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The State of Indonesia's Marriage Law: 50 Years of Statutory and Judicial Reforms

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Abstract

Because of its entanglement with religious norms, Muslim family law reform is a sensitive issue. In Indonesia, the validity, rights, and responsibilities pertaining to Muslim marriage and divorce are regulated by the 1974 Marriage Law and the 1991 Compilation of Islamic Law. The 1974 Marriage Law is both general and pluralistic in character, since it introduced general reforms applying to all religions, while leaving other matters to the legal regimes attached to a person's religion. Muslim family law norms, including several new reforms, were subsequently laid down in the 1991 Compilation of Islamic Law. After 1991, statutory reform of Muslim family law stalled, as differences in opinion between liberal and conservative Muslims proved unbridgeable. This paper argues that, despite these divisions, reform continued – not by actions of the legislative, but by actions of the courts. These actions take two forms: first, the form of court decisions, specifically "activist" judgments by the Supreme Court and judicial review decisions by the Constitutional Court; and second, the form of Supreme Court guidelines that following the introduction of the chamber system in 2011 are issued annually by means of Supreme Court Circulars. By reinterpreting family law norms in light of women's and children's rights, we will show how courts initiated significant non-statutory reforms of Muslim family law. Thus, exactly 50 years following the birth of the 1974 Marriage Law, we shed new light on the role of judicial institutions in reforming and reinterpreting Muslim family law in Indonesia.

Abstrak

Reformasi hukum keluarga Islam selalu menjadi isu sensitif karena berkelindan dengan norma-norma agama. Di Indonesia, keabsahan, hak, dan tanggung jawab perkawinan dan perceraian diatur dalam Undang-Undang Perkawinan Tahun 1974 (UU Perkawinan 1974) dan Kompilasi Hukum Islam (KHI) Tahun 1991. UU Perkawinan 1974 merupakan produk hukum yang umum dan plural. Artinya, UU Perkawinan 1974 memperkenalkan reformasi yang berlaku untuk semua agama, namun rezim hukum yang berlaku bergantung pada agama yang dianut. Norma hukum keluarga Islam, termasuk beberapa reformasi baru, kemudian ditetapkan dalam KHI. Setelah tahun 1991, reformasi hukum keluarga berjalan dengan lambat karena perbedaan pendapat antara kelompok Muslim liberal dan konservatif tidak dapat dijembatani dengan baik. Melalui artikel ini kami berargumentasi bahwa terlepas dari perbedaan pendapat tersebut, reformasi hukum keluarga tetap berjalan – tidak melalui perubahan undang-undang melainkan melalui lembaga peradilan. Reformasi ini terjadi dalam dua bentuk: *Pertama,* dalam bentuk putusan pengadilan, terutama melalui putusan yang bernuansa "aktivisme" oleh Mahkamah Agung dan hasil uji materiil oleh Mahkamah Konstitusi. *Kedua*, melalui pedoman yang dikeluarkan oleh Mahkamah Agung setiap tahunnya, dalam bentuk Surat Edaran Mahkamah Agung sebagai implikasi dari pemberlakuan sistem kamar pada tahun 2011. Lembaga peradilan, melalui reinterpretasi terhadap norma hukum keluarga yang mengedepankan hak perempuan dan anak, telah menghasilkan reformasi hukum keluarga yang signifikan melalui mekanisme di luar perubahan UU Perkawinan. Dengan demikian, tepat 50 tahun sejak lahirnya UU Perkawinan 1974, artikel ini menyoroti peran lembaga yudikatif dalam mereformasi dan menafsirkan ulang hukum keluarga Islam di Indonesia.

Keywords:
Marriage Law; Legal Development; Indonesia; Islamic Law Reform

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Introduction

This year, it has been 50 years since Indonesia adopted the 1974 Marriage Law, the first statute containing unified rules of marriage and divorce in Indonesia's (colonial) history. Specific Muslim family law norms were issued in the 1991 Compilation of Islamic Law (*Kompilasi Hukum Islam*; KHI). After 1991, statutory family law reform progressed slowly, and legal reforms mainly took place as the result of judicial activism (*yurisprudensi*) of the Supreme Court (Bowen, 2003; Huis, 2015) and judicial review by the Constitutional Court after its establishment in 2003 (Butt, 2010). In 2011, the Supreme Court introduced a new mechanism that brought about legal change in Muslim family law: the annual plenary meeting of the Religious Chamber of the Supreme Court. The results of the meetings are published as Supreme Court Circulars, serving as guidelines for judges of the Islamic courts. This article analyzes these guidelines and places them within the historical framework of Indonesian Muslim family law reforms since 1974.

The 1974 Marriage Law unified partly Indonesian family law by introducing important legal norms for all Indonesians (Katz & Katz, 1975; Soewondo, 1977; Cammack, 1989; Cammack et al., 1996), while maintaining the legal pluralism and religious basis of marriage (Bedner & Huis, 2010). For Muslims, additional Islamic family norms were subsequently issued in the KHI, which was issued by presidential decree in 1991. The KHI is consistent with the 1974 Marriage Law and adopted all its reforms, including norms that have their base in *adat* rather than in Islamic jurisprudence – the most telling ones being the rules on limited communal marital property and adopted children (Nurlaelawati, 2010; Nurlaelawati & Huis, 2015). Although specific KHI provisions were controversial among more conservative Muslims, including conservative Islamic judges, today's Islamic courts apply the KHI norms as if they are statutory norms (Nurlaelawati, 2010; Huis, 2015).

In the first decade of the 2000s, in the spirit of the *Reformasi* movement, two Bills were drafted that intended to reform the current Muslim family norms of the KHI. Both Bills were shelved because of the controversy they caused between conservative and liberal Muslims (Fauzi, 2007; Hooker, 2008; Wahid, 2008). Siti Musdah Mulia, the drafter of the 2004 Bill that reinterpreted Islamic norms based on gender equality, therefore concluded that the promulgation of the KHI had closed the door to reinterpretation of Islamic norms (*ijtihād*) again (Mulia & Cammack, 2017). This deadlock in statutory reforms continues today, meaning that legal change mainly occurs through non-statutory means.

Although the door to *ijtihād* has been closed to legislators, judges at all judicial levels (Constitutional Court, Supreme Court, Appellate Islamic Courts, first-instance Islamic courts) continued to consider social change in their application of Muslim family law, effectively generating legal change. For the past three decades, family law judges have considered Muslim family norms of the Compilation of Islamic Law in light of the public good (*maṣlaḥat*), gender equality, protection of women and children, and (other) societal changes. Rulings of the Constitutional Court, such as the discriminatory marital age in the 1974 Marriage Law (discussed below), required legislative amendments, and a number of Supreme Court decisions have become case law (*yurisprudensi tetap*) in the sense that they are generally followed by lower courts (Huis, 2015: 238-249).

The Supreme Court, as the highest adjudicative authority, plays a crucial role in preserving legal unity (Feteris, 2017; Cross & Harris, 2004). However, in Indonesia, the development of case law (*yurisprudensi*) and doctrine (*doktrin*) has not progressed systematically enough to reach such legal unity (Bedner, 2013). Therefore, the Supreme Court has developed a chamber model, which, since 2011, has divided the Supreme Court into

criminal law, civil law, religious law, military law, and administrative law chambers. Muslim family law falls under the supervision of the religious chamber of the Supreme Court.

One of the features of the chamber system is annual plenary meetings where the Supreme Court judges discuss contemporary legal issues and attempt to come to a common view on the most pressing issues. These Supreme Court views are published in circular letters (*Surat Edaran Mahkamah Agung*/ Circular), which serve as guidelines for judges in future adjudication. Although these Circulars, in essence, are not a recognized formal legal source, they have persuasive binding force and may form an attractive alternative for judges compared to compilations of selected judicial decisions (*buku yurisprudensi*) and technical guidelines (*petunjuk teknis*). A closer look at family law policies issued through Circulars indicates that several of the guidelines concern the responsibilities of the husband/father in marriage and divorce and are formulated to better guarantee women's and children's rights. This article will demonstrate that several must be considered family law reforms.

The objectives of this study are the following: (1) to give an overview of how legal change in the field of Muslim family law has taken place in Indonesia with a special focus on the role of judicial decisions in these reforms; (2) to analyze how guidelines issued as Supreme Court Circulars have changed family law norms for Muslims in Indonesia.

Method

The research methods used for this paper are doctrinal and legal historical research. Doctrinal research consists of the normative analysis of the law, whereas historical legal research focuses on changes in Indonesian family law over time. Doctrinal analysis was carried out with due consideration for the plural background of the relevant family law principles – in this case, the Shafi'ite *fiqh, adat,* and civil law backgrounds of Indonesian Muslim family law and focussing on specific Indonesian Muslim family law norms, particularly concerning divorce and its consequences for women and children. The historical approach looks at continuity and change reflected in the family norms issued through Supreme Court Circulars, placing the family law norms contained in Supreme Court Circulars in their historical context.

This paper is structured as follows. Firstly, the paper will focus on reforms in statutory family law. We will provide an overview of Muslim family law norms that applied to Indonesian Muslims before the issuance of the 1974 Marriage Law. Subsequently, the 1974 Marriage Law reforms are discussed and placed in the context of the previous legal situation. Furthermore, we discuss the continuities and changes in the 1991 Compilation of Islamic Law and argue that the "reforms" introduced by the Compilation more resemble the codification of traditional Indonesian Muslim family law practices. The second part discusses non-statutory Muslim family law reforms in Indonesia. We show how Supreme Court and Constitutional Court judgments significantly contributed to family law changes, even if core Islamic norms and values were retained. Finally, we turn to the guidelines established by the Islamic chamber of the Supreme Courts in annual plenary meetings. We show how the Islamic chamber sets new norms to protect wives and children from the adversarial consequences of divorce. Some of these norms are clear reinterpretations of Muslim family law in the light of the best interests of the child and the protection of women.

Muslim Family Law Reforms through Legislation: an Overview

This section discusses the reforms of the 1974 Marriage Law and places these reforms within the context of the Indonesian Muslim family law tradition of that time. Next, the 1991 Compilation of Islamic Law will be discussed as it has evolved into the primary source for the

Islamic courts in Indonesia (Nurlaelawati, 2010). We will show how the norms in the Compilation of Islamic Law reflect more continuity than change, as it adopted both Marriage Law norms and norms from the Indonesian Family law tradition.

Muslim Marriage and Divorce Rights before the 1974 Marriage Law

The colonial government of the Netherlands-Indies never issued a Marriage Law pertaining to Muslims. In 1882, the Dutch formally established Islamic courts on Java and Madura as part of the legal system, with jurisdiction in marriage, divorce, and inheritance matters. These early Islamic courts applied uncodified *Shafi'ite fiqh* and local customary law (*adat*). Elsewhere, customary courts and the colonial court for the indigenous population (*landraad*) also had to apply Islamic law as far as it has been received into the customary law of the local population in accordance with *Indische Staatsregeling* Article 134 (Huis, 2015: 39-40). This section draws from Indonesian handbooks discussing *fiqh* norms applying to marriage and divorce in Indonesia (Nuruddin & Tarigan, 2004; Suma, 2004; Syarifuddin, 2006; Nasution & Aini, 2007; As-Subki, 2010).

Before the regime of the 1974 Marriage Law, men and women did not have equal divorce rights. Under traditional *Shafi'ite fiqh* applied in Indonesia, a husband was allowed to repudiate his wife through the pronunciation of the *ṭalāq* and was not required to go to court or provide legal grounds for this. Within a three-month waiting period (*'iddah*) following a *ṭalāq*, a couple can reconcile. During the *'iddah,* the wife may not marry, and the husband's responsibility to provide maintenance (*nafkāḥ*) and shelter for his wife continues. If the *'iddah* passes, or if it is a third *ṭalāq,* the divorce becomes irreversible (*bā'in*). In addition to maintenance and shelter during the *'iddah*, the husband is also expected to provide a consolation gift (*mut'ah*) following the *ṭalāq*. Alternatively, the husband can divorce by *li'an,* a pledge before the judge in which the husband swears that his accusation of the adulterous behavior of his wife has been confirmed. A *li'ān* divorce is always final and does not require a *mut'ah* consolation gift. *Li'ān* divorces, however, only very seldom occur in Indonesia.

Women cannot repudiate their husbands under *Shafa'ite fiqh*, but several other divorce procedures are available. The first method is that women can divorce through *faskh,* a procedure in which the wife asks a judge to annul the marriage on legal grounds based on witness evidence. Grounds for *faskh* annulment of marriage include impotence; incurable illness of the husband; adulterous behavior (*zinā*); other forms of reprehensible behavior (*maksiat*); severe cruelty of the husband; or the husband's failure to provide maintenance in accordance with the standards of his wife's social status. In the second method, a wife could negotiate a divorce with her husband through a procedure called *khul'* or *khulū'*. In this procedure, the wife offers her husband a part of her dower (*mahr*) in exchange for his pronunciation of the *ṭalāq*. Both *faskh* and *khul'* divorce are irreversible divorces (*ṭalāq bā'in*), which means that the husband has no duty to provide maintenance during the wife's *'iddah* period.

The third divorce method available to Muslim women in Java was the *shiqāq* divorce procedure, based on continuous discord. According to Van den Berg, the colonial Adviser on Islamic Affairs during the 1880s, the *shiqāq* procedure was commonly applied during that time (Berg, 1882). Indeed, the *Compendium Freijer* of 1760, a compilation of Islamic law commissioned by the colonial authorities, describes two varieties of *shiqāq* that existed on Java: first, a judicial *shiqāq*, in which judges attempted to reconcile the couple and, in case of failure could pronounce the divorce of the couple; second, the extra-judicial traditional *shiqāq* procedure where reconciliation and negotiations were left to representatives of the families of the spouses (*hakam*), and in case the marriage was established to have been broken (*shiqāq*),

the husband was persuaded to pronounce the *ṭalāq* (Huis, 2015: 81). The second case represents the most established interpretation of *Shafi'ite fiqh*. Nonetheless, the apparent commonality of the first variety in Javanese divorce practice (Lev, 1972) suggests that the religious courts had developed a new application of traditional Islamic norms.

The fourth divorce mechanism, which appears to be typical for the Indonesian and Malay world, is the *ta'līq al-ṭalāq*. The institutionalization on Java of *ta'līq al-ṭalāq* has been attributed to Sultan Agung of Mataram (1613-1645), who had issued an ordinance stipulating the practice of conditional divorce (Prins, 1951: 292; Nakamura, 1983: 36-37, 2006: 13). However, Snouck-Hurgronje found in the late nineteenth century that *ta'līq al-ṭalāq* was also common in Aceh, casting doubt on its Javanese origins (Snouck-Hurgronje, 1906). *Ta'līq al-ṭalāq* is a form of the marriage contract in which the husband states during the marriage ceremony that his *ṭalāq* will fall upon his wife under certain conditions. Van den Berg mentioned abandonment of the wife for six months without notice and lack of maintenance as the most common *ta'līq al-ṭalāq* conditions. If the conditions of the *ta'līq al-ṭalāq* were met and the wife wished for a divorce, she could bring a petition to the *penghulu*, who had to establish whether one of the stated *ta'līq al-ṭalāq* conditions had been met. Consequently, the *ṭalāq* had been enacted (Berg, 1892: 485-486). The institutionalization of *ta'līq al-ṭalāq* in Java, and its practice elsewhere in Indonesia, meant that the husband uttered the conditions of the *ta'līq al-ṭalāq* in each formal marriage ceremony concluded by a religious official. This must have significantly increased women's legal awareness about their divorce rights under *Shafi'ite fiqh*.

Post-Divorce Rights and Responsibilities under Shafi'ite Fiqh

We already discussed the post-divorce rights of a wife in husband-initiated *ṭalāq* cases related to the husband's continued responsibility to provide housing, clothing, and maintenance for his wife during the '*iddah* waiting period, as well as the *mut'ah* consolation gift. In addition, the wife had property rights. After a divorce, the dower remained the wife's property, except where the marriage had not been consummated. In that case, the wife had to return half of the dower to her husband. All property brought into the marriage by the wife and inheritances received during the marriage remained hers upon divorce.

Moreover, following the divorce, the ex-husband remained responsible for child support for his children, who preferably reside with the mother until they reach puberty (*baligh*). Opinions within *Shafi'ite fiqh* differ regarding how long the child should remain with the mother, and applicable ages range from 5 to 12 years old. In Indonesia, customary practice was somewhat different from Islamic norms as children most commonly were not returned to the father after puberty. In the exceptional case of a child born after a *li'ān* divorce, the ex-husband is not responsible for the upbringing, as he has cut his bond with the child, who is considered to have been born out of wedlock.

In large parts of the Indonesian archipelago, under the influence of the bilateral kinship pattern, marriage generates limited communal property (*harta bersama/harta gono gini*). This means that the goods acquired during marriage are considered communal property. Customary law, or *adat*, was an additional source of *Shafi'ite fiqh* for the Islamic judges in Java and elsewhere in the Netherlands Indies. In the 19th century, Van den Berg explained that in Java, a marriage was considered a partnership (*sharīkah*), in which the increase of family property was seen as the result of the endeavor of both spouses. Van den Berg observed that Javanese Islamic courts recognized this custom in their judgments, applying a 1:2 or an equal division of marital property between the husband and wife (Berg, 1892: 475-476).

The 1974 Marriage Law: Continuity and Change in Muslim Family Law

As said, the 1974 Marriage Law was the first statute that unified family norms in Indonesia and the first statute that codified marriage and divorce norms for Indonesian Muslims. The initial 1973 Marriage Bill, drafted by the Ministry of Justice, would have unified and secularized Indonesian family law to an even more significant extent, yet met strong opposition from Muslim organizations. Negotiations ensued, and the Bill was rigorously revised to accommodate the concerns of Muslim parties (Katz & Katz, 1975).

The 1974 Marriage Law encompassed both continuity and legal change. The most controversial articles of the 1973 Bill were removed. The provision allowing interreligious marriage was omitted, while marriage remained primarily a religious act without the legal possibility of a civil marriage. Another important continuity is that the Islamic courts retained jurisdiction in matters of Muslim marriage and divorce, including polygamous marriages. In areas not regulated by the 1974 Marriage Law, uncodified *Shafi'ite fiqh* remained the primary source for Muslim family law. However, the reforms in 1974 were applied to Muslims, significantly changing Muslim family law in Indonesia. Several of its general provisions are at variance with the traditional *Shafi'ite fiqh* family law norms. However, these legal changes were deemed acceptable as they fit within the Muslim family law reform agenda of the Ministry of Religious Affairs (Vreede de Stuers, 1974; Hanstein, 2002).

Reforms in the 1974 Marriage Law

Since colonial times, the women's movement has struggled for an end to child and non-consensual marriages (Vreede de Stuers, 1974; Cammack et al., 2015). Under traditional *Shafi'ite fiqh*, a Muslim girl could be married off by her custodian (*wali*) without her consent. Marriage age was linked to the first physical signs of adulthood, such as menstruation and ejaculation, meaning that children who had reached puberty were considered marriageable. Arranged and child marriages were recognized by the Islamic courts. The 1974 Marriage Law changed these norms and stipulates that marriage is based on the consent of both parties (Article 6(1)) with the intention of creating a happy family (General Elucidation). Moreover, it established the minimum age for marriage at 16 for women and 19 for men (Article 7(1)). The 2019 Amendment to the 1974 Marriage Law changed the marital age to 19 years for both men and women.

A second set of reforms concerned grounds for divorce. Divorce rates in Indonesia were among the highest in the world in the 1960s, and therefore, it was deemed necessary to discourage divorce (Jones, G.W., 1997; Prins, 1951). The 1974 Marriage Law required judicial divorce based on statutory divorce grounds. This meant a massive alteration of *ṭalāq* divorce for men who previously could divorce their wives without the need to clarify legal grounds before a judge. The 1974 Marriage Law establishes that all divorces must be petitioned to the court (Article 39(1)). Husband and wife are required to provide grounds for divorce (Article 39(2)). The divorce grounds are the same for husband and wife. The General Elucidation to the 1974 Marriage Law lists the divorce grounds which were later adopted into Article 19 of Government Regulation 9 of 1975 on the Implementation of the Marriage Law:

a. One of the spouses commits adultery or becomes a drunk, addict, gambler, or something similar.
b. One of the spouses leaves the other party for more than two years without consent of the spouse and valid reason;
c. One of the spouses is imprisoned for five years or more;

d. One of the spouses inflicts severe violence which is life-threatening to the other spouse;
e. One of the spouses suffers from a handicap or disease such that he or she cannot fulfill his or her marital duties; or
f. Continuous discord between the spouses.

The judicial divorce requirement formed an immense legal change in the male *talak* rights under traditional *Shafi'ite fiqh*. Yet, an essential difference between male-petitioned and wife-petitioned divorce was retained after this reform. A husband petitions the court for a *permohonon cerai* or permission to divorce through *ṭalāq*, whereas a wife petitions for a *gugatan cerai* or a divorce by the judge. Since *ṭalāq* pronunciation by the husband is still required to effectuate the divorce, the Islamic core of divorce was retained. This line of reasoning appeared acceptable to the prominent Muslim organizations in Indonesia (Cammack, 1989: 62).

The divorce grounds for women are substantively very similar to those under the traditional *faskh, ta'līq al-ṭalāq*, and *shiqāq* divorce mechanisms as they were applied by the Javanese Islamic courts (Huis, 2015). By 1938, the organization of judges of Javanese Islamic courts had approved the standard application of judicial *shiqāq*, while the Ministry of Religious Affairs had included *ta'līq al-ṭalāq* in all standard marriage contracts in 1955 (Lev, 1970). Divorce, in some ways, became more difficult for Javanese women following the 1974 Marriage Law, as they lost the possibility to negotiate a consensual and relatively uncomplicated out-of-court *ṭalāq* divorce with their husbands through the *khulū'* procedure. Of course, the 1974 Marriage Law had a more considerable impact on women's divorce rights in communities where Muslim women traditionally had less access to divorce.

A third set of reforms was related to the restrictions on men's rights to polygamy, an issue that had typically divided women's organizations in the colonial period (Vreede de Stuers, 1960). According to the Marriage Law, marriage is basically a monogamous institution (Article 3). Polygamous marriage requires prior permission of the Islamic court, which may only allow it when the following conditions are met: the wife cannot carry out her conjugal duties; she has become disabled or terminally ill; or she is infertile. The husband must provide evidence of the first (and second or third) wife's consent to the marriage, sufficient means to support all his wives, and a statement that he will treat all his wives and their children fairly (Article 4-5). Thus, the Marriage Law finally settled the polygamy debate through a similar technique used to reform the *ṭalāq*: the Islamic norm was retained but made conditional to administrative requirements.

A fourth reform concerned the responsibility of the father to provide child support to children residing with the mother. This responsibility already exists under *Shafi'ite fiqh*, yet what changed was the duration of the father's responsibility. According to the most established interpretation in *Shafi'ite fiqh*, childhood ends when a girl has her first menstruation and a boy his first semen discharge. The 1974 Marriage Law adopted the Colonial Civil Code norm and stipulates the child's responsibility until it reaches 21 years or gets married.

The 1974 Marriage Law does not establish general spousal support (alimony) rights following divorce. Alimony rights for the wife (other than a continued responsibility during the '*iddah* waiting period) are unknown in traditional *Shafi'ite fiqh*, as the husband's responsibility to provide maintenance ends after the divorce has become final. While a general right to spousal alimony is absent, the court can order the husband to continue to provide maintenance to his wife following divorce (Article 34). Moreover, the Indonesian government introduced spousal alimony rights for the wives of civil servants and military staff (Huis, 2015: 99).

The inclusion of limited communal property (*harta bersama*) into the 1974 Marriage Law can be seen as the codification of both customary practices and case law of the Supreme Court. As described earlier, the concept of communal property was well-rooted in Javanese *adat* and other ethnic communities in Indonesia with bilateral or matrilineal kinship. In its judgment 51/K/Sip/1956 of 7 November 1956, the Supreme Court declared that the concept of equality in the division of joint marital property applied throughout Indonesia – also to patrilineal societies (Katz & Katz, 1975: 679). Article 37 of the 1974 Marriage Law followed this Supreme Court judgment and stipulated an equal division of joint property between husband and wife.

The Compilation of Islamic Law as the New *Fiqh* of Indonesia

Following the 1974 Marriage Law, many areas of Muslim family law remained uncodified. This meant that judges continued to apply traditional *Shafi'ite fiqh* to fields not regulated by the 1974 Marriage Law. In the late 1970s, a commission of the Ministry of Religious Affairs and the Supreme Court prepared a plan to compile substantive national Muslim family law and inheritance norms (Hanstein, 2002: 377-378). In 1984, the commission gained support from President Suharto, which was illustrative of a more general shift in the New Order's policies towards Islam (Liddle, 1997).

The main sources for the KHI were the standard *Shafi'ite fiqh* works and works from other traditional Islamic schools (*madhhab*), with national legislation, case law, and foreign codes as additional sources. The drafting process included consultation with 166 *ulamas*, Islamic court judges, Muslim scholars, and legal scholars (Hanstein, 2002; Nurlaelawati, 2010). The Compilation's aim was to establish substantive Muslim family norms that were both in compliance with the 1974 Marriage Law and acceptable to Indonesian *ulamas*, Islamic court judges, and civil society.

The KHI was presented as the 'living *fiqh* of Indonesia' because the *ulamas* had stated their agreement to the Compilation—and therefore, the government claimed, a national *ijma* had been reached (Nurlaelawati, 2010). The 1991 KHI is structured as a statute, but legally speaking, it does not have the status of a Statute, as it was introduced by presidential Instruction in 1991 and has never been passed by Parliament. The KHI adopted all general family law regulations of the 1974 Marriage Law, reformulated into a more Islamic language, and presented as modern Islamic interpretations of *fiqh*. The KHI adopted the principle of consent to marriage, the marital age, judicial divorce, grounds for divorce, communal property provisions, and polygamy conditions of the 1974 Marriage Law. The limited adjustments that the KHI made were in harmony with the original provisions of the Marriage Law. The Compilation contains one significant change to the 1974 Marriage Law: whereas the 1974 Marriage Law chose to stay quiet about interreligious marriage, the KHI explicitly disallows marriages between Muslims and non-Muslims following the position that the Indonesian Ulama Council had taken on the matter in a 1983 *fatwā* (Manan, 2006; Butt, 1999; Pompe, 1991).

In the field of divorce, the KHI added two extra divorce grounds and one divorce procedure to those listed in the 1974 Marriage Law: the *ta'liq al-ṭalāq* and apostasy (*murtad*) as divorce grounds and *khulū'* as divorce procedure. Traditionally, *ta'liq al-ṭalāq* and *khulū''* were the most common divorce procedures in Java. *Khulū'* traditionally was not a judicial divorce, yet, as the 1974 Marriage Law made *ṭalāq* divorce subject to judicial proceedings, the practice of *khulū'* must now be brought before a judge.

The KHI further regulated and specified women's maintenance rights following a divorce. In the case of a non-final divorce (a divorce that can be revoked by the couple during the '*iddah* waiting period), the husband has an obligation to provide a consolation gift (*mut'ah)*. In irrevocable divorces (*ṭalāq bā'in*), the *mut'ah* gift is only a recommended act (*sunnah*) and is thus voluntary. Only ex-wives in non-final divorces petitioned by the husband have a right to maintenance during the waiting period ('*iddah*), provided the divorce is not caused by their disobedience (*nushūz*). There are no spousal support rights when the divorce is final. Significantly, the KHI stipulates that all wife-petitioned divorces (*gugat cerai*) lead to final divorces, and women, therefore, lose their rights to maintenance during the '*iddah* when they file for divorce. As we will see below, this stipulation was recently discussed in a plenary meeting and altered by the Islamic chamber of the Supreme Court.

Further specifications were also made regarding child custody. Recognizing the reform of the 1974 Marriage Law, the Compilation provides that the father has the legal obligation to financially support his children until they reach the age of 21 or are married. This is especially relevant for children residing with the mother and thus is linked to custody. In the KHI, custody for infants under the age of 12 years, in principle, will be designated to the mother, while above 12 years, the child's own preference will be the primary consideration in custody designations. The codification of custody and child support terminated a situation in which unclarity existed regarding the age of maturity and the age at which a child is considered dependent on the mother.

In summary, if we look at the 1991 KHI and the 1974 Marriage Law from the perspective of legal change, it appears that especially the Marriage Law introduced some far-reaching reforms, while all reforms of the Compilation of Islamic Law remained close to legal practice developed after 1974. The innovative aspect of the Compilation of Islamic Law was its drafting process, the attempt to create consensus (*ijmā'*) by presenting the adopted norms of the 1974 Marriage Law as reinterpretations (*ijtihād*) of traditional Islamic law.

Reform through Judicial Decisions after 1991

As mentioned in the Introduction, following the issuance of the KHI in 1991, statutory Muslim family law reform in Indonesia stalled. Despite efforts by women activists, including Muslim feminists and others, to promote a more gender-equal family law, this had limited success. During the first decade of the 21st century, three Bills were drafted and circulated, which would turn an amended Compilation of Islamic Law into a Statute, but all were shelved as the reform-minded and conservative policymakers could not agree upon a final text (Hooker, 2008; Huis & Wirastri, 2012; Huis, 2015). Below, we will show that despite the lack of consensus, the gradual legal change did take place through activist decisions of the Supreme Court and judicial review by the Constitutional Court, causing changes in the everyday legal practice of the Islamic courts.

Legal Change through Supreme Court Decisions

In theory, the Supreme Court's role in providing guidance through its judgments and case law (*yurisprudensi*) can contribute significantly to the development of law. In Indonesia, the position of Supreme Court judgments in the legal system is not always clear, as it may take a long time before landmark decisions (*yurisprudensi*) are recognized as legal sources with a similar status to precedents (*yurisprudensi tetap*). In Muslim family law, several *yurisprudensi* have reached a status similar to *yurisprudensi tetap*, in the sense that these decisions are followed by the Islamic courts.

The first landmark case concerns the introduction of the concept of broken marriage divorce and broken marriage, leading to the legal possibility of no-fault divorce. As discussed, the 1974 Marriage Law introduced judicial divorce based on certain divorce grounds. All divorce grounds are quite specific, except the divorce ground of "irreconcilable marital strife" (Article 19 (f) of the 1975 Government Regulation). The scope of Article 19(f) would be established through court decisions. Issues that had to be solved revolved around the following questions. What would count as irreconcilable differences? Would a failed attempt to bring the parties together suffice? Can the divorce be awarded if the party filing the divorce is responsible for the marital strife?

Through several decisions, the Supreme Court developed an interpretation resembling the "broken marriage" principle in which the fault of persons is irrelevant (no-fault divorce). On 5 October 1991, the Supreme Court overturned a case in which the High Islamic Court rejected a divorce petition of the husband based on the reasoning that the petitioner himself was at fault (Supreme Court case 38/K/AG/1990). The Supreme Court judged that the law was not applied correctly by the Islamic high court of Padang, since the high court had tried to establish who was at fault. It reasoned that in cases on the grounds of Article 19 (f), it suffices to establish continuous marital strife, and it is not appropriate to hold one of the parties responsible for the broken marriage, as this will have a negative impact on the relation between the two parties and on their children.

Similarly, in a judgment of 18 June 1997 (Supreme Court judgment 534/K/AG/1996), the Supreme Court argued that if one person is persistent in pursuing a divorce, the marriage must be considered broken: 'if the hearts of the two parties are already broken, the marriage cannot be repaired when [only] one of the parties wants to heal the marriage, because when the marriage is continued, the [other] party who wants to break up the marriage will do anything possible to undermine the marriage.' Ever since, the Supreme Court has been consistent in awarding divorces based on the grounds of irreconcilable marital strife without assigning fault (Huis, 2015: 241-244).

The next landmark decision concerns communal property in case the wife is the breadwinner. We have seen how the 1974 Marriage Law adopted limited communal marital property as a norm with equal division following divorce. At the same time, the Marriage Law stipulates that the husband is the breadwinner and the wife is responsible for domestic duties. What if the husband had not contributed to the communal property and did not fulfill his role as the breadwinner? Would this have consequences for his rights to marital property? In a case decided on 26 April 2011, the Supreme Court decided that the wife can be awarded a larger share if the husband has failed his responsibility to provide maintenance and awarded three-quarters of the limited communal property to the wife (Supreme Court judgment 266 K/AG/2010).

Constitutional Review by the Constitutional Court

The Indonesian Constitutional Court was established in 2003 and has made several important decisions in the field of family law. It upheld the polygamy restrictions of the 1974 Marriage Law, the requirement to register a marriage, and the requirement to marry according to your religion (Butt, 2010; Cammack et al., 2015). Besides continuity, the Constitutional Court has also been responsible for three important legal changes: 1. the civil relationship between father and biological child; 2. the increase in the marital age for women to 19 years is equal to that of men; and 3. the possibility of a post-nuptial agreement.

To start with the first, according to Article 43 of the 1974 Marriage Law, a child born out of wedlock only has a civil relationship with the mother. The 1991 Compilation adopted

this norm but replaced the term 'civil relationship' with '*nasab*', a traditional Islamic filial relationship. In 2012, the Constitutional Court passed a judgment in a constitutional review case petitioned by celebrity Machica Mochtar and her son, who was born into an informal polygamous marriage of Machica Mochtar with former Cabinet Secretary Moerdiono (Constitutional Court ruling 46/PUU-VIII/2010). Previously, a petition for recognition of the child had been denied by the Supreme Court on the grounds that the polygamous marriage lacked prior court permission. Therefore, the marriage could not be registered and had no legal consequences (Cammack et al., 2015). Unsatisfied that a father apparently had no responsibilities towards his born-out-of-wedlock child, Machica Mochtar decided to put the constitutionality of Article 43 to the test.

The Constitutional Court's ruling amended Article 43 (1) of the 1974 Marriage Law into: "a child born out of wedlock has a civil relationship with the mother and her family, and besides that, a civil relationship with the man as her father if a blood relationship has been proven by technological means and/or other legal proof." As this ruling was inconsistent with established family law norms it triggered debates among legal scholars. Unclear was what exactly was meant by this "civil relationship" and whether it constitutes a full civil relationship (or Islamic *nasab* relationship) between child and biological father equal to one between a father and a legitimate child. The Constitutional Court was quick in denying that it intended to legitimize extra-marital children and stated that the sole purpose of the ruling was to protect children born into non-marital and extra-marital relationships – including informal marriages (Hukumonline, 2012).

The Indonesian Ulama Council subsequently issued a *fatwā* (opinion/advice) on the issue, which underlined that a biological relationship does not establish a *nasab* relationship, as this contradicts the Islamic child -born-into-marriage principle. Remarkably, the fatwa stated that courts are allowed to impose obligations on the biological father as a form of penalty (*hukuman ta'zir*) for the father's actions and the government's duty to protect children. The fatwa mentions the possibility of obliging the father to provide child maintenance and an obligatory bequest (*waṣiyyat wājibah*) – a similar requirement as exists for adopted children under Article 209 (2) of the 1991 KHI (Nurlaelawati & Huis, 2019).

The second case concerns the constitutionality of the differences in marital age of men and women. In 2017, three women petitioned for a constitutional review of Article 7 of the 1974 Marriage Law that establishes the marital age at 19 years for men and 16 years for women. The petitioners all had been married when they were children and argued that child marriage violates women's constitutional rights, including rights to education, health rights, and the right to grow up and develop. The central claim was that the different marital ages for men (19 years) and women (16 years) in Article 7 of the Marriage Law violated Article 27(1) of the 1945 Constitution, which states: "All national citizens are equal before the law and in governance and are obliged to respect the law and government without exception."

The Constitutional Court ruled that Article 7 of the Marriage Law indeed was discriminatory and, therefore, needed to be revised by the government within three years' time (Constitutional Court ruling 22/PUU-XV/2017). The 2019 Amendment to the Marriage Law changed Article 7 accordingly and set the marital age at 19 years for both men and women. One of the unintended consequences has been a steep rise in the number of marriage dispensation requests petitioned at the religious courts (Horii & Wirastri, 2022). This shows that social practices of marriage do not necessarily follow legal changes and that customary practices of marriage – including child marriage, are not easy to change without changing the mindset of communities.

The third Constitutional Court ruling relates to the difficulties couples in international marriages faced when they had not made a pre-nuptial agreement pertaining to the separation of marital property. Article 29 of the 1974 Marriage Law only allowed for pre-nuptial (not post-nuptial) agreements. The issue must be viewed in relation to Article 36 of the 1960 Basic Agrarian Law (1960 BAL), which regulates that foreign citizens may not own land in Indonesia. Article 21 of 1960 BAL stipulates that because of the prohibition for foreigners to own land, communal property in international marriages that take the form of land will fall to the State if the property is not sold within a period of one year. The petitioner was a woman who was married to a Japanese man. She argued (among others) that Article 21 of the 1960 BAL violated her constitutional rights under Article 28 H (4) of the 1945 Constitution, which stipulates, "Every person has the right to private property, and no one can take this right away," and that as a consequence of her international marriage, she cannot acquire any property in the form of land as this will be taken away by the state.

The Constitutional Court ruled that Articles 21 (and 36) of the 1960 BAL are not unconstitutional as the government has the right to protect access to the land of national citizens by limiting the rights of foreigners. However, the Constitutional Court found an alternative solution. It ruled that Article 29 of the 1974 Marriage Law, which only mentions pre-nuptial agreements, violates couples' freedom to contract and has to be revised, allowing for post-nuptial agreements and alterations to pre-nuptial agreements. Thus, couples in international marriages can at any time make arrangements to separate property so that the spouse with Indonesian nationality can enjoy his or her right to own property (Constitutional Court ruling 69/PUU-XIII/2015).

Guidelines Issued through Supreme Court Circulars

Since the introduction of the one-roof legal system in Indonesia, the Supreme Court has been granted the competence to issue internal regulations (*Peraturan Mahkamah Agung* / PerMA). In practice, these PerMAs substantially increase the law-making powers of the Supreme Court. Through a PerMA, the Supreme Court introduced the chamber system in 2011. In the chambers' annual plenary meetings, legal issues are discussed that, according to the members of the Supreme Court chamber, require guidance. The results are published as Supreme Court Circular (*Surat Edaran Mahkamah Agung*; SEMA). The idea is that the plenary meetings of the chambers of the Supreme Court and the circulation of the meetings' results as guidelines will promote more consistent decisions throughout the court system. In what follows, we discuss a selection of such guidelines that have the potency of changing Muslim family law practice in the Islamic courts.

The first set of guidelines concerns retroactive marriage registration (*isbāt al-nikāḥ*). The Islamic Chamber established that polygamous marriages could not be registered retroactively as polygamous marriages require prior court permission, but that other unregistered religious marriages (*nikāḥ sirrī*) can be registered – as long as these do not violate the law. This standpoint is in accordance with legal practice at the Islamic court, where tens of thousands of Muslim marriages are registered retroactively by Islamic courts every year (according to statistics of Badilag published on its website, in 2020, a total of 47362 marriages were registered retroactively). As a result of this, the Supreme Court also answers the question of whether it regards religious marriages that remain unregistered as valid or not (Bowen, 2003; O'Shaughnessy, 2009) with: "Yes, it does".

Another important issue discussed in the plenary meeting is related to the 2012 Constitutional Court ruling concerning the civil relationship between a child born outside a marriage and his biological father. On the question of whether children born into informal

marriages can be legitimized, the Islamic chamber maintained that the marriage must be registered retroactively first through *isbāt al-nikāḥ*. Following retroactive registration, a child can be registered as a legitimate child – born into a valid marriage. This implies that a child born into an extra-marital or informal polygamous relationship cannot be registered as a legitimate child of the biological father and that the civil relationship between father and child in such cases is also less strong in terms of attached rights and responsibilities but that those rights and responsibilities have yet to be determined.

In the Circular of 2018, the Islamic chamber restated that informal polygamous marriages cannot be registered retroactively yet mentioned that in the best interests of the child, the status of the children can be determined by Islamic courts. As a result, in current legal practice, fathers of children born outside marriage or born into informal marriages – including polygamous marriages, can be registered as a marginal note in the birth certificate and family card without formally legitimizing the child (Horii & Wirastri, 2022; Nurlaelawati & Huis, 2015).

A second set of guidelines concerns court orders instructing the husband to pay his post-divorce responsibilities to his wife, as established in the court order, prior to the *ṭalāq* pronunciation. This practice had developed within Islamic courts to ensure the implementation of such court orders by husbands (Huis, 2015). In the plenary meeting of 2014 (published as one of the guidelines through Supreme Court Circular in 2015), the issue was discussed by the Islamic chamber, which decided that payment of post-divorce rights prior to the divorce is not allowed as such payment is premature, based on the reasoning that when the *ṭalāq* has not been pronounced yet, no divorce has taken place. In 2017, the plenary meeting discussed the issue again in light of the new Supreme Court Regulation 3 of 2017 concerning Guidelines for Adjudicating Legal Cases involving Women. To better protect women from the consequences of divorce, it was decided to revoke the norm of the 2015 Circular and allow to order payment by the husband prior to the *ṭalāq*.

In the Circular of 2018, the Islamic chamber decided that the Islamic post-divorce rights of *mut'ah* and maintenance during the '*iddah* waiting period can also be awarded in wife-petitioned cases (*cerai gugat*) as long as the wife is not established to be *nushūz,* an Islamic legal concept often translated with disobedience but that in the Indonesian context is a status judges do not easily award to women (Huis, 2015). Similar to what was established for these Islamic post-divorce rights in male *ṭalāq* cases, the court can order the husband to pay the sum of the established *mut'ah* and spousal support during the '*iddah* prior to the pronunciation of the *ṭalāq* and subsequent issuance of the divorce letter.

The third set of guidelines concerns the enforcement of child support orders. The 2015 Circular includes two norms pertaining to child support. The first guideline concerns the issue that the established amount of child support loses value over time because of inflation. The Islamic chamber of the Supreme Court decided that courts may order an amount of child support and add the addition that this amount is to be increased by 10% - 20% per year. Thus, courts can protect women and children from the consequences of inflation. The second guideline regarding child support orders concerns the difficulty of enforcement (Huis, 2015: 267). The idea had developed within the Islamic courts to tie failure to pay child support to the property of the husband. If the husband did not pay alimony, the property would be put in foreclosure. In the 2015 Circular, the Islamic chamber rejected this practice without providing an explanation. The rejection by the Supreme Court is likely linked to the opinion within *Shafi'ite fiqh* that the failure of the father to fulfill his responsibility to pay child support does not constitute a debt, as this opinion was the basis for a number of similar judgments within the Islamic courts (Huis, 2015: 248). In the Circular of 2021, the issue was discussed again,

and the Islamic chamber changed its mind. The Islamic Chamber decided that based on the best interests of the child principle and the 2017 Supreme Court Regulation on the Adjudication of Legal Cases Involving Women, if it appears that a husband does not pay child support, foreclosure of his property may be requested by the wife to enforce the child support order.

The next reform through Supreme Court guidelines concerns child custody. The Islamic chamber, in 2017, discussed the right of children to be brought up by their parents. In Indonesia, there is no legal option for joint custody, as custody is always designated to only one of the parents. This norm has not been changed. However, to ensure that children can meet both parents, the Islamic chamber established the guideline to include the phrase into custody decisions that the party who has been assigned custody is obliged to provide access to the parent without custody to meet their child(ren). Moreover, the courts are advised to warn parents that failure to do so can be grounds to reverse the custody decision. Although not made explicit in the guideline, this norm is clearly inspired by Article 7 (1) of the Child Protection Law, which establishes the right of the child to be brought up by his/her own parents.

The last guideline concerns the problem that a child's living situation may deteriorate following divorce, especially if the parental home is communal marital property that must be sold so that it can be divided between the spouses. The Supreme Court decided that based on the best interests of the child principle, the division of marital property, if it concerns the residential home of the child(ren), must be delayed until the child reaches the age of 21 years or is married. As in the husband's requirement of payment of post-divorce rights, the Islamic chamber again used its competence to specify procedural norms and instigate changes in legal practice that can have a significant social impact.

The norms established in the Circulars only have the status of guidelines, and it remains to be seen how these new norms will be followed by the Islamic courts. We believe that their normative potential must not be underestimated as circulars published by the Supreme Court have strong persuasive power within the legal system. Just as important, these guidelines are indicative of the reform-mindedness of the Islamic chamber and thus will support judges in passing judgments that consider women's and children's best interests.

Conclusion

In this paper, we have analyzed Muslim family law developments in Indonesia in the framework of the 50th anniversary of the 1974 Marriage Law. We have described how the 1974 Marriage Law was a landmark law, as for the first time, traditional Muslim Family Law in Indonesia was reformed by introducing general norms, many of which had an origin outside the Indonesian Muslim Family Law tradition. The 1991 KHI, promoted as the "living *fiqh* of Indonesia", constituted both the completion of the adoption process of the Marriage Law norms into Indonesian Muslim family law and the end of a codification process of Islamic family law norms as applied in Indonesia. Following its incorporation into the KHI, the validity of the norms of the 1974 Marriage Law is no longer questioned by judges of the Islamic courts.

This paper shows that when attempts to reform the 1991 Compilation through statutory reforms proved unfeasible, Muslim family law reform continued through legal practice. Supreme Court judgments introduced the principles of no-fault divorce and broken marriage, while the Constitutional Court introduced biological fatherhood – a civil relationship between the biological father and his "illegitimate" child. Moreover, the introduction of the chamber system in 2011 meant that the Islamic chamber of the Supreme Court was established with the competence to issue guidelines based on annual plenary meetings of the chamber where pressing legal issues are discussed. We have shown how these guidelines draw from norms and principles outside the Islamic legal framework to reinterpret – not replace(!) Muslim family

norms. This is mainly done by introducing procedural changes that have legal and social impacts. A close reading of Muslim family law norms shows that even though the 1974 Marriage Law has only seen a few amendments in its 50 years of existence, the door of *ijtihād* (Islamic reinterpretation) is not closed – at least not in judicial practice.

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Supreme Court circulars

Surat Edaran Mahkamah Agung Nomor 1 Tahun 2022 tentang Pemberlakuan Rumusan Hasil Rapat Pleno Kamar Mahkamah Agung Tahun 2022 sebagai Pedoman Pelaksanaan Tugas bagi Pengadilan

Surat Edaran Mahkamah Agung Nomor 5 Tahun 2021 tentang Pemberlakuan Rumusan Hasil Rapat Pleno Kamar Mahkamah Agung Tahun 2021 sebagai Pedoman Pelaksanaan Tugas bagi Pengadilan

Surat Edaran Mahkamah Agung Nomor 2 Tahun 2019 tentang Pemberlakuan Rumusan Hasil Rapat Pleno Kamar Mahkamah Agung Tahun 2019 sebagai Pedoman Pelaksanaan Tugas bagi Pengadilan.

Surat Edaran Mahkamah Agung Nomor 3 Tahun 2018 tentang Pemberlakuan Rumusan Hasil Rapat Pleno Kamar Mahkamah Agung Tahun 2018 sebagai Pedoman Pelaksanaan Tugas bagi Pengadilan.

Surat Edaran Mahkamah Agung Nomor 1 Tahun 2017 tentang Pemberlakuan Rumusan Hasil Rapat Pleno Kamar Mahkamah Agung Tahun 2017 sebagai Pedoman Pelaksanaan Tugas bagi Pengadilan.

Surat Edaran Mahkamah Agung Nomor 3 Tahun 2015 tentang Pemberlakuan Rumusan Hasil Rapat Pleno Kamar Mahkamah Agung Tahun 2015 sebagai Pedoman Pelaksanaan Tugas bagi Pengadilan.

Surat Edaran Mahkamah Agung Nomor 7 Tahun 2012 tentang Rumusan Hukum Hasil Rapat Pleno Kamar Mahkamah Agung Sebagai Pedoman Pelaksaan Tugas Bagi Pengadilan.