

# **PROGRESSIVE READING OF CHILD CUSTODY IN INDONESIAN MARRIAGE LAW FROM A GENDER JUSTICE PERSPECTIVE (COMPARATIVE STUDY OF LAW NO. 1 OF 1974 AND THE COMPILATION OF ISLAMIC LAW)**

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## **Abstract**

Disputes over child custody often occur after a divorce. Although the rule on child custody has been regulated in laws and regulations, it is allegedly not responsive enough to gender justice that gives child custody to one party based on the particular type of genitals. So, this triggers gender inequality and injustice. This article analyses the problem of establishing child custody descriptively and analytically with a gender approach as a tool of analysis. It concludes that the laws and regulations in Indonesia regarding the determination of child custody are still classified as gender-biased and have not been responsive enough to the issue of gender justice. The reciprocal interpretation model (*qira'ah mubadalah*), as a new approach in understanding the text, if it applied in the following rules then it can be interpreted by the perspective of distinction between men and women who place both as human subjects that are whole and equal. Thus, both the mother and father are likely to have the same opportunities in child custody as long as they have qualified abilities in terms of childcare.

**Keywords:** Reading, Progressive, Child Custody, Gender.

## **Abstrak**

*Sengketa hak asuh anak kerap kali terjadi pasca terjadinya perceraian. Meskipun peraturan tentang hak asuh anak sudah diatur dalam peraturan perundang-undangan, namun disinyalir belum cukup responsif terhadap keadilan gender yang memberikan hak asuh anak kepada salah satu pihak berdasarkan jenis kelamin tertentu. Sehingga hal ini memicu kesenjangan dan ketidakadilan gender. Artikel ini menganalisis permasalahan penetapan hak asuh anak secara deskriptif analitis dengan pendekatan gender sebagai tool of analysis. Artikel ini sampai pada sebuah kesimpulan bahwa peraturan tentang penetapan hak asuh anak masih tergolong bias gender dan belum cukup responsif terhadap persoalan keadilan gender. Model penafsiran resiprokal (qira'ah mubadalah), sebagai pendekatan baru dalam memahami teks, jika diterapkan dalam memahami peraturan tersebut dapat ditafsirkan dan dimaknai dengan perspektif resiprokal antara laki-laki dan perempuan dengan memposisikan laki-laki dan perempuan sebagai subjek yang sama dan setara. Dengan demikian, baik ibu maupun ayah sama-sama memiliki peluang yang sama dalam hak asuh anak, sepanjang mereka memiliki kemampuan yang mumpuni dalam hal mengasuh anak..*

**Kata Kunci:** Membaca, Progresif, Hak Asuh Anak, Jenis Kelamin.

## **Introduction**

A Divorce in a marriage is a necessity to be regulated in laws and regulations in Indonesia. Despite the idea of marriage's objective is to establish a happy and lasting family, many marriages end of in divorce for variety reasons, including financial difficulties, opinion differences, and so on. The condition indeed becomes an irony, where it is very much at odds with the purpose of the marriage itself as stipulated that marriage is a man and a woman's spiritual connection as husband and wife in order to build a happy and everlasting family or household based on the Godhead, according to Law Number 1 of 1974 on Marriage (hence referred to as Marriage Law).<sup>1</sup>

As mentioned in the article, marriage is a bond between husband and wife that is eternal throughout life. Unfortunately, many marriages have to break up in the middle of the road either due to death or divorce. The effects of divorce, as a legal event, not only result in termination of civil relation between husband and wife but also affect

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<sup>1</sup>Republic of Indonesia, *Law Number 1 of 1974 on Marriage*, 1974, Article 1.

other legal aspects such as inheritance, shared property, and even child custody. The dispute over child custody has become crucial in divorce cases in court. In the context of dispute resolution in court, there are at least 2 (two) methods offered in the Koran and Hadith to resolve the dispute, namely: (1) proof of legal facts (adjudication) and (2) dispute resolution through peace (reconciliation).<sup>2</sup> Of these two methods, dispute resolution through peace effort is considered to be better in resolving the child custody if both parents agree to this.<sup>3</sup> This method is in line with the divorce case settlement process where reconciliation is a mandatory phase that must be carried out in a divorce case.<sup>4</sup> If the reconciliation process has not been successful, then the adjudication process will be taken to continue the dispute resolution process.

The regulations on child custody are set out in Article 45 Paragraph (1) on Marriage Law, which provide that both parents are responsible for keeping and educating their child to the best of their abilities. Furthermore, Paragraph (2) states that the obligations of the two parents referred to in Paragraph (1) of this article continue until the child marries or can stand on his/her own, whoever responsibility persists despite the two parents' marriage breaking up.<sup>5</sup> Both passages stress the importance of parents ensuring that their children are cared for and educated until they reach maturity even though the parents are divorced. The obligation to watch over and care for the children is one form of child's rights fulfillment, considering that the rights of the child has been inherent since born. In line with this, Law Number 35 of 2014 explains that children's pride and dignity must remain guaranteed, shielded, and protected from all threats and obstacles, and they have to live optimally and get none of the acts of discrimination and inhumane violence.<sup>6</sup> It implies that both father and mother have equal responsibility for their child's upbringing until he/she reaches

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<sup>2</sup>Syahrizal Abbas, *Mediasi dalam Perspektif Hukum Svariah, Hukum Adat dan Hukum Nasional* (Jakarta: Fajar Interpratyama Offset, 2010), 157.

<sup>3</sup>Faridaziah Syahrain, "Penetapan Hak Asuh Anak Di Bawah Umur Akibat Perceraian Perspektif Hukum Islam," *Lex et Societatis* 6, No. 7 (2017): 102–110.

<sup>4</sup>Republic of Indonesia, *Law Number 7 of 1989 on Religious Courts*, 1989, Article 65.

<sup>5</sup>Republic of Indonesia, *Law Number 1 of 1974 on Marriage*, 1974, Article 45, Paragraphs (1) and (2).

<sup>6</sup>Republic of Indonesia, *Law Number 35 of 2014 on Amendments to Law Number 23 of 2002 on Child Protection*, 2014, Article 2.

adulthood or marries as a form of protection for the *maslahah* of children.<sup>7</sup>

The provisions of child's custody regulate more assertive and detail in the Compilation of Islamic Law (KHI) in Article 105 and Article 156. Article 105 KHI in detail states:<sup>8</sup>

In the event of a divorce:

- a) In the event of a divorce, the mother has the right to care for a child who is not yet *mumayyiz* or under the age of 12;
- b) In the case of the child reaching *mumayyiz* age, the child has the right to select between the father or mother as the holder of the right to care.
- c) His father is responsible for the child's up bringing.

The provisions will be different if the mother who had initially taken care of the child died. Concerning this condition, in Article 156 Letter (a) KHI mentions the order of persons entitled to the right to care and preserve for the child, namely:<sup>9</sup>

"The following are some of the consequences of a divorced marriage:

- a. A Child who has not yet *mumayyiz* is entitled to get the *badhanah* along with the mother, unless the mother died then her position is replaced by:
  1. Women in a direct line from the mother side;
  2. Father;
  3. Women in a direct line from the father side;
  4. Sister of the child' concerned;
  5. Women who are blood relatives from the father side."

The regulations on child's custody in KHI seem to be more applicable than the Marriage Law. The reason is, if there is a dispute related to the struggle for child custody, it is easier for judge to decide based on KHI legal basis because the provisions in KHI are more *lex certa* and *lex stricta*<sup>10</sup> compared to the Marriage Law. That is why it can

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<sup>7</sup>Adi Nur Rohman, "The Existence of *Maslahah Mursalah* as the Basis of Islamic Law Development in Indonesia", *KRTHA BHAYANGKARA* 13, No. 2 (2019): 251-260

<sup>8</sup>Republik Indonesia, *Kompilasi Hukum Islam*, 1991, Article 105.

<sup>9</sup>*Ibid.*, Article 156, Letter (a).

<sup>10</sup> This term is commonly known in criminal law. In the context of national criminal law, the measurement of the principle of validity of legality includes *lex scripta*, *lex certa* and *lex stricta* or based on written law and clear and strict rules so that the

be said that the determination of child custody in the Marriage Act is like the saying of *'far from the fire'*. Because in reality, the child care and preservation even though charged to the both parties, will be impossible for the divorcee parents. Hence, it is the role of the court to determine for one party to obtain the child's custody. The provisions for the child's care and preservation in the Marriage Law are only conceptually described, so the interpretation is still needed in its application. Unlike the Marriage Law, KHI more specifically determines that custody and child care are given to the mother if the child is not yet *mumayyiz* (under the age of 12). Despite the fact that the two regulations are utilized as basic guidelines, the judge will still decide and determine the child's custody based on the aspect of justice for the child's survival.

As for the second provision of family law above, which is adopted from Islamic law, is considered to have a slower rate of development. For this reason, an effort to radically change the rule is needed for both regulations especially the Marriage Law, both in terms of the development process and through institutionalization. Besides, the development of law can also be conducted by negotiating in terms of new interpretations of the text.<sup>11</sup> The family is thought to be the smallest social unit in various countries and plays an essential role in national character formation.<sup>12</sup> As a result, the advancement of Islamic law in the realm of family law, such as child custody disputes, is an unavoidable requirement. As time changes, the demands for technological and scientific developments and the influence of reform in the law field require that the *mujtahid* return to the process of concluding the law (*istinbath al-hukm*) and legal discovery (*rechtrinding*) of new legal issues.<sup>13</sup> One of which is to use new methods and approaches that can see legal issues proportionally according to the needs of the times.

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principle of legality is not justified based on customary law. See I Gde Yasanegara, "Urgensi Asas Legalitas dalam Pembaharuan Hukum Pidana Nasional di Indonesia," *Krettha Dyatmika* 2 13, No. 1 (2016): 1–17.

<sup>11</sup>Dr. Sadari, "Who Speaks for Islamic Family Law? Debates on Islamic Law Compilation (KHI) in Indonesia," *Journal of Islamic Studies and Culture* 6, No. 1 (2018): 11–30.

<sup>12</sup>JM Muslimin, "The Sociological Explanation of Indonesian Muslim Family: Continuity and Change," *Journal of Indonesian Islam* 13, No. 2 (2019): 395.

<sup>13</sup>Muhammad Amin Summa, *Hukum Keluarga Islam di Dunia Islam* (Jakarta: PT. Raja Grafindo Persada, 2010), 4–5.

One perspective that can be used in viewing and reading a text is a gender approach. Gender is a notion that aims to define the distinctions in men's and women's characteristics in terms of social and cultural factors. The terms of gender and sex have significant differences in meaning. When viewed from the side of sex, the difference between men and women lies in biological factors such as anatomical forms of the body, reproduction, hormones, and other physiological characteristics while the gender sees differences in men and women from different aspects such as social, cultural, psychological and non-biological.<sup>14</sup>

In both private and public spheres, gender ideas encourage justice and equality between men and women. However, when viewed from social reality, it is not entirely appropriate where the position of women is not always the same and equal to men.

In principle, religious practices that occur in society are not necessarily in line with Islam in *syariat* as the teachings of religion *an sich*.<sup>15</sup> This non-uniformity could be due to a theological understanding of a text, or it could be different conditions of space and time. The shape of the place and time here provides space for local culture to be able to color the patterns and systems of everyday life, including gender relations. Gender relations between men and women are considered to trigger a noticeable gap caused by social construction taking part in this section. From here, the experts believe that gender is a social construction that is built based on social conditions coupled with the influence of religion in it that prioritizes and puts forward men over women (patriarchy). Nina Nurmila, a gender practitioner, considered that almost all countries adhere to patriarchal culture, including Indonesia, although the level of thickness varies among countries.<sup>16</sup> This culture prioritizes men in all respects so it contributes to the formation of style and culture in Indonesian society. This condition, according to Kathryn Robinson, is common in an ideology that legalizes the power of differential gender. Furthermore, she mentioned it in

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<sup>14</sup>Nasaruddin Umar, *Argumen Kesetaraan Gender Perspektif Al-Quran* (Jakarta: Dian Rakyat, 2010), 31–32.

<sup>15</sup>Imani Mohammad and Charlie Lehmann, "Women's Rights in Islam Regarding Marriage and Divorce," *Journal of Law and Practice* 4, No. 3 (2011): 1–13.

<sup>16</sup>Nina Nurmila, "Pemahaman Agama dan Pembentukan Budaya," *Karsa* 23, No. 1 (2015): 1–16.

ideologies that ‘naturalize’ differential gender power by substituting ideology for history, the construction of gender difference citing biological specificities is frequent. In Indonesian political debates on gender, natural sex roles or ‘traditional’ disparities between men and women are frequently mentioned ‘*it has always been so*’.<sup>17</sup>

Gender as an approach, sees the provisions of the norms related to child custody above considered gender-biased. It can be seen from the regulations on the stipulation of child custody given to one party based on specific sex. So, in gender understanding, there is an imbalance in placing the child custody. Regulations are a source of material law for Court justices when determining cases in the framework of procedural law. For this reason, a study of rereading juridical texts is deemed necessary with a gender justice reading model. Therefore, this article will deeply examine and analyze the provisions of child custody law in the Marriage Law and Islamic Law Compilation with progressive and gender-justice reading model. Thus, the topic was raised because the struggle for child custody is high in the Religious Courts, and it requires an in-depth study to realize adequate justice.

The writer formulates some of the issues that will be discussed in this essay based on the preceding description. *First*, are the legal provisions in determining child custody in Indonesia following the principles of gender justice? *Second*, how is the juridical text reading model related to child custody with gender justice?

## Methods

This research is included in legal doctrinal research, where the researcher uses a legal approach. In addition, the researcher instrumented the gender perspective as an analytical tool. The legal documents employed are basic legal materials such as marital laws and Islamic law compilations. The search for legal material begins with a literature review, which is then descriptively assessed using content analysis.

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<sup>17</sup>Kathryn Robinson, *Gender, Islam and Democracy in Indonesia* (London: Routledge, 2009), 10.

## **Custody as a Form of Child Protection**

Divorce, regardless of the reasons, will have a severe impact on the child. A child who is supposed to get love and affection from the parents becomes impeded because of parents' separation. This event will continue to ring in the child's life until he/she becomes an adult. Moreover, the issue of custody will always be a serious problem that comes next which adds sorrow to the child because of the loss of togetherness with the parents. Robert E. Emery even stated that if faced with such conditions, the biggest problem of a child is not because of the acceptance of the party to follow, but the obligation to choose itself is the real problem.<sup>18</sup>

If traced in Arabic terms, caring for children is identified with two words, namely *kafalah* and *hadlanah*. Both means caring for children who are still young after the breakup of a marriage relationship. Amir Syarifuddin considered both the *kafalah* and *hadhanah* were the legal consequences of the breaking up of the marital relationship between husband and wife and there were one or more young children.<sup>19</sup> However, the emergence of *hadlanah* can be caused by divorce and also due to death. Both of them will leave the child who is immature and unable to take care of his/herself.<sup>20</sup>

Meanwhile, Satria Efendi stated that care for child starting from birth to the age of seven or eight is called the period before *mumayyiz*. In comparison, care for child starting from the age of seven before the age of puberty is called the *mumayyiz* period.<sup>21</sup>

Apart from the different phases of childcare, the childcare itself is a form of child protection. Child protection is a mandate from the state which specified the rights of a child's needs must be guarded, nurtured, and fulfilled. The child's rights in question are the rights to obtain special protection, opportunities, and facilities that enable the child to develop healthily and reasonably, has a name and nationality from birth,

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<sup>18</sup>Robert E. Emery, *Renegotiating Family Relationships: Divorce, Child Custody and Mediation* (New York: The Guilford Press, 2012), 14.

<sup>19</sup>Amir Syarifuddin, *Hukum Perkawinan Islam di Indonesia antara Fiqh Munakahat dan Undang-Undang Perkawinan*, Cet. ke-11. (Jakarta: Prenada Media, 2006), 327.

<sup>20</sup>Andi Syamsu Alam and M. Fauzan, *Hukum Pengangkatan Anak Perspektif Islam* (Jakarta: Kencana, 2008), 114–115.

<sup>21</sup>Satria Effendi M. Zen, *Problematisa Hukum Keluarga Islam Kontemporer Analisis Yurisprudensi dengan Pendekatan Ushuliyah* (Jakarta: Prenada Media, 2004), 170–171.



receive social and health security, get adequate nutrition, housing, recreation, obtain the education, care and specialized treatment for the disabled, and raise in love and security atmosphere as far as possible under the protection and supervision of parents' responsibilities.<sup>22</sup>

## **Juridical Review of Child Custody in Indonesia**

Child custody disputes typically intersect with divorce cases and divorce will not be possible without marriage. On an ideal level, marriage ties should be in line with the sound of Article 1 of the Marriage Law that a marriage bond aims to build a happy and eternal household. But not all marriages run smoothly as initially intended. Many things lay behind the breaking of a marriage bond. Marriage Law Article 38 states that weddings can be terminated because of 3 elements, namely: (1) death, (2) divorce, and (3) court decisions.<sup>23</sup> If you look further, among the three reasons for the termination of the marriage, it can be said that divorce is the one that causes the most disputes over child custody. Both father and mother like to argue the most entitled to preserve and care for children. No doubt if this is the case, the judge referred to material legal resources on child custody as stipulated in the Marriage Law and KHI.

Regarding child custody, at least two regulations govern this matter, Article 41 and 45 of Marriage Law and Articles 105 and 156 of KHI. As explained before, one of the breakups of marriage is a divorce, in addition to other causes that can even terminate the marriage. However, in contrast to other reasons, divorce has legal consequences that are specifically related to disputes over the struggle for child custody. The following are the obligations of caring for child after a divorce, as stated in Article 41 of the Marriage Law.<sup>24</sup>

“As a result of the breakup of marriage due to divorce:

- (a) When there is a dispute about child custody, the Court decides whether the mother or father is still obligated to care for and educate their child solely in the child's best interests.

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<sup>22</sup>Setyowaty, *Aspek Hukum Perlindungan Anak* (Jakarta: Bumi Aksara, 1990), 12.

<sup>23</sup>Republic of Indonesia, *Law Number 1 of 1974 Concerning Marriage* Article 38.

<sup>24</sup> *Ibid.*, Article 41.

- (b) The child's father is responsible for all of the child's living expenses and education fees. If the father is unable to fulfill the commitment, the Court may order the mother to pay the costs.
- (c) The Court may order the ex-husband to pay the ex-living wife's expenses or establish an obligation for her."

Both parents share responsibility for the child's care and education according to Article 41. Both are equally obliged to bear the costs of maintenance when the father is considered inadequate. The court can determine the mother to help. It is also stated in article 45: 1) Both parents are responsible for maintaining and educating the child to the best of their abilities. 2) The parental obligations mentioned in paragraph (1) of this article apply until the child marries or is ready to stand on his/her own, and these bonds endure even if the parents' marriage has dissolved.<sup>25</sup>

The Marriage Law has prescribed the care and education obligations of the child to both parents, mother and father, based on the rules above. But when the court decided the divorce case, another problem that subsequently surfaced was an issue relating to which party was given custody for the child, that in child custody disputes, it was usual for each party to feel most entitled to preserve and care for their child.

If referring to Law Number 23 of 2002 on Child Protection (Child Protection Act), there is a term of 'fostering authority' which has an element of closeness to child custody. Fostering authority is the power to care for and nurture the child. Fostering authority, according to Article 1 Number 11, is the ability of parents to nourish, educate, nurture, protect, and raise the child according to their religion, capabilities, talents, and interests.<sup>26</sup>

Furthermore, Article 26 states that parents are responsible to the child to nurture, care for, educate, and protect.<sup>27</sup> These two articles again say that both parents are jointly obliged to preserve and care for the child. It has not yet been stated precisely as to which party is given custody when they are separated, so it can be said that these two articles

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<sup>25</sup>*Ibid.*, Article 45.

<sup>26</sup>Republic of Indonesia, *Law Number 23 of 2002 on Child Protection*, 2002, Article 1, Paragraph 11.

<sup>27</sup>*Ibid.*, Article 26, Paragraph (1), Letter (a).

are still unable to answer the issue to whom the childcare rights are given after divorce.

Compared with the two regulations above, it seems that KHI is more able to answer that question. Article 105 of KHI expressly in detail, states that in the event of a divorce, the mother has the right to care for a child who is not yet *mumayyiz* or who is not yet 12 years old. So, when the child has already been *mumayyiz*, the child has the option for choosing between the father or mother as the holder of the right to care.<sup>28</sup>

The above provisions indicate two conditions that may occur in terms of childcare. *First*, if the child is not yet *mumayyiz* (under the age of 12), then the right of care is given to the mother. *Second*, when the child is already *mumayyiz* (over the age of 12), the child is given custody and has the option of joining the father or mother. If there is a condition where the mother who had been caring for the child died, then Article 156 of KHI specifies those who can replace the position as mentioned above.<sup>29</sup>

The regulations mentioned above are a source of material law for judge to decide cases in court. Besides, a judge must also be able to see living values in the community. That is why Satjipto Raharjo considered that a decision uses not only the regulation logic but also social logic and conscience. He further said, to be able to make such a decision, a judge besides having intellectual intelligence must also has spiritual intelligence. Spiritual intelligence is not limited to a particular benchmark, it is contextual in seeking truth and justice and deeper values (transcendent).<sup>30</sup> As the case in making decisions on child custody, a judge must look at the laws that live in a society to protect the child's best interests. Meanwhile, if it only refers to the written law then the decision given can be felt to be less than fair as in the case of child custody.

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<sup>28</sup>Republik Indonesia, *Kompilasi Hukum Islam*, Article 105.

<sup>29</sup>*Ibid.*, Article 156.

<sup>30</sup> Satjipto Raharjo, *Membedah Hukum Progresif*. (Jakarta: Kompas, 2008), 16–21.

## **Gender Readings on Child Custody Regulations**

As previously stated, Indonesian law stipulates that both parents, the father and mother, are responsible for the child offspring. Both parents are responsible for raising and educating their child according to Article 45 of Marriage Law. Likewise, the Child Protection Act outlines the obligation of parents to provide protection, guidance, and care for their child following their religion and abilities, talents, and interests. Even if a marriage is terminated due to divorce, both the father and mother must continue to look after and educate their child solely in the best interests of the child, according to Article 41 Letter (a) of Marriage Law. When there is a disagreement about who has custody of the child, the court makes a decision. If it stops at this point, then who is more entitled to the child custody if the two separates will become a question. This question will be difficult to answer if it only refers to the provisions above, because generally everything in general alone determines the obligations of both parents to care for the child without explaining further possibilities if the parents separate.

The next provisions notably in Articles 105 and 156 of KHI provide an answer to that question. The child who is not yet *mumayyiz* (under the age of 12) has parental rights transferred to the mother under Article 105 of KHI. If the child is already *mumayyiz* (above the age of 12), the parental rights might be handed to the child himself to choose between the father or mother. Even further, Article 156 stipulates the people who are entitled to childcare if the mother who is supposed to receive childcare rights died.

It should be understood that the task and responsibility to nurture and educate the child is not an easy problem. This task must be given to people who are genuinely able to do it with all the capabilities they have, ranging from material to non-material things such as love and affection, outpouring of attention, and other needs. The child's best interests must be the foundation in carrying out the obligations and responsibilities of caring for the child as prescribed by the Child Protection Act.

Regulations on child custody, both in Marriage Law and KHI, when viewed from a gender perspective do not seem to meet the spirit of fulfilling the best interests of the child. Determination of child custody rights should not be given automatically granted to a certain gender without looking at the other aspects that are in line with the

principles of childcare such as the abilities and capabilities of the caregiver, morals and character aspects of personality, environmental factors of residence, and also other aspect prioritizing of child's best interests. The Articles 105 and 156 of KHI which state that child custody is given to the mother and some groups of women, indicate that the determination of child custody is decided based on gender, not on the ability to educate and care for children. Yet as it is known that the task to educate and care for children is a burdensome task, considering that children are the future that will continue the nation's leadership relay.

The issue of gender bias, in the text of the regulation stipulating child custody, harms the spirit of equality and gender justice. A benchmark of the ability and capability to care for children should not be seen from a particular gender. It must be seen from the skills of the individuals regardless of gender. Although most people acknowledge that a mother is better suited to caring for and raising the child, there might be other conditions that require child custody to be given to a father instead of a mother.

The gender lens considers that such beliefs are a cultural product that is built based on the influence and habits of the local community. In a patriarchal system, the role of men is positioned as a central while women and children are placed as a support. From this, we can see the patriarchal system subordinates the roles and functions of women and children over men.<sup>31</sup>

## **Examples of Child Custody Cases**

In this regard, there is a compelling case in Malaysia concerning a child custody dispute involving a husband and wife, Low Swee Siong and Tan Siew Siew, and their 11-year-old daughter Low Bi-Anne. The couple married on August 2, 1999. When they divorced on June 19, 2006, the child custody fell to the father. Two years later, the mother applied for custody. As reported on the page of *The Star*, the Malaysian Court persuaded Low Bi-Anne to give her mother a second chance to be able to care for her. Bi-Anne who sat near her father (who was a real estate agent) refused to meet her mother.

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<sup>31</sup>Nina Nurmila, "Feminist Reinterpretation of the Qur'an," *Journal of Qur'an and Hadith Studies* 2, No. 2 (2013): 155–166.

In the trial, Judge Sulong Matjeraie asked Bi-Anne to give her mother a second chance to show her affection. He expressed the desire of the mother who came far from England only to meet with her child. But the child remained reluctant. Another judge named Mohamed Apandi Ali on the panel then tried to explain that his mother had struggled to conceive it for nine months. He also begged the child to provide an opportunity for his mother to meet. Hearing this explanation, the child had her own answers, while crying, she said that it was true that her mother had conceived her and cared for her for nine months in the womb but her father had been caring for her for ten years. The number is far more than the number of care her mother gave when she was pregnant. Another judge named Jeffrey Tan Kok Wha Back assured that her parents loved her very much. But the child remained with the answer that she does not love her mother.<sup>32</sup>

The above case concludes that a mother cannot automatically give love and affection to her child as most people believe. The example above illustrates that even a father can provide the same passion and warmth even more than what is given by a mother. Custody and preservation are not just a transfer of the right to live together. The caregiver must have several commitments and responsibilities. The aspects of morality, living environment, and physical abilities must be the main parameters in determining to whom custody is given not to a particular gender. Because the real ability to nurture and care for children is not monopolized by distinct sexes, but to both parties equally based on strength and ability.

Looking at Articles 105 and 156 of KHI, Ahmad Rafiq considered that the provisions refer to the hadith of the Prophet (PBUH) narrated by Abdullah bin Amr r.a. as follows:

“O Messenger of Allah (PBUH), my son is I who conceived him, my breast milk he drank, and in my room where he gathered (with me), his father divorced me and attempted to separate him from me,” a lady said to the Messenger of Allah. As a result, the Messenger of Allah remarked, “You have more right (to look after him) if you are not married.” (Ahmad’s Hadith, Abu Dawud, and Hakim validate it).

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<sup>32</sup>This case was excerpted from the page “<https://www.tribunnews.com/Internasional/2010/08/13/Kisah-Mengharu-Biru-Perebutan-Hak-Asuh-Anak-Di-Malaysia>,” 2010, n.d. accessed on April 22, 2020.

He clarified that as long as the mother was not married to another man, she had the greater right to care for her child. If the mother marries then the practical custody of the child switches to his father. The reason can be stated that if the mother of the child is married, then most likely, the attention will turn to the new husband and defeat or even sacrifice his biological child.<sup>33</sup>

Another hadith which is also used as a basis in the formulation of articles 105 and 156 of KHI is the hadith narrated by Abu Hurairah r.a. as follows:

One woman said: “O Messenger of Allah SAW, my husband wanted to go with my son while he had benefited me and fetched drinking water for me from the Abi’ Inbah well. Then her husband came, the Messenger of Allah said to him, “O little boy, this is your father and this is your mother, hold both their hands which you want”. So, the child held his mother’s hand then the woman left with her child. (Hadith narrated by Ahmad and the Fourth Imam)

The two hadiths above, still according to Ahmad Rafiq, are used as the basis for the stipulation of Article 105 Paragraph (2) of KHI where the child who has *mumayyiz* age, the child is asked to choose between the two. However, in *Hanafyyah*’s opinion emphasized that a mother still has more right to care for the child because a woman has more love for children.<sup>34</sup> *Hanafyyah* explained that women are generally better able to devote love and tenderness in guiding the child while men usually only have the ability and obligation to guard, protect, give the best to the child physically. Furthermore, *Hanafyyah* scholars require that women who perform *badlanah* are women who are relatives to the child.<sup>35</sup>

The scholars in principle agreed that child custody law is an obligation for both parents<sup>36</sup> regardless of gender. However, scholars disagree in determining who is more entitled to child custody after a

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<sup>33</sup>Ahmad Rafiq, *Hukum Islam di Indonesia*, (Jakarta: Rajawali Press, 2003), 251.

<sup>34</sup>*Ibid.*, 252.

<sup>35</sup>Alam and Fauzan, *Hukum Pengangkatan Anak Perspektif Islam*, 116–117.

<sup>36</sup>*Ibid.*, 115.

divorce occurs, whether the mother owns the right or some people can replace it or the child's right to choose.<sup>37</sup>

Commenting on this, Ibn Rushd explained that child custody is regularly seen from the factors of closeness and gentleness, not based on trusteeship powers such as marriage, *mawali* conception, corpse prayer, and inheritance division.<sup>38</sup> Meanwhile, Wahbah Zuhaili argued that the right of *hadlanah* is a shared right between mother, father, and child. If there is a conflict between these three people then the child's freedom is prioritized.<sup>39</sup>

Protecting the five components of benefit (*maslahah*) as articulated by Imam Syatibi, namely: keeping the religion, preserving the soul, protecting the mind, nurturing the child, and also protecting wealth is a component of child custody.<sup>40</sup> The five components must be used as the primary reference in terms of childcare and maintenance to develop the child into adulthood.

Sequentially, it can be explained that safeguarding child's religion is a fundamental principle of protection for the child. People who care for and nurture must be able to oversee the child's religious education from an early age so that the child can grow with spiritual values. Furthermore, they must also be able to maintain the mental condition and mind of the child so that he/she can present a mature subjective and healthy mind with an extensive knowledge. Also, people who nurture and care for must be able to guarantee the child's safety and security, including guarding the assets owned by the child.

If viewed further, the five aspects above will be in line with the spirit of the Child Protection Act in terms of providing care, persevering, and nurturing the best interests of the child. Whoever is granted the right of custody to care, the mother or father must be able to ensure the child's survival by paying attention to these five aspects and basing actions on the four basic principles of child protection, namely:<sup>41</sup>

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<sup>37</sup>*Ibid.*, 116.

<sup>38</sup>Ibnu Rusyd, *Muqaddimah Ibn Rusyd*, ed. Juz 2 (Mesir: Daar el-Fikr, n.d.), 258–259.

<sup>39</sup>Wahbah Al-Zuhaili, *Al-Fiqh Al-Islamiy Wa Adillatuhu*, Vol. 10. (Beirut: Daar al-Fikr, 1997), 7297.

<sup>40</sup>Al-Syatibi, *Al-Muwafaqat Fi Ushul Al-Syari'ah* (Kairo: Mustafa Muhammad, n.d.), 5.

<sup>41</sup>Republic of Indonesia, *Law Number 23 of 2002 on Child Protection* Article 2.



1. non-discrimination,
2. child's best interests,
3. rights to live, survive, and develop, and
4. child's opinions value.

The obligation of childcare is not trivial considering the duties and responsibilities are weighty. That is why, it will take a figure who is truly able to protect the child's rights and guarantee the child's protection. If the parents neglect their obligations, the state must be present to supervise and even can revoke the parental authority.<sup>42</sup>

From this, it began to be seen that the ability and capability to hold care responsibilities became very significant. Thus, when viewed from a gender justice perspective, the reasons for giving child custody stated above as gender-related is the idea that women are more patient, gentler, more affectionate, and so on which the majority of society indeed attaches these attributes to the figure of women. Although, based on social and cultural condition, the character and conception of such women may change at certain times. This is because gender is related to people's thoughts and expectations (in social and cultural) about how they should be male and female, given that gender is an artistic notion that seeks to differentiate men and women as they grow up in society in terms of roles, conduct, mindset, and emotional characteristics.<sup>43</sup>

Thus, the provisions of child custody should not be a burden to a certain party based on the distinct sexes. It should be based on the abilities of the caregiver in presenting the child's rights in the best interests of the child. Thus, the text and narrative of the Marriage Law and KHI related to the determination of child custody must be re-read to find new perspectives in the context of presenting universal gender justice.

One of the reading models that can be applied in redefining the text of the regulations is by reciprocal reading (*qira'ah mubadalah*). Faqihuddin Abdul Kodir in his book *Qira'ah Mubadalah* explained that the interpretation of the text could be interpreted with the perspective

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<sup>42</sup>In detail, it is described as follows: "In the event that the parents as referred to in Article 26 neglect their obligations, they can take control measures or parental authority can be revoked." See *ibid.*, Article 30, paragraph (1).

<sup>43</sup>Helen Tierney, *Women's Studies Encyclopedia*, ed. Helen Tierney (New York: Green Wood Press, n.d.), 153.

of disturbances between men and women where this reciprocal perspective places men and women as subjects of a whole and equal human being, not interfering with each other but support and complement to each other. This conception also disagrees if placing women always in the right conditions and placing men as a source of problems.<sup>44</sup> This principle of equality and balance is attempted to be repositioned in the meaning of the texts of law.

If we look at Article 41 of Marriage Law, it confers authority on the Court to decide if a custody dispute occurs, then in this case, the meaning of the ability and capability to care must be the main points in determining which party has the right to care. This means that both father and mother have the same opportunity to obtain custody as long as they can do so. So, the judge in determining the case must see and find the ability and capability of each party.

Furthermore, in Article 105 of KHI which stipulates that the right to care for children who have not yet been granted to the mother, then the word “mother” in the text must be interpreted not to the personal person of mother, but as an attitude of love, gentleness, and giving more attention as usually people describe the figure of a mother. So, the contextualization form of the article can be interpreted as follows: as long as the mother or father can show the characteristics of “motherhood”, the party then has a greater right to care for the child. This is because in some cases, love and affection as well as attention are given by the father rather than the mother. The Low Bi-Anne case described above is enough evidence that the love, affection and care provided by the father can defeat the love of the birth mother.

That way, child custody should not be granted based on a person’s gender but to any party who is able and capable to bring love and affection to the child, and of course also be able to protect, preserve, and fulfill the child’s rights in the best interests of the child. This means that both men and women have difficulties in obtaining child custody including those who can replace the mother if she died.

Finally, it can be observed that when interpreted from a gender perspective, both Marriage Law and KHI can offer justice to both parties, husband and wife, by stressing the principle of the child’s best

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<sup>44</sup>Faqihuddin Abdul Kodir, *Qira’ah Mubadalah: Tafsir Progresif untuk Keadilan Gender dalam Islam* (Yogyakarta: Ircisod, 2019), 49–51.

interests. This kind of progress needs to be raised to actualize the values of gender justice in the form of dealing with canonical texts.

## Conclusion

Child custody, according to the Marriage Law, is given to both parents of the child, both during the marriage and after the marriage termination. In the event of disagreement between the parents, the court will make a decision about the child custody. Unlike the Marriage Law, Article 105 of KHI specifies that the child who has not yet been *mumayyiz* (under the age of 12) is cared for by the mother while the child who has *mumayyiz* (over the age of 12) then the custody is left to the child him/herself to determine whether he/she will join the mother or father. Next in Article 156 of KHI mentions the possibility that if the mother died then the people who can replace her are: women in a direct line from the mother side; father; women in a direct line from father side; the child's sister concerned; female relatives according to the mother's sideline; female relatives in the father's sidelines. Such provisions can be said to be still classified as gender-biased because the granting of child custody is more weighted towards certain genders, so that it creates a gap in the perspective of gender justice.

The reciprocal interpretation model (*qira'ah mubadalah*), if applied in understanding on the text above, can be interpreted and read as a perspective of distinction between men and women where the reciprocal perspective places men and women as subjects of a whole and equal human being, not interfering with each other, but support and complement to each other. Thus, both mother and father likely to have the same opportunity to get child custody as long as they have an ability and capability in terms of childcare

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