

Legal Responses to Sexual Orientation Related Marital Breakdown: A Comparative Analysis of Islamic Family Law and Indonesian State Law

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DOI: 10.29240/jhi.v10i2.11669

Received: 30/11/2024

Revised: 07/10/2025

Accepted: 27/11/2025

Cite this article:	Rahmadanil, Yaswirman, Yasniwati, Devianty Fitri, Deri Wan Minto (2025), Legal Responses to Sexual-Orientation-Related Marital Breakdown: A Comparative Analysis of Islamic Family Law and Indonesian State Law Approach. <i>Al-Istinbath : Jurnal Hukum Islam</i> , 10 (2), 2025, 923-947. Doi : 10.29240/jhi.v10i2.11669
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Abstract

Marital breakdown due to sexual orientation is becoming an increasingly visible phenomenon in Indonesian courts, but it remains in a gray area in both Islamic family law and national law. This study aims to analyze how both legal systems respond to this issue, both through written norms and jurisprudential practice, while identifying points of convergence and divergence between the two. Using qualitative research methods with a normative-comparative approach, this study examines classical and contemporary fiqh literature and legislation. The findings show that although fiqh and Indonesian positive law depart from different epistemological orientations fiqh is based on ethical-normative principles and state law is based on legal-formalist principles both have important intersections in the form of the principle of preventing harm, recognition of factual disharmony, and psycho-social protection of couples. but there are significant differences in the categories of disgrace, standards of evidence, and the scope of judicial discretion, which lead to disparities in rulings. This research contributes to the development of family law discourse by offering a harmonization framework based on maqāṣid al-sharī'ah and a harm-based reasoning approach, as well as recommending interpretive guidelines that can increase legal certainty and protection of couples' rights in marriage cases involving sexual orientation.

Keywords: Islamic Family Law; Sexual Orientation; Marital Breakdown; Indonesian Legal System; Legal Reform

Introduction

The global debate on the relationship between sexual orientation and marital integrity shows that conflicts related to non-heteronormative sexual identity or behavior have become a contributing factor to marital breakdown in various countries. Cases such as coming out after marriage¹, sexual orientation incompatibility between partners², or alternative sexual behavior that does not conform to marital expectations³, has been recorded in modern family law literature as a significant factor causing divorce.⁴ In many jurisdictions, this issue not only reflects a moral or social issue, but also raises important questions about how the law understands marital responsibility, consent, and harm in the family context.⁵ Thus, sexual orientation conflict in marriage is now understood as a global phenomenon that demands a careful, adaptive, and evidence-based legal response.

In the Indonesian context, similar issues also arise, although they are not always explicitly recorded in formal data. Various social reports and court rulings indicate cases of marital breakdown related to one partner's sexual orientation or behavior.⁶ Indonesian society's sensitivity to the issue of sexual orientation due to religious, cultural, and political factors makes this issue more complex than in other countries.⁷ On the one hand, this phenomenon is considered a moral issue or behavioral deviation; however, on the other hand, the court must handle the

¹ Patrick Ross Scott MSW and Elizabeth Thompson Ortiz DSW, "Marriage and Coming Out: Four Patterns in Homosexual Males," *Journal of Gay & Lesbian Social Services* 4, no. 3 (1996), https://doi.org/10.1300/J041v04n03_04.

² Donny Chrissutianto, "Homosexual Orientation in Marriage: A Reason for Divorce?," *Klabat Theological Review* 1, no. 1 (2020).

³ Khalil Alahveriani et al., "Studying the Relationship Between Sexual Disorder and Marriage Satisfaction in Those Suffering From Depression," *Procedia - Social and Behavioral Sciences* 2010 (nd), <https://doi.org/10.1016/j.sbspro.2010.07.343>.

⁴ Atiyeh Eskandari et al., "Analysis of Sexual Disorders as a Cause for Seeking Divorce," *Interdisciplinary Studies in Society, Law, and Politics* 4, no. 1 (2025), <https://doi.org/10.61838/kman.isslp.4.1.19>.

⁵ Stephen D. Hart and P. Randall Kropp, "Sexual Deviance and the Law," in *Sexual Deviance: Theory, Assessment, and Treatment*, ed. D. Richard Laws and William T. O'donohue (The Guilford Press, 2008), 557.

⁶ Satmi Utari Aziz, "Annulment of Marriage Due to Husband's Sexual Disorder (Study of Yogyakarta Religious Court Decision Number: 176/Pdt.G/2019/PA.Yk)," *El-Usrah: Jurnal Hukum Keluarga* 6, no. 1 (2023), <https://doi.org/10.22373/ujhk.v6i1.17412>.

⁷ Annastasia Edianti et al., "Social Stigmatization in Late Identified Patients with Disorders of Sex Development in Indonesia," *BMJ Paediatr Open* 1, no. 1 (2017), <https://doi.org/10.1136/bmjpo-2017-000130>.

case within a positive legal framework that regulates limited grounds for divorce.⁸ It is this tension between social perception and legal procedures that places this issue in a crucial position for scientific analysis.

The complexity is compounded by Indonesia's dual legal system (legal pluralism), which divides authority between Islamic family law in the Religious Courts and state law in the District Courts. Each system has different legal categories, terminology, and reasoning methods for deciding divorce cases.⁹ To date, neither the Marriage Law nor the Compilation of Islamic Law explicitly mentions sexual deviation as grounds for divorce. This gap leaves room for wide interpretation, both within the framework of Islamic family law which uses concepts such as *al-'aib*, *syiqaq*, *nushuz*, and harm and within state law, which relies on the categories of "quarrels and disputes," "discord," or "reprehensible acts."¹⁰ This situation creates legal uncertainty and opens up the possibility of different responses between the two systems.

In judicial practice, judges often encounter cases that are actually related to a particular sexual orientation or behavior, but neither the parties nor the statutory provisions explicitly address this. This forces judges to make interpretive adjustments to construct grounds for divorce based on empirical facts, the appropriateness of the evidence, and the principle of the well-being of the household.¹¹ Several decisions show that judges interpret sexual orientation conflicts as a form of psychological cruelty, dishonesty in marriage contracts, or prolonged disputes.¹² This condition shows the flexibility of judicial reasoning as well as the limitations of the normative framework in explaining complex issues.¹³ Thus, the study of judicial responses is important for understanding how the law works on the ground.

⁸ Wisnu Catur Bayu Pati et al., "Analysis Of Factors Causing Sexual Deviance (Lesbian) In Adolescents In The Coastal Region Of Southeast Sulawesi: Sexual Deviance (Lesbian)," *Indonesian Journal of Health Sciences Research and Development (IJHSRD)* 6, no. 1 (2024): 148–54, <https://doi.org/10.36566/ijhsrd/Vol6.Iss1/209>.

⁹ Alviona Anggita Rante Lembang et al., "Limitation of Absolute Authority of Religious Courts and District Courts in Settlement of Inheritance Disputes," *Legal Discourse* 28, no. 1 (2022), <https://doi.org/10.33061/wh.v28i2.7705>.

¹⁰ Abie Kausar Sholahuddin, "Disparity in Decisions Regarding Homosexual Behavior as Grounds for Divorce (Study of Decisions No. 1319/PDT.G/2015/PA.JS and No. 3868/PDT.G/2018/PA.JT)" (Thesis, Syarif Hidayatullah State Islamic University, 2021).

¹¹ Zakia Nur Kholifah, "Bisexuality as a Ground for Divorce in Case Number 2285/Pdt.G/2023/PA.Mlg Family Law Psychology Perspective" (Thesis, Kediri State Islamic Institute, 2024), <https://etheses.iainkediri.ac.id/16264/>.

¹² Fadhilah Mahfuzah and Helvia Putri, "Deviant Sexual Behavior as Grounds for Divorce in Religious Courts," *Jurnal Hukum Ius Publicum* 5, no. 2 (2024): 164–76, <https://doi.org/10.55551/jip.v5i2.174>.

¹³ Galih Puji Mulyono and Hawu Yosafak, "Analysis of the Phenomenon of Sexually Deviant Behavior (LGBT) in Indonesia from the Perspective of Human Rights Law," *Jurispruden*:

Despite the increasing social and legal relevance of this issue, academic literature at both the global and national levels still shows significant gaps. International research has indeed addressed LGBT rights or the protection of sexual minorities, as Langlois has done.¹⁴ Magni,¹⁵ Grabowska-Moroz,¹⁶ and Earle.¹⁷ However, very little has focused on marital breakdown due to sexual orientation conflicts, particularly in countries with a Muslim majority population. In Indonesia, research is mostly normative-descriptive and has not yet examined how courts interpret and handle similar cases within a legal pluralism framework. Some of this research, including that conducted by Kartono,¹⁸ Andryansyah,¹⁹ Azahra,²⁰ and Badawi.²¹ Furthermore, very limited studies integrate socio-legal theory, Islamic family law, and state law to explain the complexity of legal responses to marital breakdowns based on sexual orientation issues. This gap represents the scope for this research's contribution.

Based on this context, this study aims to analyze how Islamic family law and Indonesian state law respond to marital discord related to sexual orientation, both through written norms and judicial practice. A comparative and socio-legal approach is used to understand the construction of legal reasoning, the flexibility of judicial interpretation, and its implications for certainty and justice for the parties. By offering an analysis that integrates legal pluralism theory, positive legal

Journal of the Faculty of Law, Islamic University of Malang 3, no. 1 (2020): 12–23, <https://doi.org/10.33474/yur.v3i1.1633>.

¹⁴ Anthony J. Langlois, “Making LGBT Rights Into Human Rights,” in *The Oxford Handbook of Global LGBT and Sexual Diversity Politics*, ed. Michael J. Bosia (Oxford University Press, 2020).

¹⁵ Gabriele Magni and Andrew Reynolds, “Why Europe's Right Embraces Gay Rights,” *Journal of Democracy* 34, no. 1 (2023), <https://doi.org/10.1353/jod.2023.0003>.

¹⁶ Barbara Grabowska-Moroz and Anna Wójcik, “Reframing LGBT Rights Advocacy in the Context of the Rule of Law Backsliding. The Case of Poland,” *Intersections. EEJSP* 7, no. 4 (2025), <https://doi.org/10.17356/ieejsp.v7i4.852>.

¹⁷ Megan Earle et al., “A Multilevel Analysis of LGBT (Lesbian, Gay, Bisexual, Transgender) Rights Support Across 77 Countries: The Role of Contact and Country Laws,” *British Journal of Social Psychology* 60, no. 3 (2021): 851–69, <https://doi.org/10.1111/bjso.12436>.

¹⁸ Kartono et al., “Lesbian, Gay, Bisexual and Transgender (LGBT) in Indonesia in the Perspective of Traditional Law and National Resilience,” *Proceedings of the 1st International Conference on Research in Social Sciences and Humanities (ICoRSH 2020)*, Atlantis Press, 2021, <https://doi.org/10.2991/assehr.k.211102.085>.

¹⁹ Andryansyah et al., “Analysis of Sangatta Religious Court Decisions on Divorce on the Grounds of Sexual Disorder,” *Journal of Islamic and Socio-Religious Studies* 2, no. 4 (2025): 991–95.

²⁰ Siski Jasmine Azahra, “Sexual Disorder as a Ground for Divorce: A Study of Decision Number 2907/Pdt.G/2023/PA.Badg” (Thesis, Sunan Gunung Djati State Islamic University, 2024), <https://digilib.uinsgd.ac.id/95902/>.

²¹ Ah. Badawi and Khoiruddin Nasution, “Sexual Deviation as a Ground for Divorce from an Islamic Legal Perspective,” *Millah: Journal of Religious Studies* 20, no. 2 (2021): 417–48, <https://doi.org/10.20885/millah.vol20.iss2.art9>.

norms, and judicial practice, this study seeks to contribute to the global discourse on family law in Muslim countries. The findings of this study are expected to enrich academic understanding of how legal systems address evolving social dynamics and fill a gap in the literature that has so far been understudied.

This study employs a qualitative, juridical-normative approach, focusing on an in-depth analysis of legal norms, Islamic jurisprudence doctrine, and court decisions related to marital dissolution due to sexual orientation. The approaches employed are comparative legal and socio-legal. The socio-legal approach examines the social context underlying the emergence of divorce cases due to sexual orientation, including the socio-cultural dynamics that influence judges' interpretations of the grounds for divorce. The primary data sources for this study include court decisions related to divorce cases that address sexual deviations, Law No. 1 of 1974 concerning Marriage, the Compilation of Islamic Law, and classical Islamic jurisprudence literature such as Wahbah Zuhaili's *Book of Islamic Fiqh Wa Adillatuhu* and Sayyid Sabiq's *Book of Fiqh Sunnah*. The secondary data sources include international academic literature on sexual-orientation-related marital breakdown, human rights commission reports, family law journals, and the works of contemporary scholars on sexual issues from a fiqh perspective.

Data were collected through document analysis, namely the analysis of legal products, court decisions, Islamic jurisprudence literature, and global academic publications, particularly from reputable articles in the fields of gender, human rights, and Islamic family law. This data collection technique was combined with normative content analysis, which was used to interpret the legal concepts of physical/psychological disability, marital fraud, *dharar* (harm), and *mafsadah* in Islamic jurisprudence, as well as grounds for divorce in Indonesian positive law. Furthermore, the data were analyzed using comparative legal analysis to identify points of convergence and divergence between Islamic family law and state law; and theory-based analysis, with reference to the theory of legal realism, to explain how social factors and judges' perceptions influence legal reasoning in sexual orientation cases. This combination of theories allows the research to provide an analysis that is not only dogmatic, but also critical of judicial practices and challenges in legal implementation. With this methodological framework, the research is directed to produce academically relevant findings, contributing to the global discourse on family, gender, and Islamic law.

Discussion

Configuration of Marital Discord Due to Sexual Orientation: Social, Psychological, and Legal Dimensions

The phenomenon of heterosexual marriage involving individuals with non-heterosexual sexual orientations is a social reality increasingly identified in various societies, including countries with strong religious and cultural norms like

Indonesia. In a social context that strongly emphasizes heteronormativity, marriage is understood as an institution that is not only private but also a social symbol reflecting one's adherence to societal norms and expectations.²² Therefore, individuals with minority sexual orientations often face pressure to enter heterosexual marriages to meet the demands of their families, communities, and broader social institutions. This phenomenon is not limited to Muslim or developing countries; several studies have shown similar cases occurring in various countries, including Western societies, where religious, family, or conservative ethnic community norms demand certain sexual conformity.²³ Thus, heterosexual marriage undertaken as an effort to meet social standards, rather than as an authentic relational choice, becomes one of the fundamental factors causing imbalance in husband-wife relations.

The causes of this phenomenon can be traced to various intertwined social dynamics. First, social and religious norms that reject or even criminalize the expression of non-heterosexual sexual orientation leave many individuals without a safe space to express their sexual identity. In such situations, heterosexual marriage is often seen as a "social escape route" to avoid stigma, discrimination, and social sanctions that can include ostracism from family or school, loss of job opportunities, and even threats of violence.²⁴ Second, family structures in many societies, including Indonesia, view heterosexual marriage as a sign of maturity and family honor. Family pressure to "normalize" a child's sexual identity through marriage is often a determining factor in the decision.²⁵ Third, there are very strong social expectations regarding reproduction and the continuation of the lineage; this encourages individuals to marry even if their sexual orientation does not align with heterosexual relationships.²⁶ Ultimately, the

²² Natalia Purnomo and Marselius Sampe Tondok, "Prejudice Against Homosexuals in Indonesia's Heteronormative Cultural Context: The Roles of Cultural Humility and Right-Wing Authoritarianism," *Jurnal Psikologi Tabularasa* 20, no. 1 (2025), <https://doi.org/10.26905/jpt.v20i1.15354>.

²³ Yun Zhang et al., "Family Outcome Disparities Between Sexual Minority and Heterosexual Families: A Systematic Review and Meta-Analysis," *BMJ Global Health* 8, no. 3 (2023), <https://doi.org/10.1136/bmjgh-2022-010556>.

²⁴ Dag Øistein Endsjø, "The Other Way Around? How Freedom of Religion May Protect LGBT Rights," *The International Journal of Human Rights* 24, no. 10 (2020), <https://doi.org/10.1080/13642987.2020.1763961>.

²⁵ Ferdiansyah Thajib, "Discordant Emotions: The Affective Dynamics of Anti-LGBT Campaigns in Indonesia," *Indonesia and the Malay World* 50, no. 146 (2021), <https://doi.org/10.1080/13639811.2022.2005312>.

²⁶ Rinaldi Ridwan and Joyce Wu, "Being Young and LGBT, What Could Be Worse?" *Analysis of Youth LGBT Activism in Indonesia: Challenges and Ways Forward*, *Gender & Development* 26, no. 1 (2018), <https://doi.org/10.1080/13552074.2018.1429103>.

combination of social pressure, moral obligations attached to the institution of the family, and stigma against non-normative sexual identities are the primary causes of marriages that fundamentally lack a foundation of compatible orientations and emotional attractions.

In the Indonesian context, this social dynamic is exacerbated by the absence of inclusive public discourse on diverse sexual orientations. Discourse on sexuality remains heavily influenced by religious moral constructs, leading society to view non-heterosexual sexual orientations as deviant or moral failings. Consequently, individuals experiencing sexual disorientation prefer to conceal their identity and enter heterosexual marriages to maintain social status, family reputation, and community acceptance.²⁷ However, this adaptive pattern then turns into a source of social tension when the reality of hidden sexual identities emerges in household dynamics and gives rise to conflicts that are not only personal, but also related to the social structures that shape marital choices.²⁸ Thus, the social dimension not only explains the formation of the marriage, but also confirms that the resulting rift is a product of a complex interaction between societal pressures, institutional expectations, and the absence of social space for the expression of different sexual identities.

Social pressures that push individuals with non-heterosexual sexual orientations to enter heterosexual marriages not only create socially imbalanced relationships but also significantly impact the psychological well-being of both parties in the household. Individuals who conceal their sexual orientation often experience a persistent identity conflict, between the need to present themselves according to social expectations and the internal need to live authentically. This tension between self-identity and normative demands creates a significant psychological burden, including anxiety, guilt, chronic stress, and emotional exhaustion from having to maintain heterosexual performativity in daily life.²⁹ This condition can develop into psychological distress that affects the capacity to carry out emotional roles in marriage, thus creating distance and an absence of affection that ultimately worsens household dynamics.

²⁷ MV Lee Badgett et al., *LGBT Exclusion in Indonesia and Its Economic Effects* (The Williams Institute, 2017).

²⁸ Rimanto et al., "Ethics of Sexuality in the Household," *Al-Mabsut: Journal of Islamic and Social Studies* 19, no. 1 (2025), <https://doi.org/10.56997/almabsut.v19i1.2013>.

²⁹ Johan Wijaya et al., "Gay Men's Exploration of Maintaining Psychological Well-Being Under the Pressure of Hegemonic Masculinity in Chinese Christian Families," *Calypatra* 13, no. 1 (2024), <https://journal.ubaya.ac.id/index.php/jimus/article/view/7977>.

At the same time, heterosexual couples involved in these types of marriages also experience significant psychological impacts. When a partner's sexual orientation is revealed or revealed through inappropriate relational behavior, they face feelings of betrayal, loss of trust, and emotional confusion about the meaning of their marriage. Many couples describe this situation as a form of emotional betrayal, not because of sexual orientation itself, but because the marriage was built on the premise of an identity that was not fully disclosed from the start. This emotional trauma can develop into depression, low self-esteem, and even a personal crisis regarding their worthiness as partners.³⁰ Therefore, the rift that occurs is not only caused by sexual orientation, but also by the collapse of relational trust which is the foundation of marital relations. This situation creates a cycle of relational dysfunction: social pressure forces marriage, psychological pressure weakens the quality of the marriage, and ultimately, the accumulated emotional tension fuels conflict that leads to dissolution or divorce.³¹ Thus, the psychological dimension is not only a consequence of oppressive social structures, but also a determining factor that connects these social phenomena with the legal implications that will be discussed in the next section.

The accumulation of social pressures and psychological conflicts experienced by couples in marriages involving non-heterosexual sexual orientations ultimately transforms into legal issues when the disharmony enters the realm of litigation. However, when couples seek legal resolution, they are confronted with the reality that Indonesia's positive legal system does not explicitly regulate sexual orientation as a valid ground for divorce. This regulatory vacuum creates a legal limbo condition in which the socio-psychological experiences of couples are not fully accommodated in the available legal structures, thus encouraging judges to engage in creative legal reasoning based on interpretations of these general categories.

In judicial practice, sexual orientation is often argued as a form of “psychological disability,” “psychological violence,” “fraud in a contract,” or the cause of “irreconcilable disputes.” However, this framework is not always adequate because it is not designed to address the complex dynamics of sexual identity. Furthermore, the burden of proof in such cases presents a unique

³⁰ Ayub, “Sexual Orientation Deviations (Psychological and Theological Studies),” *Tasfiah: Journal of Islamic Thought* 1, no. 2 (2017), <https://doi.org/10.21111/tasfiah.v1i2.1851>.

³¹ Luthfa Lutfia Madjid, “Description of the Quality of Life of Homosexuals in Yogyakarta After Coming Out” (Thesis, Universitas Cendekia Mitra Indonesia, 2024).

challenge. Sexual orientation is not an easily proven legal fact, especially when the available evidence is private or digital, and is not always considered sufficiently strong by judges. When judges lack explicit guidelines, decisions become heavily dependent on individual reasoning, the judge's empirical experience, and the court's level of sensitivity to contemporary social issues, which in turn gives rise to inconsistencies between decisions.³²

The phenomenon of marital breakdown due to sexual orientation is not an issue limited to Indonesia, but rather a global problem facing various family law systems worldwide. In several countries with Western legal traditions, such as the United Kingdom, Canada, and Australia, a couple's sexual orientation is often articulated in a more explicit legal framework through the categories of irretrievable breakdown of marriage or non-consummation.³³ This means that sexual orientation is seen not simply as a moral condition or private identity, but as a structural factor that can hinder the normal functioning of marital relations. Meanwhile, countries that still maintain legal frameworks based on religion or conservative values, such as Malaysia,³⁴ or some Middle Eastern countries,³⁵ tends to place this issue in a space of normative ambiguity similar to Indonesia. Thus, it appears that the relationship between sexual identity, marital stability, and legal responses is a universal problem, but it is interpreted differently according to the legal, cultural, and political structures of each country.

This global comparison demonstrates that the problems emerging in the Indonesian context namely, social pressures on individuals with minority sexual orientations, psychological conflicts experienced by both partners, and the lack of an explicit legal framework are part of the global challenge of reconstructing modern family law systems to be more responsive to contemporary social realities. In many countries, academic debate is growing about how legal systems can fairly protect both parties without liberalizing or forcing changes in societal moral

³² Anita Yuliastini et al., "The Legal Politics of Regulation for Lesbians, Lesbians, Gays, Bisexuals and Transgender (LGBT) in Indonesian Law (Discourse Between Punishment and Regulation)," *International Journal of Multi Disciplinary Science (IJ-MDS)* 1, no. 2 (2018), <http://dx.doi.org/10.26737/ij-mds.v1i1.433>.

³³ Stephen Whittle and Lewis Turner, "Queer Europe: New Normative Values for Global LGBT Law | SpringerLink," *Transgender and Intersex: Theoretical, Practical, and Artistic Perspectives* 1 (2016), https://doi.org/10.1057/978-1-349-71325-7_2.

³⁴ Mohd Izzat Amsyar Mohd Arif et al., "Misconduct of LGBT in the Malaysian Law: Law as the Mechanism of Obliteration and Control," *Journal of Advanced Research in Social and Behavioral Sciences* 13, no. 1 (2018): 19–34.

³⁵ Heather Simmons, "Dying for Love: Homosexuality in the Middle East," *Human Rights & Human Welfare* 10, no. 1 (2010), <https://digitalcommons.du.edu/hrhw/vol10/iss1/30>.

values. This debate has given rise to various models of legal responses, ranging from a victim-centered approach to honesty in marriage contracts and relationships (marital transparency). By placing Indonesia within this global context, the analysis of marital breakdown due to sexual orientation not only reveals unique local issues but also indicates that Indonesia is at the heart of global discourses on family law reform, the protection of spousal rights, and the reimagining of marriage amidst changing configurations of sexual identity in modern society.

The Normative Framework of Islamic Family Law on Marital Dissolution: An Analysis of Classical and Contemporary Islamic Jurisprudence

From an Islamic legal perspective, marriage is understood as an institution aimed at achieving spiritual and emotional peace through the values of *sakinah* (love), *mawaddah* (love), and *rahmah* (mercy), which are essential orientations for the sustainability of a household. These goals are not only normative but also serve as an ethical framework for assessing the quality of the husband-wife relationship when faced with the dynamics of family life. The main foundation for building this relationship is the marriage contract, which is seen as a sacred contract (*'uqd dzī syibhat al-ta'abbud*), which contains legal implications in the form of validity, harmony, and consequences that bind both parties. The contract marks the transition from ordinary social relations to legal relations framed by sharia rules, so that every action, right, and obligation that arises afterward is always interpreted in the context of compliance with the ethical and legal principles inherent in the contract itself.³⁶ Thus, the sacred purpose of marriage and the validity of the contract form the normative basis for the entire structure of Islamic family law.

In classical fiqh, marital discord is understood through a relatively limited categorization of the causes of divorce and is closely linked to the patriarchal social structure of the time when it was formed. Scholars of the four schools of thought, such as al-Syafi'i, Mālik, and AbūḤanīfah, and AḥMad ibnḤAnbal emphasized that legal divorce occurs through *talak*, *khulu'*, *fasakh*, and *li'ān* if there is an accusation of adultery that cannot be proven.³⁷ Deviations in sexual behavior are discussed in the context of *fujūr*, *liwāṭ*, *sifah*, or *khiyānah*, but not

³⁶ Shabnam Banoo and Tanveer Ahmed, "Rules of Marriage in Islam: A Comprehensive Analysis," *Journal of Emerging Technologies and Innovative Research* 11, no. 4 (2024).

³⁷ Nuraida Khoirun Nisa, "Forms of Divorce in the Fiqh Books of the 4 Madzhabs," *SAMAWA: Journal of Islamic Family Law* 2, no. 2 (2022): 25–45, <https://doi.org/10.53948/samawa.v2i2.50>.

explicitly mapped to the realm of sexual orientation as understood in modern studies.³⁸ The Maliki school, as explained by Ibn 'Abd al-Barr and al-Qarāfī, expands the reasons for *fasakh* when the behavior of the spouse gives rise to *ḍarar* which are clear, including violence, neglect, and deviant behavior that threatens the moral stability of the family.³⁹

Although classical *fiqh* does not address modern sexual orientation, the concept *ḍarar* (danger/loss) becomes an epistemic bridge that allows for the recognition of various forms of destructive behavior in the household. Scholars such as Ibn Qudāmah (Ḥanbali) in al-Mughnī and al-Kāsānī (Ḥanafī) in *Badā'ī' al-Ṣana'i'* emphasizes that *fasakh* is permissible if a condition causes the honor, physical safety, or dignity of the couple to be disturbed.⁴⁰ This discourse also appeared in Shafi'i jurisprudence through the works of al-Nawawī and al-Suyūṭī which opens up space for the cancellation of the contract when one of the parties experiences psychological disorders, chronic illness, or destructive behavior that threatens the goal of *sakinah*.⁴¹ Even though they did not use the term "sexual orientation", classical scholars acknowledged that harmful sexual behavior (for example compulsive sexual behavior, repeated adultery, or serious moral deviation) could be classified as a 'god for legal intervention'. Thus, classical *fiqh* provides an initial framework for understanding household breakdown through the concepts of *mafsadah* and *hiḍḍal-'ird* (protection of honor), although the category is not yet fully compatible with the issue of sexual orientation in modern discourse.

Meanwhile, contemporary *fiqh* expands the discussion of classical *fiqh* by integrating modern knowledge of sexuality and psychology into the *maqāṣid al-sharī'ah*. Characters like Yūsuf al-Qaraḍawī, Wahbah al-Zuhaylī, and Muṣṭafa Zarqa encourage reinterpretation of categories *ḍarar* to include emotional breakdown, psychological instability, and sexual behavior that leads to the destruction of intimate relationships, including sexual orientation that

³⁸ Abdul Ramli and Abdallah Abdallah, "Politeness in Using the Kinayah of the Koran in Revealing the Meaning of Husband and Wife Sexual Relations," *Journal of Islam in Asia* 20, no. 1 (2023): 328–43, <https://doi.org/10.31436/jia.v20i1.1142>.

³⁹ Nilpa Safitri Daulay, "The Concept of *Fasakh* in Marriage Due to the Defects in Islamic Law Perspective," *Jurnal Budi Pekerti Agama Islam* 2, no. 2 (2024): 146–56, <https://doi.org/10.61132/jbpai.v2i2.166>.

⁴⁰ Fataqia Rahma, "The Concept of Women's Protection in Marriage (Analysis of Ibn Qudamah's Opinions)," *Al-Ahkam Journal* XIV, no. 1 (2023).

⁴¹ Slamet Arofik, "Annulment of Marriage (*Fasakh Nikah*) in Various Legislations," *JAS MERAH: Jurnal Hukum Dan Ahwal al-Syakhsyah* 2, no. 1 (2022): 1–17.

is incompatible with the goals of Islamic marriage.⁴² *Zuḥaylīn al-Fiqh al-Islāmī wa Adillatuh* it is stated that *fasakh* is acceptable when the behavior of the husband or wife causes "obstruction to the achievement of *maqṣad* family," including orientation disorders or the inability to build healthy intimate relationships.⁴³ Contemporary scholars such as Husein Muhammad and Faqihuddin Abdul Kodir in the Indonesian context expand this approach by emphasizing relational equality and protection from psychological violence, so that marital breakdown is not only understood through legalistic texts, but also the dynamics of the couple's emotional well-being.⁴⁴ This approach provides space for the issue of sexual orientation as an objective factor that influences the sustainability of a household without solely judging the morality of the perpetrators.

A comparison between classical and contemporary *fiqh* reveals an important shift from an approach focused on formal moral and legal categories to a relational approach based on *maqāṣid* and family welfare. While classical scholars such as al-Māwardī, Ibn Ḥteach al-'Asqalanī, or Ibn Taymiyyah saw the rift as a violation of the normative structure of marriage, contemporary scholars such as Jasser Auda, Abdullahi an-Na'im, or Khaled Abou El Fadl emphasizes the aspects of substantive justice, relational capacity, and the individual's right to psychosocial protection. In the context of sexual orientation issues, classical *fiqh* tends to categorize it as a behavioral deviation (*liwāt, fahḥIsha*), but contemporary *fiqh* views it as a condition that demands a special approach to assessing the compatibility of marital relations. As a result, marital breakdown is no longer understood simply as a violation of norms, but as a structural failure to fulfill the *maqāṣ* family id which includes maintaining peace, respect and psychological safety.

⁴² Khalid Shah, "Validity of 'Faskh' (Judicial Annulment) of 'Nikah' (Islamic Marriage) Due to 'Shiqaq' (Marital Discord) and Its 21st Century Application," *Australian Journal of Islamic Studies* 10, no. 1 (2025): 41–65, <https://doi.org/10.3316/informit.T2025061400001800797449018>.

⁴³ Bayu Wayan Nugroho, "Wahbah Al-Zuhailiy's Thoughts About Limitations of Disability as a Reason for *Fasakh* in the Book of *Al-Fiqh Al-Islami Wa Adillatuh*" (Thesis, Sultan Syarif Kasim State Islamic University, 2025), <https://repository.uin-suska.ac.id/87397/>.

⁴⁴ Diana Farid et al., "Divorce from a Gender Equality Perspective: God's Command to Implement Egalitarianism in the Household," *Tahkim: Journal of Islamic Civilization and Law* 6, no. 1 (2023).

A Positive Legal Review of Indonesia on Marital Dissolution Due to Sexual Orientation: A Regulatory and Jurisprudential Analysis

The position of sexual orientation within Indonesia's national legal framework is normatively unregulated, particularly in the context of divorce. To date, no legislation mentions non-heteronormative sexual orientation whether homosexual, bisexual, or transgender as valid grounds for divorce. Consequently, the issue of sexual orientation only arises indirectly through articles addressing disharmony or failure to fulfill marital obligations.⁴⁵ This normative vacuum creates wide scope for interpretation for judges, while also creating legal uncertainty for parties experiencing marital breakdown due to changes or disclosure of their partner's sexual orientation.⁴⁶ In the absence of a clear formulation, sexual orientation is ultimately positioned as a contextual factor that explains marital breakdown, rather than as a stand-alone legal basis.

In Law No. 1 of 1974, the normative basis for divorce focuses on proving that the household “cannot be maintained.” The key article in this context is Article 39 paragraph (2), which emphasizes that divorce can only be carried out for reasons that are sufficient according to law. However, this law does not specifically regulate the types of issues that can be grounds for divorce, including sexual orientation. Consequently, judges must interpret whether a partner's sexual orientation can be classified as a general reason for divorce that is regulated in more detail at the level of derivative regulations or legal doctrine. Because sexual orientation is not a legal category in the Marriage Law, this reason does not have explicit normative legitimacy, and therefore must be “translated” through other categories.

Further analysis of the norms in the Marriage Law shows that several articles can be used as entry points to assess rifts caused by sexual orientation, even though they are not specifically formulated. In addition, Article 31 paragraph (1) which emphasizes the position of husband and wife as partners can be used as a normative basis that incompatibility of sexual orientation that leads to a loss of harmony is a violation of the principle of partnership. Thus, even though the law does not contain the category of “sexual orientation,” the factual conditions

⁴⁵ Muhammad Ikhlas, “Sexual Health in Marriage: A Case Study of Divorce Filed Due to Intimacy Problems in a Married Couple,” Al-’Adalah: *Journal of Sharia and Islamic Law* 8, no. 2 (2023), <https://doi.org/10.31538/adlh.v8i2.4359>.

⁴⁶ Mahfuzah and Putri, “Deviant Sexual Behavior as a Ground for Divorce in Religious Courts.”

that arise from it can still be qualified as an inability to implement the fundamental principles of marriage according to the law.

In addition, the relationship between the formulation of the Marriage Law and the principle of monogamy in Article 3 paragraph (1) is also relevant, especially when a certain sexual orientation encourages emotional or sexual relationships outside of marriage that can be considered a form of betrayal. In judicial practice, such relationships are often constructed by judges as acts that violate the principle of fidelity or as a form of "continuous disputes and quarrels," even though sexual orientation is the root of the problem.⁴⁷ This means that positive law indirectly forces judges to subsume through the available categories, so that sexual orientation never stands as a standalone legal issue but rather as a cause processed within other legal categories. This confirms that the Marriage Law relies on a functional approach to domestic harmony, not a moral categorization of sexual behavior or preferences.

In the Compilation of Islamic Law (KHI), the normative problem becomes more complex because sexual orientation is also not explicitly mentioned, while the construction of grounds is more based on the doctrine of *syiqaq* and failure to fulfill marital obligations. The KHI formally formulates grounds for divorce within a descriptive-functional framework. For example, Article 116 of the KHI lists grounds for divorce litigation, such as persistent disputes, misconduct, and inability to fulfill household obligations, but does not explicitly mention sexual orientation.⁴⁸ Therefore, normatively, the KHI places the problem of marital discord due to sexual orientation in the realm of implication: judges and parties will "qualify" facts about sexual behavior or relational incompatibility into one of the existing reasons (e.g., *syiqaq* or reprehensible acts), rather than referring to a clear textual basis for orientation itself. This statement is reflected in the Indonesian legal review which notes that the KHI provides a procedural basis for divorce suits but still relies on the judge's interpretation of the socio-psychological facts in the trial.

Theoretically, KHI carries the legacy of classical *fiqh* (concept *d'Arar*, *'uyūb*, and *shiqāq*) that allow for the recognition of both moral and psychological

⁴⁷ Luluk Latifah and Iskandar Ritonga, "Difference of Divorce Determination in Indonesia: A Study Systematic Literature Review," *Journal of Biometrics and Population* 11, no. 02 (2022): 223–35, <https://doi.org/10.20473/jbk.v11i02.2022.223-235>.

⁴⁸ Husaema and Ermawati, "Divorce According to The Compilation of Islamic Law (KHI) and *Fiqh*," *Proceedings of the International Conference on Islamic and Interdisciplinary Studies* 3 (August 2024): 347–50.

“harm” but the application of these rules to modern phenomena such as sexual disorientation requires contemporary *ijtihād*. International literature confirms that many contemporary scholars advocate a reading of the *maqāṣid* to family issues so that personal law can respond to new phenomena without simply repeating classic moral dichotomies.⁴⁹ These studies propose an approach that shifts the focus from moral judgment to harm mitigation and family protection as the goals of law. Studies that examine the relationship between religious authorities and queer Muslims,⁵⁰ as well as writings that discuss how modern *fiqh* interprets sexual issues,⁵¹ provides theoretical support for efforts to read the KHI functionally for cases involving sexual orientation.

In judicial practice, this terminological vacuum has led to two patterns: first, pragmatic legal construction judges fill the normative vacuum by assessing whether a partner's behavior or condition fulfills the elements of *syiqaq*, psychological cruelty, or breach of obligation as defined in the Compilation of Islamic Law (KHI). Second, inconsistent decisions arise between courts due to the lack of standard guidelines on how to prove and assess orientation or relational incompetence. This reliance on factual evidence (e.g., communication evidence, witnesses, or behavioral patterns) and the variability in judges' sensitivity to contemporary social issues emphasize that the KHI, without additional interpretative guidance (e.g., Supreme Court Circular Letters or judges' guidelines), is prone to producing inconsistent outcomes for affected parties.

Convergence and Divergence between Islamic Family Law and Indonesian Law: Implications for Legal Reform and Protection of Spouses' Rights

Although Islamic family law and Indonesian national law operate within different epistemological frameworks, they share important convergences in maintaining the stability and functioning of households. This convergence can be seen from four substantive points. First, the Harm-Avoidance Principle. Both Islamic family law and Indonesian national law inherently depart from the

⁴⁹ Taufiqurohman and Nelli Fauziah, “The Evaluation of *Maqāṣid Asy-Syarī'ah* on Discourses of the Islamic Family Law,” *El-Usrah: Journal of Family Law* 6, no. 1 (2023): 81–90, <https://doi.org/10.22373/ujhk.v6i1.13035>.

⁵⁰ Sabeehah Ravat and Milton Wendland, “Muslims under the Rainbow: Five Aspects of Reconciling Islamic Faith with Queer Identity,” *International Journal of Undergraduate Research and Creative Activities* 12, no. 1 (2023), <https://doi.org/10.7710/2168-0620.0304>.

⁵¹ Kecia Ali, *Sexual Ethics and Islam: Feminist Reflections on the Qur'an, Hadith, and Jurisprudence* (Simon and Schuster, 2016).

principle of harm prevention as the ethical basis for determining whether a marriage should continue or dissolve. This paradigm is commensurate with the principle of protection which is explicitly present in the Marriage Law and the Compilation of Islamic Law (KHI), where marriage may not be maintained if it causes greater suffering or damage.⁵² The point of convergence is that both legal systems, although based on different epistemologies, both emphasize the importance of ending a marriage when the relationship has become unhealthy, detrimental, or no longer capable of achieving the basic goals of the family, namely peace (*sakinah*), affection (*mawaddah*), and mercy.

Second, the recognition of factual disharmony as a ground for divorce. From an Islamic perspective, factual disharmony in a household has long been recognized as a *shar'i* ground for divorce, as reflected in the categories of *syiqāq* (prolonged conflict), *nushūz* (disobedience or destructive behavior by one of the parties), *darar* (harm or harm), and *'uyūb* (defects or conditions that prevent the achievement of the goals of marriage).⁵³ This paradigm is in line with national regulations, especially Article 39 of the Marriage Law and Article 116 of the Compilation of Islamic Law, which places “continuous disharmony” and conditions that eliminate the function of the household as a legitimate justification for divorce.⁵⁴ Both systems do not require proof of “moral deviation” as a form of normative wrongdoing, but instead focus on the functioning of family relationships. This convergence emphasizes that factual aspects not abstract morality are the basis for assessment, so the primary emphasis is on the household's ability to perform its affective, social, and spiritual functions.

Third, the right to psycho-social protection in marriage. Within the framework of Islamic jurisprudence, the principle *ḥimayah* (protection) and *ḥifẓ al-nafs* (protection of the soul) is the most important part of *maqāṣid al-syarī'*. This requires a safe, supportive, and non-threatening household environment for the couple's mental health. Indonesian national law has a comparable orientation, through arguments for victim protection, both in the Marriage Law and in court decisions, which emphasize the rights of both wives and husbands to a healthy

⁵² Endad Musaddad et al., “Guaranteeing the Rights of Children and Women Post-Divorce: A Comparative Study Between Indonesia and Malaysia,” *Volkgeist: Jurnal Ilmu Hukum Dan Konstitusi*, April 18, 2025, 1–14, <https://doi.org/10.24090/volkgeist.v8i1.12214>.

⁵³ Putri Ayu Lestari, “Gender Equity in Islamic Marriage and Divorce: A Narrative Review,” *Sinergi International Journal of Islamic Studies* 2, no. 4 (2024): 203–14, <https://doi.org/10.61194/ijis.v2i4.611>.

⁵⁴ Husaema and Ermawati, “Divorce According to The Compilation of Islamic Law (KHI) and Fiqh.”

psychosocial environment free from damaging pressures.⁵⁵ Therefore, both Islamic normative frameworks and positive law view factors that disrupt psychological well-being including a partner's sexual orientation not as moral wrongs to be punished, but as variables that influence the continuity of relationships and the quality of family life. This convergence has led to the understanding that psychosocial protection is not an optional extra, but rather an essential element of the concept of family in both legal systems.

Fourth, sexual orientation as an impact factor, not an object of moral judgment. From all the points of agreement above, a substantive convergence emerges that a partner's sexual orientation, when directly related to disharmony, emotional alienation, or psychosocial vulnerability in marriage, is treated as an impact factor not an object of moral judgment. In Islamic jurisprudence, the existence of *darar* is a category that emphasizes the impact on the stability and safety of the household, while national law assesses whether the situation diminishes the family's function as a space for psychological well-being.⁵⁶ Thus, both systems do not essentially judge identity or sexual orientation as faulty, but rather evaluate the extent to which these conditions create a structural inability to foster healthy relationships. This shared orientation demonstrates that Islamic family law and national law, despite their different foundations, arrive at a similar conclusion: dissolution of marriage is justified when the couple's interaction no longer produces benefits and instead causes harm, regardless of the actual cause.

While there are several important points of convergence between Islamic family law and Indonesian national law, the two still exhibit significant epistemological differences in understanding sexual orientation as a legal factor. *Fiqh* operates within a moral-ethical framework based on Islamic texts and legal principles, so that a couple's sexual orientation although not explicitly discussed in classical categories is still assessed through moral parameters, family honor, and the sharia function of marriage. In contrast, national law operates within a paradigm of legal formalism, an evidentiary approach, and constitutional human rights standards that assess facts empirically without incorporating inherent morality as a legal premise. This difference becomes even more apparent when

⁵⁵ Lilis Handayani, "Review of *Fiqh* Legal and Positive Law Regarding Divorce Procedure," *Journal of Economics, Accounting, and Management in Agribusiness* 1, no. 1 (2023): 41–48, <https://doi.org/10.58222/jurekma.v1i1.146>.

⁵⁶ Muhammad Irfanudin Kurniawan and Adi Nur Rohman, "Reasons for Divorce in the Compilation of Islamic Law: An Overview of Islamic Legal Psychology," *Krtha Bhayangkara* 17, no. 3 (2023): 495–504, <https://doi.org/10.31599/krtha.v17i3.782>.

examining the concept of a spouse's "disgrace" or "flaw": classical fiqh associates it with biological, psychosexual, or behavioral conditions that directly impede the functioning of marriage, while national law does not recognize such normative categories. The Marriage Law and jurisprudence only assess whether a household has lost harmony and is no longer fulfilling its function, so sexual orientation is not treated as a "defect" but as a factual situation that may contribute to the breakdown of the relationship.⁵⁷ This methodological divergence results in fundamental differences in the conclusions regarding the legal relevance of sexual orientation, particularly regarding the burden of proof, impact assessment, and validity of divorce claims.

The next divergence is seen in the interpretation space of judges in each judicial system, which creates different patterns of legal reasoning regarding sexual orientation in divorce.⁵⁸ In Religious Courts, judges often have to fill a normative vacuum because the KHI does not explicitly regulate sexual orientation as a reason for divorce, so they rely on *ijtihad qadā'i* to construct sexual orientation as a form of *darar*, *'uḡūb*, or behavior that hinders the achievement of the goals of marriage. In contrast, District Court judges proceed from a framework of constitutional rights such as the right to dignity, psychological protection, and personal freedom and assess factual evidence without attaching moral weight to the sexual identity of the parties.

These differing approaches have led to disparities in rulings and inconsistent standards of proof between the two jurisdictions, indicating that despite points of principal convergence (such as harm avoidance), the implementation of the law in practice still demonstrates fragmented legal logic. This divergence confirms that the integration of Islamic family law and national law still faces structural, methodological, and epistemological obstacles, which directly impact the protection of spouses' rights and the consistency of rulings in divorce cases related to sexual orientation.

The epistemological and methodological divergence between Indonesian fiqh and positive law suggests that family law reform cannot be carried out without a renewal of *ijtihad* that consciously responds to modern issues, including sexual orientation, which is increasingly becoming a socio-psychological reality in

⁵⁷ Handayani, "Review of Legal Fiqh and Positive Law Regarding Divorce Procedure."

⁵⁸ Nurul Khikmah and Karimatul Khasanah, "The Ijtihad Method in the Construction of Indonesian Arbitration Law," *Wahana Islamika* 8, no. 2 (2022): 222–42, <https://doi.org/10.61136/pgents60>.

marital dynamics. *ṣid al-sharī'ah*, especially life protection (*hiḥẓal-nafs*), dignity ('ird), and family stability (*hiḥẓal-nasl*), offers a rational framework for assessing the impact of sexual orientation with a harm-based reasoning approach, not moral judgment.⁵⁹ Thus, contemporary family ijtiḥad needs to incorporate modern psychological findings on sexual identity, internal conflict, spousal trauma, and relationship dysfunction, so that the assessment of marital breakdown is more oriented towards relationship health and not merely on classical normative categories of biological or physical nature. At the national legal level, the need for regulatory reform arises in the form of a revision of the Compilation of Islamic Law (KHI) or at least the development of specific interpretative guidelines regarding how sexual orientation is assessed legally, so as to avoid disparities in decisions between Religious Courts and District Courts. The formulation of new norms based on psychosocial impacts, rather than moral categorizations of the right or wrong of orientation, will strengthen the harmonization between the principle of presumption of human dignity in the state legal system and the principle of *izālat al-d'Arar* in family fiqh.

To bridge the divergences outlined above, a legal harmonization model is needed that goes beyond simply combining two normative systems, but also identifies "minimum common values" that can serve as a shared foundation between Islamic jurisprudence and Indonesian national law. These values include protection from harm, respect for the dignity of spouses, and an objective assessment of the functioning of marriage; all of which can be articulated within a substantive justice framework that emphasizes the actual justice experienced by the injured party.

This approach allows for methodological integration, where Religious Court judges can maintain a normative sharia basis while adopting more precise empirical evidence instruments, while District Court judges can take into account the sensitivity of religious values without sacrificing constitutional principles. Such a harmonized framework is also key to reducing the disparity in decisions that has arisen due to judges' excessively broad interpretation and lack of uniform evaluation standards. Ultimately, a unified interpretation mechanism is needed whether through consistent jurisprudence, technical judicial guidelines, or derivative norms to ensure that divorce cases due to sexual orientation no longer depend on judges' interpretive preferences, but instead adhere to standards that

⁵⁹ Taufiqurohman and Fauziah, "The Evaluation of Maqāṣid Asy-Syarī'ah on Discourses of the Islamic Family Law."

guarantee legal certainty, substantive justice, and the protection of spouses' rights, as demanded by the dynamics of modern society.

Conclusion

This research shows that marital dissolution due to sexual orientation is a multidimensional issue that cannot be understood solely as a moral deviation, but as a socio-psychological dynamic that results in relational dysfunction and potential harm to couples. Islamic family law and Indonesian positive law both provide space for the dissolution of marriage when household harmony can no longer be maintained, although they start from different epistemological orientations: *fiqh* emphasizes ethical-normative foundations and classical concepts such as *darar*, *'uyūb*, and *syiqāq*, while state law relies on legal formalism and factual proof as reflected in Article 39 of the Marriage Law and Article 116 of the Compilation of Islamic Law (KHI). A comparison of the two reveals important points of convergence namely the principle of preventing harm, recognizing factual disharmony, and protecting the psychosocial well-being of couples but also shows fundamental divergences in terms of categories of disgrace, standards of proof, and the scope of judicial interpretation that have led to disparities in decisions. From this synthesis, the research confirms that future legal reforms need to move towards a model that harmonizes the values of substantive sharia justice with modern instruments of proof through the renewal of *ijtihād* based on *maqāṣid al-shari'Ah*, revision of regulations or technical guidelines for the judiciary regarding the assessment of sexual orientation cases, as well as strengthening the integrated interpretation framework so that the protection of couples' rights and legal certainty can be achieved more consistently in the context of a continuously evolving society.

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