or amendments to established jurisprudence.

Aside from the chamber plenary meetings held by individual chambers, the Supreme Court consistently organizes annual chamber plenary meetings attended by all case chambers. Since the chamber system at the end of 2011 until 2023, the Supreme Court has held 12 annual chamber plenary meetings (Circular Letter Number 3 of 2023 concerning the Enforcement of the Resolutions of the 2023 Chamber Plenary Meeting of the Supreme Court as Guidelines for Judicial Tasks. The outcomes of these meetings are formulated and enacted as guidelines, which are issued through SEMA on the Implementation of the Formulated Outcomes of the Supreme Court Chamber Plenary Meetings as Guidelines for Judicial Tasks.

The interpretation of "persistent disputes and endless quarreling" has been discussed and decided in three chamber plenary meetings, including SEMA No. 05 of 2014, SEMA No. 01 of 2022, and SEMA No. 03 of 2023. All of them focus on specific conditions and contribute to the development of the Indonesian divorce law system. The provisions in these regulations are detailed as follows:

1. Provisions in SEMA No. 05 of 2014



SEMA No. 05 of 2014 establishes specific rules on divorces involving members of the Indonesian National Police (POLRI) who lack approval from their superiors. According to this circular letter, the religious court handling such divorce applications/lawsuits must follow guidelines from the Regulation of the Chief of the Indonesian National Police No. 9 of 2010 on Procedures for Filing Marriage, Divorce, and Reconciliation for Civil Servants in the Indonesian National Police. Additionally, the court took into account SEMA No. 5 of 1984, which provides implementation guidelines for Government Regulation No. 10 of 1983.

The key provision in SEMA No. 05 of 2014 is that if a POLRI member has submitted a declaration of willingness to accept all consequences of divorce, the religious court is required to consider the factors causing disputes and quarrels between the spouses. This ensures that the court's decision reflects the principles of legal certainty, justice, and benefits, regardless of whether the application or lawsuit is granted or denied.

Unlike existing jurisprudence and Constitutional Court rulings that downplay the need to identify fault or causes of ongoing disputes, SEMA No. 05 of 2014 requires judges to assess these factors. This divergence is reasonable, given the specific rules on marriage and divorce for POLRI members and civil servants as outlined in Government Regulation No. 10 of 1983 (amended by Government Regulation No. 45 of 1990). These rules were issued during the New Order era and aimed to control the marital and sexual conduct of civil servants, reflecting the state's view that they should set a moral example in society.

## 2. Provisions in SEMA No. 01 of 2022

SEMA No. 01 of 2022 introduces clear timelines for divorce. If it is based on failure to fulfil obligations financially and/or emotionally, the failure has persisted for at least 12 months. For continuous dispute cases, divorce may be granted if the couple has been in ongoing quarrels or lived apart for at least six months.

According to the wording of SEMA No. 01 of 2022, continuous disputes and quarrels can be proven through two options: (1) Evidence that the husband or wife has engaged in continuous disputes and quarrels; (2) Proof that the grounds for continuous disputes and quarrels are marked by the couple living separately for at least six (6) months.

## 3. Provisions in SEMA No. 03 of 2023

SEMA No. 03 of 2023 refines the legal framework established by previous regulations, specifically revising Item 1(b)(2) in SEMA No. 01 of 2022. The original provision stated:

"Divorce cases on the grounds of continuous disputes and quarrels can be granted if it is proven that the husband or wife has engaged in continuous disputes and quarrels or has been living separately for at least six (6) months." This provision has now been amended to: "Divorce cases on the grounds of continuous disputes and quarrels can be granted if it is proven that the husband and wife have engaged in continuous disputes



and quarrels, with no hope of reconciliation in the household, accompanied by living separately for at least six (6) months, unless there is legal evidence of the Respondent/Plaintiff committing domestic violence."

The amendment in SEMA No. 03 of 2023 seeks to refine the provisions in SEMA No. 01 of 2022 regarding grounds for divorce based on continuous disputes and quarrels within a marriage. A notable difference between the two regulations is the approach to proving these grounds. SEMA No. 01 of 2022 offered two alternative criteria for evidence: either proving that the husband or wife had engaged in continuous disputes and quarrels or demonstrating that the couple had been living separately for at least six (6) months. In contrast, SEMA No. 03 of 2023 requires cumulative proof. To establish grounds for divorce based on continuous disputes and quarrels, both conditions must be met: (1) continuous disputes and quarrels must be demonstrated, and (2) the couple must have lived separately for at least six (6) months. This cumulative requirement does not apply if there is evidence of domestic violence by the Respondent or Plaintiff.

Additionally, SEMA No. 03 of 2023 emphasizes that the marriage is irreparably broken by including the criteria that there is no reasonable hope for the couple to resume a harmonious household. An analysis of the two most recent SEMAs reveals that the Supreme Court continues to emphasize the importance of establishing "continuous disputes and quarrels" as grounds for divorce. However, the evidentiary approach differs: SEMA No. 01 of 2022 allows for an optional framework, whereas SEMA No. 03 of 2023 mandates a cumulative approach. These regulations reflect the Supreme Court's intent to clarify the evidentiary criteria for continuous disputes and quarrels, focusing on two key aspects: (1) proof of continuous disputes and quarrels and (2) evidence of living separately for at least six (6) months.

In general, the evolution of the interpretation of the fault-based concept can be explained in Table 1 which summarizes the evolution of fault-based divorce within Indonesia's legal framework. It traces key legal milestones from the 1933 Indonesian Christian Marriage Ordinance to the most recent Supreme Court Circular Letters (SEMA) in 2022 and 2023. The table highlights how the legal interpretation of "fault" has gradually shifted from a reliance on disputes as indirect evidence of irretrievable breakdown towards a more structured evidentiary approach requiring both prolonged quarrels and physical separation. Notably, the 2023 regulation introduces a cumulative standard while maintaining judicial discretion, marking a significant step in harmonizing evidentiary consistency with substantive legal principles.

**Table 1.** Fault-based Concept Evolution in the Indonesian Divorce Law System.

Year	Laws and Regulations	The Concept of Fault-based Divorce
1933	Indonesian Christian Marriage Ordinance (Huwelijks Ordonantie Christen Indoneesiërs S. 1933 No. 74)	The fault must be established from the couple's testimony, and the judge must assess the degree to which reconciliation is evidently no longer feasible.
1985	Supreme Court Decision No. 3180 K/Pdt/1985	The fault is acceptable by merely establishing that a dispute has occurred without needing to prove the cause.
1996	Supreme Court decision No. 534 K/Pdt/1996	The fault must be established from the fact that the marriage has irreparably broken down, with disputes serving as one indicator of the breakdown. Furthermore, the Supreme Court allows other indicators beyond disputes to be the primary evidence of a marital breakdown.
2011	Constitutional Decision Court No. 38/PUU/IX/2011	The fault is acceptable by merely establishing that a dispute has frequently occurred without needing to prove the cause.
2014	SEMA No. 04 of 2014	The fault is determined by the judge's assessment of the factors causing disputes and quarrels between spouses.
2022	SEMA No. 01 of 2022	The fault should be determined by two options; (1) The couple has engaged in continuous disputes and quarrels, and (2) The couple has been living separately for at least six months, as a sign of persistent disputes and endless quarrels.
2023	SEMA No. 03 of 2023	The fault should be determined by the condition that the couple has engaged in continuous disputes and quarrels and has been living separately for at least six months unless there is legal evidence of one of them committing domestic violence.

Source: The authors' analysis of secondary data.

Under the grounds for divorce in the Marriage Law, as applied in conjunction with Article 19 of Government Regulation No. 9 of 1975 and Article 116 of the CIL, the provision regarding "persistent disputes and endless quarrels between the spouses, with no hope of reconciliation" can be interpreted in two ways: either as an



independent ground for divorce or as an “ultimate” or “final” ground. If interpreted as a final ground where a marriage involves behaviors such as adultery, habitual intoxication, drug addiction, gambling, abandonment, or similar misconduct but “continuous disputes and quarrels” are absent, the marriage cannot yet be deemed irreparably broken. Thus, when “continuous disputes and quarrels” are viewed as a final ground, the other grounds enumerated in letters (a) to (e) serve as preconditions that may culminate in “continuous disputes and quarrels.” Conversely, if the ground under letter f, namely “continuous disputes and quarrels,” is regarded as an independent and standalone basis for divorce, it allows for other causes, beyond those outlined in letters (a) to (e), to also result in “continuous disputes and quarrels.”

In comparison with other legal frameworks, such as Islamic law and Western legal systems, similar grounds for divorce align with the concept of “continuous disputes and quarrels.” In Islamic marriage law, an analogous ground is recognized as *shiqaq*, which refers to continuous and irreconcilable disputes. Similarly, the concept of “continuous disputes” is found in the divorce laws of countries such as the United States, Canada, the United Kingdom, the Netherlands, Russia, Australia, Sweden, and others, where it is commonly referred to as “irreconcilable differences” or “irretrievable breakdown” (Parkman, 2018)

### **The Concept of *Shiqaq* and Its Relation to the Fault-Based Divorce Law System in Indonesia**

In Indonesia, the settlement of *shiqaq* is regulated under Article 76 of Law No. 7 of 1989 on Religious Courts. Article 76 (1) stipulates that if a divorce lawsuit is based on the grounds of *shiqaq*, a divorce decree can only be issued after hearing witness testimony from family members or individuals close to the husband and wife. The term *shiqaq* in this article, as clarified in the Explanation of Article 76(1) of the Religious Courts Law, is defined as sharp and continuous disputes between husband and wife that are difficult to reconcile. More precisely, *shiqaq* refers to continuous disputes that pose a danger to both parties. A common manifestation of this danger is the presence of domestic violence within marital relationships (Ilhami, 2014).

Several decisions from religious courts illustrate the implementation of Article 76(1) of the Religious Courts Law. For instance, in the Supreme Court Judicial Review Decision No. 28-PK/AG/1995 dated 16 October 1996, regarding the Supreme Court Cassation Decision No. 137 K/AG/1994 dated 30 March 1995, the court emphasized that judges handling divorce cases based on *shiqaq* should apply the doctrine of *shiqaq*, a contemporary concept that equates *shiqaq* with a broken marriage. The doctrine of *shiqaq* is not limited to evidence of physical cruelty but also includes mental cruelty. If it is factually evident or strongly suspected that mental cruelty has occurred, this should be accepted by judges as evidence of *shiqaq*. The rationale behind this doctrine is that forcing a couple to remain in an irreparably unharmonious marriage, when the marriage is already broken and on the brink of collapse poses a danger and results in greater harm (*mudharat*).



In another case, specifically in the Supreme Court Cassation Decision No. 136 K/AG/1997 dated February 25, 1998, the court highlighted the importance of family witness testimonies. Even if such testimonies are not given under oath in court, they can be accepted as evidence indicating irreconcilable disputes between the husband and wife. In this case, both parties acknowledged that they had been living separately for three years due to the disputes, thereby demonstrating the breakdown of their marriage. These facts fulfilled the requirements of Article 19(f) of Government Regulation No. 9 of 1975. The Supreme Court further reasoned that rejecting family witness testimonies on the grounds of insufficient evidentiary strength contradicts the intent of Article 76 (1) of Law No. 7 of 1989.

Another illustrative case found in the Supreme Court Cassation Decision No. 237 K/AG/1998 dated 26 December 1998. In this case, the couple's disputes led to the wife's father expelling his son-in-law from the shared residence. Since that event, the husband and wife ceased living together at the wife's father's home and begun living separately. Moreover, the wife expressed no intention of continuing household life with her husband. The court concluded that these facts were sufficient to align with the grounds for divorce stipulated in Article 19(f) of Government Regulation No. 9 of 1975.

### **Irreconcilable Differences or Irretrievable Breakdown in the Western Legal System**

The concept of irretrievable breakdown forms a cornerstone of the no-fault divorce system adopted in Western legal systems. For example, in England and Wales, the only ground for divorce is that the marriage has broken down irretrievably. However, the court requires evidence that at least two of the five conditions are met. Three of these conditions are adultery, unreasonable behavior, and desertion, which demonstrates adoption to a fault-based system. Meanwhile, the remaining two: separation for two years with mutual consent or five years without consent, reflect a no-fault approach ([House of Commons Library, 2019](#)). What exists in England and Wales bears a structural resemblance to the divorce system in Indonesia, namely that on one hand it recognizes the reason that the marriage has broken down irretrievably and emphasizes that there is no need to determine who is at fault, but on the other hand, fault-based grounds for divorce are still acknowledged.

Another example of the application of no-fault divorce is Ireland. The Irish Divorce Laws have adopted a no-fault system for the purpose of granting a divorce ([Law Society of Ireland, 2019](#)). The state adopted no-fault divorce in an effort to align legal norms more closely with extralegal societal expectations and in response to increasing dissatisfaction with the fault-based divorce system ([Price, 1997](#)). Fault-based systems require one spouse to prove in court that marital offenses were committed by the other spouse ([O'Brien, 2004](#)). In other words, these systems require that one spouse be deemed innocent and the other guilty ([Price, 1997](#)). Generally, there are a few statutorily enumerated grounds for divorce. The most common



grounds include adultery, extreme cruelty, willful desertion, habitual intemperance, willful neglect, and supervening incurable insanity (O'Brien, 2004). In this system, even when both parties wished to divorce, they were unable to proceed unless evidence was provided to prove their fault (Carter, n.d.). As a result, the parties frequently colluded with one another and committed perjury to meet the evidentiary requirement of fault-based grounds.

Although fault-based divorce systems were common in the past, few modern jurisdictions retain them as the exclusive means of obtaining divorce (O'Brien, 2004). Many jurisdictions have transitioned to a mixed system combining fault-based and no-fault divorce mechanisms (Allen, 1996). The primary reason for adopting no-fault divorce systems has been to reduce the hostility historically associated with divorce-related litigation (Wardle, 1994). However, when Ireland introduced its no-fault-based system, the legislation faced criticism as being the "most liberal" type of divorce regime (McQuaid, 2006). Critics argued that the adoption of such a system reflected a policy misstep, with reformers accused of understanding Ireland's strong moral heritage (O'Brien, 2004). Commentators viewed that the regime attempted to replace the concept of marriage as a divine moral duty with a secular view of marriage as a state-created institution.

In the 1970s, 37 out of 50 states in the U.S. amended or repealed divorce laws to accommodate no-fault-based divorce (Vlosky and Monroe, 2002). By 1985, all states had adopted some form of no-fault divorce, with some retaining fault-based grounds for divorce (Myers, 2025). Several states strategically amended their divorce laws without adding an explicit "no-fault" clause. Instead, they added as little as six months of separation grounds (Vlosky and Monroe, 2002). In the no-fault-based divorce, a plaintiff may submit a divorce petition based on "irretrievable breakdown" of marriage or "irreconcilable differences" without attributing fault to one spouse (Myers, 2025). In California today, it is not acceptable to bring up fault in a divorce petition (Myers, 2025).

While there are no guidelines in determining "irretrievable breakdown," the U.S. courts have articulated the end of a marriage in various ways. For instance, the Florida Supreme Court in *Ryan v. Ryan*, 277 So. 2d 266 (Fla. 1973) described it as occurring "... whatever reason or cause and no matter whose fault, the marriage relationship is for all intents and purposes ended; when it is no longer viable; when the marriage is a hollow sham; or when it is beyond hope of reconciliation or repair." Similarly, the Supreme Court of Georgia in *Shapray v. Shapray*, 236 Ga. 393, 223 S.E.2d 802 (1976) referred to situations "... when the parties are unable, or refuse, to cohabit." These formulations, drawn from judicial opinions, are compiled in *Corpus Juris Secundum*, vol. 27A, on divorce (27A C.J.S. Divorce §§ 28-29).

In addition, the U.S. courts have also interpreted "irreconcilable differences" statutes. In Mississippi—*Perkins v. Perkins*, 787 So. 2d 1256 (Miss. 2001)—the primary



purpose of these statutes is to provide "a less painful alternative to traditional grounds for divorce, which required the parties to publicly put on proof of sensitive private matters." In California—*In re Marriage of Fink*, 54 Cal. App. 3d 357, 126 Cal. Rptr. 626 (2d Dist. 1976)—the statutes aim to remove "from domestic relations litigation the issue of marital fault as a determining factor." In New Hampshire—*Baker v. Baker*, 120 N.H. 645, 421 A.2d 998 (1980)—they seek "to minimize the acrimony usually attending divorce proceedings" (27A C.J.S. Divorce §§ 30). Over the years, the U.S. courts have consistently held that a divorce based on irreconcilable differences may be granted regardless of marital fault, even when traditional misconduct grounds are also pleaded, so long as the separation results from mutual differences (27A C.J.S. Divorce §§ 31).

Methods for obtaining a no-fault divorce vary, but the most common requirement is a court finding that the marriage has "irretrievably broken down" (Starnes, 2006). Some jurisdictions use the term "failure of the marriage" (Franck, 2009). This finding does not rely on moral blame or imposing behavioral standards on married couples. Instead, the court's role is to determine whether a breakdown has occurred without raising questions of fault or blame (Price, 1997). In Ireland, a no-fault divorce is granted based on the breakdown of the relationship, often coupled with a mandated period of separation, which serves as proof of the breakdown.

### Conclusion

Although Indonesia initially adopted a fault-based divorce system, the inclusion of the ground "persistent disputes and quarrels that are irreconcilable" in the Indonesian Marriage Law demonstrates that the country cannot be strictly classified as adhering solely to a fault-based system. This ground closely resembles the concept of irretrievably broken down, recognised in several Western legal systems as part of the no-fault divorce concept. Over time, Indonesia's Religious Courts, General Courts, Supreme Court, and Constitutional Court have increasingly supported the view that when a marriage experiences "persistent disputes and quarrels that are irreconcilable," it is unnecessary to determine fault or the cause of these disputes. In such cases, divorce may be granted based on the indication that the marriage has irretrievably broken down. The fault-based system originated from the 1933 Indonesian Christian Marriage Ordinance, which mandated the demonstration of fault to justify marital dissolution. However, jurisprudential developments have progressively departed from this rigid fault-based criterion. Judicial bodies across multiple tiers have shifted their focus towards recognizing the substantive reality of marital breakdown rather than engaging in fault attribution, thereby reflecting a more pragmatic and context-sensitive approach. Consequently, although the statutory framework formally retains fault-based principles, contemporary judicial interpretation evidences the emergence of a hybrid model incorporating elements functionally analogous to no-fault divorce, particularly concerning irreconcilable differences. This evolution reflects Indonesia's multifaceted socio-legal environment and pluralistic legal traditions. The growing judicial acceptance of irretrievable



marital breakdown without fault determination signals a significant paradigm shift, underscoring the necessity for legislative reforms aimed at reconciling these dual legal principles. Such reforms would enhance legal certainty, equity, and consistency within Indonesia's divorce law system, thereby better addressing the complexities of marital dissolution in the contemporary context.

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Author contribution : Author 1: Initiated the research ideas, developed the instrument, conducted data collection analysis, and drafted the manuscript. Author 2: Reviewed and revised the research ideas, literature review, data presentation, and analysis. Author 3: Participated in data collection, contributed to writing the manuscript, and verified the final version. Author 4: Assisted in data collection and drafting of the manuscript. Author 5: Analyzed and compared the concept of irretrievable breakdown in Western legal systems. Author 6: Contributed to data collection, translation, and formatting adjustments for the manuscript.

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