

# Sole Custody and The Implication of Fault-based Divorce Under the Indonesian Legal System

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## Abstract

This study analyses the reasons why most judges in Indonesia's religious courts tend to rule in favour of the sole custody model over the joint custody model following a divorce, even though the state, through the Child Protection Act, has enacted regulations emphasizing the granting of child custody using the joint custody model. This study is an evaluative review of the dominant sole custody model decided in the Religious Court concerning the Indonesian divorce law system, which emphasizes that divorce must be filed for a reason. The study results show that the divorce law requiring divorce to be accompanied by a reason and adopted by the Religious Court makes Indonesia a country that adopts a fault-based divorce system. This impacts the contestation and efforts of one party to find fault with the other party through the proof process in the Religious Court. Furthermore, to show that one party is better and more moral, there is a struggle for child custody rights while affirming the presumption that the party winning child custody is the better and more moral party. This means that child custody is always given to one party, not to both parties. The Religious Court needs to consider the use of a no-fault divorce system for several

reasons: (1) Islamic jurisprudence recognizes no-fault divorce, namely, divorce with *khuluk* (*khul*), and (2) efforts not to defame the couple in court are more in line with Islamic teachings.

**KEYWORDS** *Fault-based Divorce System, Implication, Joint Custody, Religious Court, Sole Custody*

## Introduction

Child custody, defined as the parents' responsibility to provide for and nurture their children, including the ability to make decisions regarding the development of their child, is a legal term that covers the relationship between parent and children and aspects related to the well-being and care of children. Decisions related to child custody commonly occur in cases of separation of partners and the responsibilities of parents toward their children based on the best interests of the child<sup>1</sup>. These decisions focus mainly on three issues, namely, physical custody, legal custody, and visitation<sup>2</sup>. Physical custody is related to whom the children will live with<sup>3</sup>. Legal custody is related to who will be the decision-maker on the important decisions regarding a child<sup>4</sup>. Finally, visitation refers to how both parents will agree on the best arrangements for children to meet the parent they are not living with (noncustodial parent)<sup>5</sup>.

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<sup>1</sup> United Nation, "Convention on the Rights of the Child" (1989), <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child>.

<sup>2</sup> Jennifer K. Dieringer, Susan R. Elsen, and Stephanie E. Goldenhersh, "Chapter 9 - Child Custody," in *Family Law Advocacy for Low and Moderate Income Litigants*, ed. Jacquelynne J. Bowman, 2nd Editio (Boston: Massachusetts Continuing Legal Education, Inc, 2008), <https://search.worldcat.org/title/family-law-advocacy-for-low-and-moderate-income-litigants/oclc/1030942119>.

<sup>3</sup> Lara Augustijn, "Joint physical custody parent-child relationships, psychosomatic problems", *Journal of Public Health (Berl.): From Theory to Practice* 31 (2023): 755-764, <https://doi.org/10.1007/s10389-021-01583-1>

<sup>4</sup> Mohmed Lawal Omar, "Custody and Guardianship of Children: Shari'a Perspective", Paper Presented at the Refresher Judge and Kadis Organized by National Judicial Institute, Abuja, 11<sup>th</sup> -15<sup>th</sup> March 2019, pp. 5-6

<sup>5</sup> Michael Saini, Melissa Van wert, Jacob Gofman, "Parent-Child supervised visitation within child welfare and custody dispute contexts: An exploratory comparison of two distinct models of practice", *Children and Youth Services Review* 34 (2012): 163-168.

Matters of child custody often follow divorce cases. For some families, postdivorce child custody matters can be solved amicably without any prolonged disputes. However, it is not unusual for a case of child custody to bring more disputes that must be settled in court. In Indonesia, the concept of postdivorce custody decided in the Islamic Religious Courts is unique. The concept used is called *hadhanah* which describes the idea of child custody<sup>6</sup>. This concept emphasizes a child custody pattern that leads to the sole custody model, not joint custody. The concept of *hadhanah* in Indonesia is defined as the activity of raising, nurturing, and educating children until they are adults or able to fend for themselves based on Article 1 letter g Compilation of Islamic Law (Kompilasi Hukum Islam/KHI)<sup>7</sup>. Childcare and custody in a *hadhanah* institution are in two categories based on the age of the child; under 12 years old (not yet *mumayyiz*) and over 12 years old (already *mumayyiz*). The pattern of custody for a child under 12 years old follows the philosophy of maternal preference<sup>8</sup>. This philosophy is influenced by Islamic Law teachings based on the books of *Fiqh* and became reference material when the Indonesian government produced the Compilation of Islamic Law (KHI) in 1991. Subsequently, once the child is of *mumayyiz* age (having reached the age of 12), he/she is given a choice to go along with either the father or the mother on matters of custody. This provision affirms the determination of child custody rights in Indonesia, which prefers to use sole custody provided that the father is still obligated to fulfil the cost of a child's care and custody.

In the Islamic context, the concept of child custody is known as *hadhanah* (Arabic: custody) which focuses on nurturing children, and *wilaya* (Arabic: guardianship) which focuses on matters of a child's education, acculturation, and managing the child's property<sup>9</sup>. This is similar to the Western concepts of "physical custody" and "legal custody." One common theme highlighting Western laws, such as those in France, England, and the United States, is that the idea of the "best interests of the child" evolved from a narrow concept applied only in conditions of abuse endangering the child's life to a broader

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<sup>6</sup> Ahmed Fekry Ibrahim, *Child Custody in Islamic Law* (Cambridge: Cambridge University Press, 2018), <https://doi.org/10.1017/9781108648042>

<sup>7</sup> Abdurrahman, *Kompilasi Hukum Islam di Indonesia*, (Akademika Pressindo, 1992)

<sup>8</sup> R.I. Amriel, "There Are No Ex-Children and Ex-Parents," *Tempo Newspaper*, 2011, <https://koran.tempo.co/read/opini/240505/tak-ada-mantan-anak-dan-mantan-orang-tua>.

<sup>9</sup> Mohmed Lawal Omar, Custody and Guardianship of Children: Shari'a Perspective, Paper Presented at the Refresher Judge and Kadis Organized by National Judicial Institute, Abuja, 11<sup>th</sup> -15<sup>th</sup> March 2019, pp. 5-6

concept by determining the best environment for children's upbringing without assigning presumptive rights prematurely to either parent<sup>10</sup>. This brings into question a matter of discourse in child custody on whether the concept equivalent to the "best interests of the child" exists or not in Islamic juristic discourse and practice.

Indonesia has made distinct advances in its child custody system. Since 2007, the phenomenon of child custody decisions has shifted to no longer emphasizing giving custody of children to mothers only, especially for not-yet-*mumayyiz* children<sup>11</sup>. Such decisions were made because of the jurisprudence of Indonesian Supreme Court Decision Number 110 K/AG/2007, whereby the Supreme Court deliberated whether the child's best interests and welfare should be the primary factor considered when determining child custody, rather than only following normative guidelines<sup>12</sup>. In this case, after their parents divorced, a child experienced difficulties when living with their mother, while the mother often travelled abroad and left the child with their father. Since the child has lived quietly and peacefully with their father, then for the benefit of the child, the Supreme Court ensures that custody is handed over to the father, even though the child is under seven years old. Thus, the debate regarding maternal preference versus paternal preference has been completed.

Starting in 2014, the joint custody model was introduced in Indonesia as a new model of custody, as stated in Article 14 paragraph (1) of Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection (hereafter referred to as the 2014 Child Protection Law). This law stipulates that children have the right to receive care from their parents, and the prioritized childcare model is the joint custody model, while the second option is the sole custody model. It is also determined that sole custody is a form of exception and a last resort while still prioritizing the best interests of the child. Thus, an interesting phenomenon at the moment is the tendency of judges to maintain the concept of sole custody rather than joint custody, thus leading to a shift in issues and discussions related to sole custody versus joint custody.

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<sup>10</sup> Ahmed Fekry Ibrahim, *Child Custody in Islamic Law* (Cambridge: Cambridge University Press, 2018), <https://doi.org/10.1017/9781108648042>.

<sup>11</sup> Anjar S. C. Nugraheni, Setiono, Burhanuddin Harahap, Kukuh Tejomurti, "Development of Custody Regulation in Indonesian Divorce Law", *International Journal of Business, Economics and Law* 18, no. 5 (2019)

<sup>12</sup> Supreme Court of Indonesia, "Supreme Court Decision No. 110 K/AG/2007 on 13 November 2007," (2007).

In several cases in Indonesian courts, the judge at a higher level has been found to annul joint custody that has been decided by the judge of the lower court, or the judge rejects the joint custody claim filed by one of the parties. In South Jakarta Religious High Court Decision No 10/Pdt. G/2016/PTA. JK, for instance, the court decided on the joint custody of a six-year-old child, with the specific condition that the child will be with their mother on weekdays and with their father on weekends<sup>13</sup>. However, considering the trial has proven that the mother often left her child to go abroad and had a habit of taking drugs, which was proven by the results of a urine test that was found to be positive for amphetamine and methamphetamine, the Supreme Court annulled the joint custody and changed it to sole custody given to the father<sup>14</sup>. This case raises the question of why religious court judges still prefer to assign sole custody instead of joint custody in most child custody disputes.

This study is an evaluative study of the introduction and application of postdivorce joint custody in religious courts, which was not easily accepted and implemented by religious court judges. The state has recognized joint custody as an ideal situation that must be prioritized after the emergence of the 2014 Child Protection Law. However, joint custody cannot be automatically allowed by court judges. From this research, it is hoped that a new theory will emerge or at least a counter to the old theory regarding child custody and the principle of the best interests of the child after divorce.

Previous research has also shown concerns in the custodial issues of children and it is necessary to look back on existing studies on the best policies for each child. For instance, a study has discussed child custody law in classical Islamic texts and the contemporary Muslim world emphasizing the development of child custody laws in Pakistan, particularly child custody arising from divorce, judicial separation, or the dissolution of marriage<sup>15</sup>. The research finds the custody of children is not automatically given to the father after seven years old and that such a view of the preferential right of male children's custody to be given to the father after that age is only upheld by the Hanafiyah (Abu Hanifa) school of thought. The father may then claim custody of the children once they are of sufficiently mature age from seven years old until puberty and

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<sup>13</sup> South Jakarta Religious High Court, "South Jakarta Religious High Court Decision No 10/Pdt.G/2016/PTA. JK," (2016).

<sup>14</sup> Supreme Court of Indonesia, "Supreme Court Decision Number 574 K/Ag/2016," (2016).

<sup>15</sup> Aayesha Rafiq, "Child Custody in Classical Islamic Law and Laws of Contemporary Muslim World (An Analysis)," *International Journal of Humanities and Social Science* 4, no. 5 (2014): 267–77.

capable of expressing their own opinion. Consideration of child custody should also deliberate on the children's access to both parents. Furthermore, there is strong evidence toward a single uniform law that can be made based on Islamic principles and contemporary practices<sup>16</sup>.

Similar research has also been conducted to analyse postdivorce child custody by reviewing Article 105 of the Compilation of Islamic Law/KHI in Indonesia<sup>17</sup>. The research questions whether only a mother has the right to care as a custodial parent and whether a father should only provide for the child as a noncustodial parent postdivorce for children who are not yet *mumayyiz* (12 years old and under). The results show that it is not only the mother who is allowed to take custody of a child under 12 years old but also the father as he (the father) has equal rights to care for and take custody of their children. In some cases, there is even more priority for the father to have the right to care for children over the mother. Moreover, there is also evidence of gender bias in the Compilation of Islamic Law/KHI and classical *fiqh* studies in determining child custody<sup>18</sup>. Looking back on the normative rules on child custody, provisions on a juridical basis state that the mother as the absolute holder of child custody originates from social constructions and stereotypes attached to men and women<sup>19</sup>.

One interesting empirical paper is among the first to quantitatively analyse the effect of economic incentives for joint custody on children's outcomes, specifically examining how the incentives of US child custody and support systems affect the outcomes of children of divorced parents. This study found that economic incentives for joint custody have negative effects on human capital development and the health of children of divorced parents<sup>20</sup>. One possible reason for this is that economic incentives for joint custody cause children to spend less time with relatively high-quality mothers because of

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<sup>16</sup> Mohamad Salman Podungge and Siah Khosyi'ah, "The Portrait of Children Custody Rights in Indonesia: A Study of Mother's Rights in Child Custody from Gender Perspective," *Khazanah Sosial* 4, no. 3 (2022): 545–55, <https://doi.org/10.15575/ks.v4i3.18845>.

<sup>17</sup> Podungge and Khosyi'ah.

<sup>18</sup> Podungge and Khosyi'ah.

<sup>19</sup> Adi Nur Rohman and Elfirda Ade Putri, "Progressive Reading of Child Custody Rights in Indonesia: A Gender Justice Perspective on Marriage," *Jurnal Hukum dan Pembangunan* 11, no. 1 (2022). <http://dx.doi.org/10.25216/jhp.11.1.2022.43-63>.

<sup>20</sup> Daniel Fernández Kranz, Jennifer Roff, and Hugette Sun. "Can Economic Incentives for Joint Custody Harm Children of Divorced Parents? Evidence from State Variation in Child Support Laws." *Journal of Economic Behavior & Organization* 189 (2021): 1–27. <https://doi.org/10.1016/j.jebo.2021.06.020>.

fathers responding to the policy and pursuing joint custody. One noteworthy finding in the aforementioned study that is useful for further consideration in our research is that the negative effects of economic incentives for joint custody on children's welfare are higher for girls and all children aged 12 and under.

This paper is based on normative juridical research conducted by examining and interpreting the theoretical elements of legal principles, including conceptions, laws and regulations, perspectives, legal doctrines, and legal systems that are correlated with the topic. Categorized as doctrinal research, the research aimed to obtain a systematic explanation of the regulations governing certain legal categories, relating and analysing the relationship between existing rules, explaining areas that are still controversial, and predicting future developments. The research is conducted based on laws and regulations and the decisions of the religious courts related to the model of childcare in Indonesia, which has so far been dominated by sole custody.

The research was conducted using literature research and field research. Literature research is intended to obtain secondary data in the form of books, articles, research results, and laws and regulations concerning marriage and civil law enforcement through the religious courts. Field research is conducted to obtain primary data from respondents to religious court judges who will be determined purposively. The secondary data, which is the main source of data in this study, are decisions relevant to research, especially regarding (1) divorce decisions in which there is a ruling that determines child custody, (2) decisions of child custody as independent cases, and (3) decisions related to the annulment of child custody.

Concerning the decisions of the judges, the legal principles will be identified first and then the principles will be investigated. The legal rule of the decision in this context has important meaning because it contains factors that are considered relevant juridically. This will be examined in the Legal Considerations and Legal Basis sections (*fundamentum petendi* section) because this section reviews the application of the law by judges and the judges' considerations used as the basis for decisions.

The approaches used in this study are the statute, conceptual, and case approaches. The conceptual approach is used to provide an analytical perspective on problem-solving concerning child custody in terms of the legal concepts behind it, or even from the values contained in the normalization of regulation concerning the concepts used in this study. All collected data will be analysed qualitatively.

## Sole Custody in the Indonesian Legal System

Some psychology studies qualify several child-rearing models. The types of custody that can be used by divorcing couples are explained by Clarke-Stewart & Brentano<sup>21</sup>, namely, sole custody, joint custody, divided custody, and physical custody. Sole custody is a child-rearing model where one of the divorced parents acts as a single parent for the child. If the one acting as a single parent and caring for and taking care of the child is the mother, it is called the mother with custody. Conversely, if the one acting as a single parent and caring for the child is the father, it is called the father with custody<sup>22</sup>. Joint custody is a child-rearing model that still involves full parenting from both parents even though they are divorced<sup>23</sup>. The next model is bird's nest custody, which is a child-rearing model that refers to the child's residence. In this parenting model, children who are victims of divorce continue to live in the joint residence before the parents divorced and the parents take turns living with their children at home<sup>24</sup>. The fourth parenting model is split custody, known in Indonesia as divided custody, which is a childcare arrangement model that involves both divorced parents by mutually dividing child custody so that there are children who live with the mother and there are children who live with the father<sup>25</sup>. Finally, the physical custody parenting model is a custody right given by the court to one parent physically to care for and control the child routinely<sup>26</sup>.

The law that applies in the Indonesian Religious Court is Islamic Law, which is based on the Quran, Hadith, and *ijtihad*<sup>27</sup>. The judge refers to the *fiqh* books that have been included in the Compilation of Islamic Law. In reality, since 1992, the Compilation of Islamic Law has been used as a guideline by judges and the Indonesian community as a positive law to fill the substantial legal gap (including marriage law, inheritance, and endowments) that is applied

<sup>21</sup> Alison Clarke-Stewart and Cornelia Brentano, *Divorce: Causes and Consequences* (RI, USA: Yale University Press, 2006), <https://www.jstor.org/stable/j.ctt1nnpfks>.

<sup>22</sup> David H. L. Olson and John DeFrain, *Marriage and the Family: Diversity and Strengths*, 3rd Edition (California: Mayfield, 2000), <https://search.worldcat.org/title/41002797>.

<sup>23</sup> Olson and DeFrain.

<sup>24</sup> Clarke-Stewart and Brentano, *Divorce: Causes and Consequences*.

<sup>25</sup> Robert Bauserman, "Child Adjustment in Joint-Custody versus Sole-Custody Arrangements: A Meta-Analytic Review.," *Journal of Family Psychology* 16, no. 1 (2002): 91–102, <https://doi.org/10.1037/0893-3200.16.1.91>; Olson and DeFrain, *Marriage and the Family: Diversity and Strengths*.

<sup>26</sup> Clarke-Stewart and Brentano, *Divorce: Causes and Consequences*.

<sup>27</sup> Muhammad Daud Ali, *Islamic Law: Introduction to Islamic Jurisprudence and the Legal System in Indonesia* (Jakarta: RajaGrafindo Persada, 2016).



in court within the Indonesian religious court environment<sup>28</sup>. The Compilation of Islamic Law has successfully created a legal standard, namely the standard of norms, and official and standard legal rules for both the Indonesian Religious Court and the Islamic community and justice seekers<sup>29</sup>. With the presence of the Compilation of Islamic Law as a law book and applied text in the Indonesian Religious Court, judges are not allowed to make decisions that contain disparities. Through the Compilation of Islamic Law, religious court judges are required to be able to uphold the law and legal capacity uniformly, without reducing the possibility of different decisions due to being casuistic and the existence of different variables. Thus, there is a demand to guarantee the equality of perception and uniformity of decisions through the application of the Compilation of Islamic Law while still allowing judges the freedom to make decisions that contain different variables as long as they remain proportional casuistically.

From the perspective of justice seekers, when they defend their rights and protect their interests in a litigation process in the Indonesian Religious Court, they should not deviate from the formulation of rules, norms, and legal standards in the Compilation of Islamic Law and should not depart from the provisions of the Compilation of Islamic Law and take other rules under the pretext of still existing differences of opinion (*ikhtilaf*).<sup>30</sup> The parties seeking justice and judges are required to use, research, search for, and interpret Islamic law when litigating in the Religious Court, starting from the formulation of the articles contained in the Compilation of Islamic Law, except for an article that has been annulled by the Supreme Court.

In the Indonesian legal system, the development of regulations on child custody has long been initiated, within and outside of the legal environment. Regulatory development has positioned the rule on custody into several regulations. Introduced by Law Number 1 of 1974 on Marriage (hereafter

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<sup>28</sup> Andi Herawati, "Kompilasi Hukum Islam (KHI) Sebagai Hasil Ijtihad Ulama Indonesia," *HUNafa: Jurnal Studia Islamika* 8, no. 2 (2011): 321, <https://doi.org/10.24239/jsi.v8i2.367.321-340>.

<sup>29</sup> Herawati.

<sup>30</sup> There are various terms that have similar connotations, namely *Ikhtilaf*, *Khilaf*, and *Khilafiyah*, which in language mean differences of opinion, thought, color, type, which connote to change. In terms of terminology, it refers to the differences of opinion among scholars, especially fiqh experts, about a *furu'* issue that does not have a definitive argument. However, the terms *Khilaf* and *Khilafiyah* are more connotative of opposition and dispute. See Minhajuddin, "Ikhtilaf Ulama Suni and Its Influence on the Development of Islamic Fiqh (Second & Third Hijri Century)", *Dissertation*, Institut Agama Islam Negeri (IAIN) Syarif Hidayatullah Jakarta, 2002, pp.23-24

referred to as the Marriage Law 1974), children's custody is positioned as both parents' responsibility for the sustenance and education of their children to the best of their ability. The responsibility remains effective until the children marry or become independent and continues to be effective even though the marriage between the parents may have been dissolved<sup>31</sup>. In the case of dissolution of the parents' marriage, the Marriage Law 1974 mentions that both the father and the mother remain responsible for the sustenance and education of their children, exclusively to serve the children's interests. In the case of a dispute concerning custody of the children, the Court shall decide the matter, and the father is responsible for all expenses related to the children's sustenance and education. Supposing that it is a fact that the father is unable to fulfil his obligations, the Court may determine that the mother shall share in such responsibility. At the same time, the Court can also obligate the ex-husband to pay alimony and/or impose one or another obligation upon the ex-wife.

The Marriage Law of 1974 is the national marriage law that applies to all Indonesian citizens, whether they are Muslims or non-Muslims. This law was promulgated by the Government of Indonesia on February 2, 1974, but only became effective on October 1, 1975, based on Government Regulation No. 9 of 1975.<sup>32</sup> Next, for the enforcement of its provisions, there was a difference. For the Muslim population, the matter of marriage became the absolute jurisdiction of the Religious Court of Indonesia. Meanwhile, for the non-Muslim population, the matter of marriage became the absolute jurisdiction of the District Court.

Furthermore, the basic concept of custody in the Marriage Law 1974 was elaborated by the Compilation of Islamic Law, which applies only specifically to Muslims in the Religious Courts. The compilation specifically stipulated the priority of the holder of custody by the statement that children under 12 years old are to be the right of the mother, while children over 12 years may decide whether they will be under the custody of the mother or the father. The cost of raising the children will be the responsibility of the father<sup>33</sup>. If the mother has passed away, the priority will be replaced by women vertically up the line from the mother. Following that, the priority will be assigned to the father, then to women vertically up the line from the father, sisters of the aforementioned children, women of the same blood of the horizontal line of the mother, and

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<sup>31</sup> Republic of Indonesia, "Law No. 1 of 1974 Concerning Marriage" (1974).

<sup>32</sup> Nafi Mubaraok, "Sejarah Hukum Perkawinan Islam di Indonesia" *Al-Hukama* 2, No 2 (2012): 139-163. <https://doi.org/10.15642/al-hukama.2012.2.2.139-163>.

<sup>33</sup> Republic of Indonesia, "Compilation of Islamic Law" (1991).

women of the same blood of the horizontal line of the father<sup>34</sup>. Conceding that the bearer of the custody right cannot guarantee the safety of the children either physically or spiritually, although materially or financially adequately, the Religious Court may transfer the right of custody to other relatives who also bear the right upon the request of the relatives of the children. The whole cost of the custody and living costs of the children are the responsibility of the father within his capability, at least up to the time when the children are grown up and able to manage themselves. Should there be a dispute over the custody and living costs of the children, the Religious Court issues the decision and may also, by considering the ability of the father, decide the amount of the funds needed for the maintenance and education of the children who do not live with him<sup>35</sup>.

In addition, child custody is regulated in the regulation concerning child protection, Law Number 23 the Year 2002 on Child Protection Law, which has been amended by Law Number 35 Year 2014 on the Amendment of Law Number 23 Year 2002 on Child Protection (hereafter referred to as the Child Protection Law). Using the term “Parental Rights,” this law explains the rights of a child’s parents to care for, educate, maintain, develop, protect, and ensure the growth and development of a child following the child’s religion, talents, and interests. In principle, the existence of child custody power as regulated in legal provisions provides guarantees, protection, and fulfilment by the holder of child custody power, namely, the parents. Child custody that is carried out responsibly will certainly greatly encourage the quality of the child’s life and the development of their potential and skills. This law regulates purely the protection of children, without considering the background condition of parents who are divorced or not divorced. Under this law, it also does not matter whether children have clear parents or not. Another visible meaning is the phenomenon of the specificity and strictness of the Child Protection Law in protecting children. The responsibility for child protection under this law is expressly constructed by involving joint obligations between parents, society, and the state, to determine what is best for children. Overall regulations on child custody show that customarily, the norm for determining child custody in the Indonesian legal tradition places greater emphasis on custody being given to the biological mother.

However, Indonesian court practice shows developments in determining child custody. In the initial phase after the promulgation of the Marriage Law

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<sup>34</sup> Compilation of Islamic Law.

<sup>35</sup> Compilation of Islamic Law.

in 1974, court decisions regarding child custody were dominated by determining child custody based on the basic norms of the Marriage Law. In this period, in general, it can be said that the custody of children who are still minors is assigned to their biological mother without considering further aspects of the benefits for the child. In other words, determining child custody refers purely to the norms in the Compilation of Islamic Law. This was confirmed, among other things, in Supreme Court Decision Number 102 K/Sip/1973 dated April 24, 1975. In this decision, the judge emphasized that the determination of granting child custody in a divorce must prioritize the biological mother, especially for custody of children who are still 12 years old and under. This is determined by examining the interests of children who need a mother figure<sup>36</sup>. This condition was then marked by a legal breakthrough by the Supreme Court, which did not apply regulations rigidly but began to move toward determining child custody based on considerations related to the best interests of the child. This condition began with Supreme Court Decision Number 267 K/AG/2006 dated February 28, 2007, regarding the case of a divorce petition, which was cumulated with a petition to determine the Petitioner's child custody. Before being decided by the Supreme Court, this case was first submitted and decided by the Cibinong Religious Court in Decision Number 777/Pdt. G/2003/PA.Cbn dated April 19, 2004, which determined that the child's custody rights belonged to the biological father. This decision was upheld on appeal by the Bandung High Religious Court through Decision Number 170/Pdt. G/2004/PTA.Bdg. dated October 27, 2005. At the cassation level, the determination of the child's custody rights to the biological father was again confirmed by the Supreme Court in Decision Number 267 K/AG/2006 dated February 28, 2007. The Supreme Court in its decision acknowledged the considerations of the Cibinong Religious Court, which determined the child's custody rights to the biological father on the basis that the child's welfare would be better guaranteed if he was raised by his biological father.

Similar conditions were also found in other cases, namely in Supreme Court Decision Number 110 K/AG/2007 dated November 13, 2007. At the first level, the case was accepted and decided by the South Jakarta Religious Court through Decision Number 50/Pdt. G/2006/PTA.Jk. December 20, 2006, which assigned custody of the child to the Defendant as the biological father. At the High Court level, this decision was annulled, and the mother was designated as the holder of custody. At the cassation level, the Supreme Court

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<sup>36</sup> Supreme Court of Indonesia, "Supreme Court Decision Nomor 102 K/Sip/1973 on 24 April 1975," (1975).

cancelled the decision of the Jakarta High Religious Court and upheld the decision of the South Jakarta Religious Court which assigned custody of the child to the Defendant as the biological father. The Supreme Court reinterpreted the meaning of Article 105 of the Compilation of Islamic Law by carrying out a *contra legem* by interpreting Article 105 from the aspect of legal objectives and benefits. In its considerations, the Supreme Court stated<sup>37</sup>:

*Concerning child care, it is not necessarily seen from who has more rights but is seen from the fact of including who contributes most to the damage to the child. In other words, what must be prioritized is the interests of the child, not who has the most rights. 'And the facts stated by the first judge are that the child would suffer more if he had to go with his mother because the child's mother often travels abroad and it is not clear who the child should be with, whereas the current facts are that the child is calm and peaceful with his father'.*

These two decisions show the development of determining child custody which no longer simply applies literal regulatory norms, but places greater emphasis on efforts to protect the interests and welfare of the child so that examinations of child custody cases in the Religious Courts also consider and trace track records from both of the child's parents.

## Fault-based Divorce in the Indonesian Legal System

In family law discourses, the system of divorce is usually divided into two classifications: a fault-based and a non-fault-based divorce<sup>38</sup>. In the system of fault-based divorce, the law recognizes that the party seeking the dissolution of the marriage must state specific reasons why the marriage is ending by placing fault with the other spouse for the end of the marriage. Fault-based divorce law was a restrictive law designed to protect marriage. A divorce was granted under

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<sup>37</sup> Supreme Court of Indonesia, "Supreme Court Decision No. 110 K/AG/2007 on 13 November 2007."

<sup>38</sup> Initially, the petitioner party had to provide evidence of fault in order for their divorce to be granted under the divorce laws of many nations. The United States and some European nations started implementing no-fault divorce laws in the 1950s, and other Asian nations soon followed. See Paul R. Amato and Shelley Irving, "Historical Trends in Divorce in the United States," in *Handbook of Divorce and Relationship Dissolution*, ed. Mark A. Fine and John H. Harvey (New York: Routledge, 2013), <https://doi.org/10.4324/9781315820880>.

the traditional fault-based law only if one spouse was found at fault or guilty<sup>39</sup> (e.g., of adultery or cruelty) and the other spouse was found innocent.<sup>40</sup> Furthermore, the consent of the innocent spouse was needed to grant the divorce. Divorce was denied if both spouses were at fault. In theory, fault law awarded alimony<sup>41</sup>, child support, and property distribution to the innocent spouse, and the monetary value of the economic settlement was linked, in part, to the income level of the guilty spouse. Thus, financial gain resulted from proving the fault of the other<sup>42</sup>.

By contrast, in the other system, a non-fault-based divorce, the party requesting a divorce does not have to provide evidence of their misconduct. It is not necessary for the spouse who is thinking about divorcing the other to provide evidence of wrongdoing. Irreconcilable differences, an irretrievably shattered marriage, or an irretrievable breakdown of the marriage are among the justifications stated by parties seeking a no-fault divorce. The other party's no-fault divorce petition cannot be objected to by the spouse who is receiving the divorce petition. The objection itself may be viewed by the court as irreconcilable differences. At any rate, no-fault divorce is looked at as a radical departure from the past system. There are no grounds for divorce other than the irretrievable breakdown of the marriage. There is no necessity to determine who is guilty of the breakdown of the marriage, but simply the necessity to verify that it is irretrievably broken<sup>43</sup>.

A non-fault-based divorce refers to a type of divorce in which the spouse filing for divorce does not need to prove fault. The spouse considering divorce does not have to prove the other spouse did anything wrong. Reasons given by parties seeking a no-fault divorce include irreconcilable differences, an irretrievably broken marriage, or an irretrievable breakdown of the marriage. These somewhat amorphous terms imply that the marriage can no longer work. The spouse receiving the divorce petition cannot object to the other party's

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<sup>39</sup> Norma Basch, *Framing American Divorce: From the Revolutionary Generation to the Victorians* (California: University of California Press, 2001).

<sup>40</sup> Paul A. Nakonezny, Robert D. Shull, and Joseph Lee Rodgers, "The Effect of No-Fault Divorce Law on the Divorce Rate Across the 50 States and Its Relation to Income, Education, and Religiosity," *Journal of Marriage and the Family* 57, no. 2 (May 1995): 477, <https://doi.org/10.2307/353700>.

<sup>41</sup> Mary E. O'Connell, "Alimony after No-Fault: A Practice in Search of a Theory," *New England Law Review* 23, no. 2 (1988): 437–514.

<sup>42</sup> L. Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* (New York: Free Press, 1985).

<sup>43</sup> James T. McHugh, "No-Fault Divorce Laws: An Overview and Critique," *The Catholic Lawyer* 18, no. 3 (1972).

petition for a no-fault divorce. The court can view that objection itself as an irreconcilable difference.

Throughout the 1950s and 60s, several European nations only permitted divorces based on fault, which usually included physical abuse and adultery. One of the legally recognized fault-based reasons for divorce, such as cruelty, adultery, or desertion, had to be the basis for the divorce. By using the system, a judge will have the ability to release an innocent partner from the legally binding commitment of a lifetime marriage to a guilty partner.<sup>44</sup>

The revolution of this system gained momentum in the 1970s when some nations replaced or added grounds for divorce, usually citing the "*irretrievable breakdown*" of the marriage, for which mutual consent was frequently accepted as evidence. At some point, "unilateral divorce" was legalized in several nations, eliminating the need for mutual consent and allowing divorce to be requested by just one spouse<sup>45</sup>. The goal of this new system was to eliminate marital fault as the foundation for judicial decisions on divorce. From this perspective, the dissolution of marriage could no longer be an adversarial proceeding; instead, it would turn into a factual investigation into whether a marriage had ended.<sup>46</sup> If so, there would be no need to assign any fault when a marriage was dissolved in court.

However, this new system has also introduced new complexities, particularly when it comes to child custody and financial settlements.<sup>47</sup> In the absence of the obligation on fault-proving, the focus of the trial switched to determining the best interests of the children and allocating assets equally, which can be very arbitrary and involve intricate legal issues. In a no-fault divorce, dividing marital assets fairly becomes critical, and managing these difficulties requires competent legal representation. The new system created further issues for women by undermining the provisions for alimony. Under a fault-based system, the perception that marriage is a lifetime commitment justifies a guilty husband's to fulfill his post-divorce financial obligations to his spouse.<sup>48</sup> However, under no-fault, such justification does not exist. The

<sup>44</sup> herma Hill Kay, "No-Fault Divorce and Child Custody: Chilling out the Gender Wars," *Family Law Quarterly* 36, no. 1 (2002): 27–47, <http://www.jstor.org/stable/25740368>.

<sup>45</sup> Libertad Gonzalez, "Should Divorce Be Easier or Harder?," *IZA World of Labor*, 2014, <https://doi.org/10.15185/izawol.113>.

<sup>46</sup> Kay, "No-Fault Divorce And Child Custody: Chilling Out The Gender Wars."

<sup>47</sup> Donald S. Moir, "No Fault Divorce and the Best Interests of Children," *Denver Law Review* 69, no. 3 (1992): 663, <https://digitalcommons.du.edu/dlr/vol69/iss3/18>.

<sup>48</sup> Laura Bradford, "The Counterrevolution: A Critique of Recent Proposals to Reform No-Fault Divorce Laws," *Stanford Law Review* 49, no. 3 (1997): 607–36, <https://doi.org/10.2307/1229344>.

priority placed on distributing family assets equally has made alimony a temporary benefit that the woman can only get until she receives "retraining" to sustain herself.<sup>49</sup>

Divorce in Islam is treated as a private matter, and as such, the grounds for obtaining one are not required to be announced publicly<sup>50</sup>. The reason for not asserting disclosure may be related to the idea that "*such grounds are probably entrusted to be individual's conscience.*"<sup>51</sup> Hammidah Abd al Ati made a summary regarding the reasons for not requiring disclosure, as well as Islam's attitude toward Muslim divorce in general, as cited by Thompson and Yunus<sup>52</sup>.

The Qur'an seems to assume that the normal Muslim, man or woman, in most cases and most of the time, will act responsibly, conscientiously, and God-mindedly. It further assumes that with dutiful authorities, a sensitive public, and sound character, divorce will be used as the very last resort. It is highly unlikely that rational, conscientious individuals will take lightly the separation from their loved ones, the breaking up of their homes, and the inconveniences of divorce.

This idea may justify the Islamic divorce to retain a unilateral, extrajudicial at the initiative of the husband in the form of *talaq*. In classical Muslim law, the wife's consent is not required, and the declaration of the *talaq* is extrajudicial and in no way subject to any external check.<sup>53</sup> It also allows extrajudicial divorce by the mutual consent of the spouses in the form of *khul*. Such unilateral and extrajudicial divorces are still considered legal in most Muslim nations. So far, it has been recorded that such extrajudicial divorces have been applied in Kashmir, Dubai, and some other East African and Arab states<sup>54</sup>.

The institution of unilateral and extrajudicial divorces has been subjected to severe criticism<sup>55</sup>. There has been pressure to introduce reforms to safeguard the wife's rights, while the most common procedures in traditional law have adopted extrajudicial and unilateral divorce, modern personal law status

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<sup>49</sup> Bradford.

<sup>50</sup> Emily L. Thompson and F. Soniya Yunus, "Choice of Laws or Choice of Culture: How Western Nations Treat the Islamic Marriage Contract in Domestic Courts," *Wisconsin International Law Journal* 25, no. 2 (2007): 361, <https://wilj.law.wisc.edu/issues-archive/volume-25-issue-2/>.

<sup>51</sup> Thompson and Yunus.

<sup>52</sup> Thompson and Yunus.

<sup>53</sup> David Pearl and Werner Menski, *Muslim Family Law* (London: Sweet & Maxwell, 1998).

<sup>54</sup> David Hodson, *A Practical Guide to International Family Law* (Dunfermline: Jordans Publishing Limited, 2008).

<sup>55</sup> Hodson.



legislators tend to curb such power of the husband to the extent that, under some legislation, no divorce shall be effective or even allowed outside the court<sup>56</sup>.

However, the shift from extrajudicial regulation of Muslim divorce toward judicial intervention does not mean that the extrajudicial modes will vanish<sup>57</sup>. An analysis of modern Muslim family laws reveals that there are three main approaches to acquiring an Islamic divorce among Muslim countries. *The first* assumes a Western stance and makes all forms of dissolution of marriage available only through a court order<sup>58</sup>. Turkey and Tunisia can be placed in this category as the leader of the modernization process. Turkey enacted a Civil Code translated and adapted from the Swiss practice in 1926. A new code was introduced in 2002 that emphasized further the Western perspectives on the equality of women. Such regulations show that divorce decrees can only be granted by the court.<sup>59</sup> Similarly to Turkey, Tunisia, through the Tunisian Code of Personal Status (*Majallat al-Ahwal al-Shakhsiyya*) of 1956, has ruled that divorce shall only occur in court<sup>60</sup>. Consequently, any extrajudicial divorce is not valid in this region. *The second* approach takes the opposite position and confines divorce to extrajudicial proceedings without the intervention of a judge. The 1984 Kuwait Law of Personal Status, for example, requests that *khul'* be the right of a wife to ask for divorce mutually agreed upon. Kuwait seems to have adopted the view of jurist Muslims, for instance, the Zahiri jurist Ibnu Hazm, who strongly defended the opinion that *khul'* can only take place upon the agreement of the couple and the court cannot impose it on either of them. *The third* approach allows divorce to occur either with or without the intervention of a court. A good example of this last approach to divorce is Egyptian Law No. 1 of the year 2000 concerning certain provisions and judicial procedures on a personal status where the law makes Islamic divorce<sup>61</sup>,

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<sup>56</sup> Fazlur Rahman, "A Survey of Modernization of Muslim Family Law," *International Journal of Middle East Studies* 11, no. 4 (1980): 451–65, <https://doi.org/10.1017/S0020743800054817>.

<sup>57</sup> Pearl and Menski, *Muslim Family Law*.

<sup>58</sup> Bustami Mohamed Khir, "The Right of Women to No-Fault Divorce in Islam and Its Application by British Muslims," *Islam and Christian-Muslim Relations* 17, no. 3 (2006): 295–306, <https://doi.org/10.1080/09596410600794970>.

<sup>59</sup> Khir.

<sup>60</sup> George N. Sfeir, "The Tunisian Code of Personal Status (Majallat Al-Ahw Al Al-Shakhsiy Ah)," *Middle East Journal* 11, no. 3 (1957), <https://www.jstor.org/stable/4322925>.

<sup>61</sup> J. Rehman, "The Sharia, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq," *International Journal of Law, Policy and the Family* 21, no. 1 (2007): 108–27, <https://doi.org/10.1093/lawfam/eb1023>.

particularly *khul'*, possible either by the consent of the spouses or, if the husband does not consent, by the wife petitioning the court.

In most Muslim countries, even though modern laws have been introduced for almost all matters, family laws—mostly laws governing marriage, divorce, and inheritance—are still governed by Sharia. These countries maintain a dual system of secular and religious courts in which the religious courts can grant Islamic divorce. Most countries in the Middle East and North Africa follow this system<sup>62</sup>. Several countries in the Asian region, such as Indonesia and Malaysia, have also imposed a two-tier judicial system where Shariah courts handle family law cases involving Muslims, while secular courts handle those involving non-Muslims. Among 49 Muslim nations, only Iran and Saudi Arabia follow Sharia law in its strictest sense. Saudi Arabia and Iran maintain religious courts for all aspects of jurisprudence<sup>63</sup>.

Islamic divorce law allows divorce on either fault or no-fault grounds<sup>64</sup>. The reasons for divorce in Islam lead to a situation of irretrievable breakdown of marriage. All types of divorce can be granted after a peaceful marital relationship is impossible to maintain with or without the fault of the parties. The Quran states regarding grounds for divorce in very general terms,

*And if you fear that the two (i.e. husband and wife) may not be able to keep the limits ordered by Allah, there is no blame on either of them if she redeems herself (from the marriage tie) ... (2: 229)*

The general grounds for divorce in the Quran, therefore, are a hopeless failure of one or both parties to discharge their marital duties and to consort with each other in kindness, peace, and compassion. Divorce based on fault grounds is reflected in the divorce by a judicial authority wherein the Islamic jurists have also developed some indices, which may be accepted as grounds for divorce in cases where the divorce matter goes to the court (e.g., long absence of the husband without any information, long imprisonment, refusal to provide

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<sup>62</sup> Ismail bin Mat, "The Impact of Western Colonialism and Secularization on the Application of the Shari'ah Law in the Muslim World," in *AMSS 34th Annual Conference Muslim and Islam in the Chaotic Modern World: Relations of Muslim among Themselves and with Others*, 2005, <http://www.amss.net/pdfs/34/finalpapers/IsmailbinMat.pdf>.

<sup>63</sup> Ismail bin Mat.

<sup>64</sup> Anver M. Emon, "Conceiving Islamic Law In A Pluralist Society: History, Politics And Multicultural Jurisprudence," *Singapore Journal of Legal Studies*, (2006): 331-355. <https://www.jstor.org/stable/24869084>.

for the wife, abuse, or impotence)<sup>65</sup>, while the *shul* reflects Islamic law where a wife is allowed to terminate her marriage based on a mutual agreement and no-fault grounds. In *khul*, a woman asserts no fault by her husband and agrees to forgo any financial claim against her husband to be free from the marriage.

Divorce law in Indonesia adheres to the fault-based divorce system, which recognizes that divorce should only be accepted when a fault is discovered. This system was introduced through the Marriage Law 1974, which constitutes the purpose of marriage is to establish a family that is happy and lasting, and prosperous. Having the Pancasila philosophy as the most fundamental ground in law, Indonesian marriage law accepts the concept that marriage is very closely related to religion and spiritual values<sup>66</sup>. Marriage possesses not only physical elements but also spiritual elements. In light of that recognition, forming a happy family is closely connected with posterity, which is also a purpose of marriage. Therefore, any acts that may cause the dissolution of a marriage shall be given full consideration and careful thought. To apply every effort to establish a lasting family, the Marriage Law 1974 decided on a basic principle in marriage law, the Principle of Difficult Divorce<sup>67</sup>.

The Principle of Difficulty in Divorce generally dictates that laws should impose stricter requirements for divorce. Accordingly, divorce must meet two mandatory conditions. Firstly, it should be based on substantial grounds indicating the irreconcilable nature of the relationship between the spouses. Secondly, divorce proceedings must be conducted in court. In the first condition, Indonesian law constitutes six acceptable grounds for divorce<sup>68</sup>: the **first** is that one of the parties commits adultery, or becomes an alcoholic, drug addict, gambler, or addicted to other vices that are hard to cure; the **second** is that one of the parties has deserted the other for two years without the other's consent and valid reasons or because of other circumstances beyond their control; the **third** condition is one in which one of the parties is convicted and imprisoned for five years or longer after the marriage; the **fourth** is that one of the parties commits serious cruelty or maltreatment endangering the other party; the **fifth** is that one of the parties becomes physically disabled or afflicted with a disease preventing the consumption of conjugal life, and the **sixth** is that the couple should prove that they have such constant differences of opinion and quarrels that accord and harmony in the household can no longer be expected. All legal grounds for divorce are cumulative, which excludes the possibility of

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<sup>65</sup> Emon.

<sup>66</sup> Republic of Indonesia, Law No. 1 of 1974 Concerning Marriage (Law 1/1974).

<sup>67</sup> Law 1/1974.

<sup>68</sup> Law 1/1974.

using grounds other than those mentioned in the regulations. In its development, the restriction on divorce was developed by the Compilation of Islamic Law, which specifically applies to Islamic divorce. The Compilation adds two grounds for divorce, namely, the violation of the *taklik talak* by the husband and religious conversion that causes disharmony in the family. All these grounds show that the divorce legal system in Indonesia adheres to the concept of fault-based divorce. The restriction on the grounds for divorce is a legal recognition that divorce can only be carried out if there has been a mistake by the husband or wife, and the form of this mistake is limited to eight forms, as explained previously. Without fault, divorce cannot take place.

The fault-based divorce system has also been increasingly strengthened through court practices, as shown in the Supreme Court Circulation Letter Number 4 of 2014, which states that a lawsuit for divorce can be granted if the facts show that a marriage has broken down, with indicators including that peaceful efforts have been unsuccessful, there is no good communication between husband and wife, or one of the parties or each party abandons their obligations as husband and wife, even if there has been a separation of beds/living together. In 2018, the Supreme Court further emphasized this fault-based divorce system through a statement in the Supreme Court Circulation Letter Number 3 of 2018:

*Judges should consider sufficiently and carefully in adjudicating divorce cases because divorce will end the sacred institution of marriage, change the legal status from halal to haram, have a broad impact on the structure of society, and involve accountability in the afterlife, therefore the divorce can only be granted if the marriage has broken down (broken marriage) with indicators that have been clearly proven.<sup>69</sup>*

Furthermore, in 2022, the Supreme Court again emphasized the nature of fault that must be proven in divorce by ruling that in cases of divorce on the grounds that the husband/wife does not perform their physical and/or mental support obligations, can only be granted if it is proven that the husband/wife has not carried out their obligations after a minimum of 12 months. Apart from that, in cases of divorce based on continuous disputes and quarrels, it can be

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<sup>69</sup> Supreme Court of Indonesia, “Supreme Court Circulation Letter Number 3 of 2018” (2018).

granted if it is proven that the husband/wife has continuous disputes and quarrels or has lived separately for at least six months<sup>70</sup>.

Referring to the theoretical explanation of the fault-based divorce system, parties tend to dig into each other's faults to prove their claims or deny the allegations made by their spouse. These are also demonstrated through the lawsuits on how these problematic marriages, husbands, and wives strayed from the "standard" family model in two ways<sup>71</sup>. Some cases occurred because of a significant event in the marriage, such as physical violence, infidelity, or desertion, which was deemed by the suing spouse as a critical turning point. These incidents were, typically, briefly outlined in the lawsuits as they were directly linked to the divorce grounds explicitly stated in Austrian family law, thereby justifying the plaintiff's fault in the divorce filing. Conversely, there were accounts of a slow transformation where a "normal" marriage deteriorated into a "bad" one over time. These narratives portrayed the marriage as a downward spiral, a linear progression from a once harmonious union to an irredeemably "bad" one. These depictions hinged on the characterization and portrayal of the other spouse as someone incapable of upholding the marital agreement. Additionally, previous evidence has noted that the processes leading to the divorce through the official court's decision can lead to disputes and disharmony<sup>72</sup>.

Based on the regulatory analysis above, this condition has been adopted by the Indonesian legal system, which shows an emphasis on fault as the basis for divorce.

## **The Impact of Fault-based Divorce on a Religious Court's Decision on Sole Custody**

The implementation of the principle of Difficult Divorce in the proceeding of divorce has influenced the court's decision to grant sole custody instead of joint custody. In the Religious Court of Indonesia, the impact has been expressed in several High Religious Courts' rulings on child custody that

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<sup>70</sup> Supreme Court of Indonesia, "Supreme Court Circulation Letter Number 1 of 2022" (2022).

<sup>71</sup> Viktoria Parisot, "Performing the Bad Marriage? The Transition from a Troubled to a Troubling Family in the Course of Fault Divorce in the 21st Century," *Social Sciences* 10, no. 12 (2021): 464, <https://doi.org/10.3390/socsci10120464>.

annulled joint custody, which was granted by the Religious Court, and switched custody to sole custody. In Palembang High Religious Court Decision No. 26/Pdt. G/2010, for example, by referring to the Child Protection Law, the judge emphasized that the substance of custody is placing children in the custody of their parents to obtain protection, welfare, comfort, educational supervision, health care, the opportunity to develop talents/be creative, and religious education to forge strong morals and intellectual intelligence<sup>73</sup>. For this reason, in this case, because it was proven that the mother was not taking care of the child properly, the judge annulled the joint custody that had been granted by the previous judge and awarded sole custody to the father.

A similar condition was also found in the decision of Bandar Lampung High Court Number 011/Pdt. G/2020/PTA.Bdl, which is in opposition to the Decisions of the Gedong Tataan Religious Court Number 0334/Pdt. G/2019/PA.Gdt. At the first level, the Religious Court judge stipulated joint custody for children with several provisions, including the right of the mother to care for the child on weekends, while the father was given the right to care for the child on weekdays. Matters regarding education, health, and other matters related to the development of the child's basic competencies and skills must be carried out with the mutual agreement of the mother and father<sup>74</sup>. However, in the facts at trial, conditions were found where the father, as the dominant holder of parenting time, apparently did not have enough time to care for the child, so the High Religious Court judge annulled the joint custody and awarded sole custody to the mother<sup>75</sup>.

These two cases demonstrate that the fault-based divorce system influence judges in determining sole custody. Indeed, a decision on joint custody can be annulled if it is later proven that there was a fault on the part of one of the parties, so the initial decision is eliminated by establishing sole custody on the other party. Based on the author's research, this condition is brought about by several factors. **First**, the fault-based divorce system impacts efforts to fight for child custody or care of one parent. This is used socially and psychologically as a platform for proof by the party who wins child custody that they are the "innocent" or "sinless" party. This is supported in a previous study discussing the fault-based divorce system in which the suing partner attempts

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<sup>73</sup> Palembang High Religious Court, "Palembang High Religious Court Decision No. 26/Pdt.G/2010," (2010).

<sup>74</sup> Gedong Tataan Religious Court, "Gedong Tataan Religious Court Number 0334/Pdt.G/2019/PA.Gdt," (2019).

<sup>75</sup> Bandar Lampung High Religious Court, "Bandar Lampung High Religious Court Number 011/Pdt.G/2020/PTA. Bdl," (2020).

to prove in court that the other partner is at fault for the breakdown of the marriage<sup>76</sup>. This process often involves one spouse attempting to prove that the other spouse has violated the marital agreement, thus seeking dissolution of the marriage.

**Second**, the influence of Islamic law, particularly conventional jurisprudence, has always adhered to the sole custody model in child care with a preference for the maternal line (maternal preference) for children who are not yet at the age at which children can differentiate between what is beneficial and what is harmful to themselves. Meanwhile, children who are of sufficient age are given the choice to follow either their mother or their father. This is in line with a book titled “Child Custody in Islamic Law,”<sup>77</sup> which discusses how premodern Muslim jurists drew a clear distinction between the nurturing and upkeep of children, or “custody,” and caring for the child’s education, discipline, and property, known as “guardianship”. The book also emphasizes the influence of Islamic law, particularly conventional jurisprudence, which has always adhered to the sole custody model in child care with a preference for the maternal line for children who are not yet at the age at which children can differentiate between what is beneficial and what is harmful to themselves<sup>78</sup>. Children who are of sufficient age are given the choice to follow either their mother or their father.

**Third**, it cannot be denied that the considerations in child custody decisions are mostly minimalist. The term “minimalist” is used to indicate the lack of elaboration on the legal basis proposed, including the limited references of the judges to enrich these considerations. The consideration is made on a legal basis (usually articles in legislation) that is used as a major premise and then collides with events (facts). In classical language, judges who work in the *subsumptie-automaat* manner (the “subsumption machine” in legal language) are those who base their decisions primarily on the legal basis, usually articles in legislation, then apply these to the facts of the case, and this approach often results in a lack of elaboration on the legal basis proposed and limited references to enrich the judges’ considerations<sup>79</sup>. The minimalist approach to child custody decisions has been criticized for its insufficient depth and breadth in addressing

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<sup>76</sup> Parisot, “Performing the Bad Marriage? The Transition from a Troubled to a Troubling Family in the Course of Fault Divorce in the 21st Century.”

<sup>77</sup> Ahmed Fekry Ibrahim, *Child Custody in Islamic Law*. (Cambridge: Cambridge University Press, 2018). <https://doi.org/10.1017/9781108648042>.

<sup>78</sup> Ibrahim.

<sup>79</sup> Yunanto Yunanto, “Menerjemahkan Keadilan dalam Putusan Hakim,” *Jurnal Hukum Progresif* 7, no. 2 (2019): 192, <https://doi.org/10.14710/hp.7.2.192-205>.

the intricacies of family dynamics and prioritizing the child's best interests, requiring a more comprehensive approach that considers various factors beyond the legal basis, including the psychological and emotional well-being of the child, the parenting abilities of each parent, and the child's wishes<sup>80</sup>. Moreover, the judge's decision to grant sole or joint custody should also take all factual elements into account in the best interests of the child, especially related to the psychological condition of the child and the relationship between parents, which is very much in line with the family system theory and suggests that other factors also play a crucial role in child custody decisions aside from the legal basis<sup>81</sup>.

## How Should the Ideal Child Custody Rights be Determined in Indonesia?

Indonesian marriage law, which applies in both religious and civil courts, adheres to the principle of making divorce difficult. The manifestation of this principle is that divorce must be filed for a reason; there can be no divorce without a reason. These reasons for divorce were described by the Indonesian Government and stipulated in Law Number 1 of 1974 on Marriage and Government Regulation (PP) Number 9 of 1975. The reasons for divorce listed in Article 19 of PP Number 9 of 1975 include adultery, gambling, becoming a drunkard, domestic violence, neglecting household duties, being sentenced for criminal acts, and continuous disputes that are difficult to reconcile. Thus, divorce in Indonesia adopts a fault-based divorce system. This type of divorce system has an impact on the determination of child custody rights, which tends to lean toward the sole custody model rather than the joint custody or shared custody model. From the beginning, couples are indeed required to show and prove the other party's fault through the court process by presenting evidence. This condition puts the parties in a hostile situation, and they strive to show that the other party is less moral than them. The results of the contest and competition in court greatly influence the victory of one party in obtaining child custody rights; that is, whoever is more moral and innocent can win child

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<sup>80</sup> M.E. Lamb, "An Attachment Theory Approach to Parental Separation, Divorce, and Child Custody," in *Attachment: The Fundamental Questions*, ed. Thompson R. A., J. A. Simpson, and L. J. Berlin (New York: The Guilford Press, 2021), pp. 357–364.

<sup>81</sup> José Félix Muñoz Soro and Carlos Serrano-Cinca, "A Model for Predicting Court Decisions on Child Custody," ed. Donrich Thaldar, *PLOS ONE* 16, no. 10 (2021): e0258993, <https://doi.org/10.1371/journal.pone.0258993>.



custody rights. Conversely, the party proven to have faults and thereby contribute to the cause of the divorce is seen as less moral and, therefore, not worthy of obtaining child custody rights.

The Indonesian government needs to evaluate and review the current divorce law system. The fault-based divorce used in Indonesia stems from past experiences in the colonial era due to legal pluralism, namely, the application of Islamic marriage law that allows divorce with the marriage law applied by the colonial government with the Civil Code (*Burgerlijk Wetboek*), which prohibits divorce as influenced by canon law. When people from the Islamic group marry people from the European group, there is a meeting of two legal systems with different values and philosophies. The most prominent impact is when the spouses from different groups are no longer aligned and want to end the marriage with a divorce; that is, they divorce on the grounds of pretence (camouflage reasons or pseudo reasons). The most commonly used reason is that the husband and wife confess that one party has committed adultery because only for this reason does the canon law that colours the Civil Code provide an opportunity for the husband–wife marriage to be broken through the annulment institution. Although annulment is a form of marriage cancellation, the goal is that the husband and wife can separate from each other.

Currently, Indonesia already has a national law that does not prohibit divorce, and there is no longer a difference in the value of divorce law as in the colonial era. In addition to using the fault-based divorce system currently adopted in Indonesia, the use of a no-fault divorce law system commonly applied in several modern-era countries today needs to be considered. The Indonesian Religious Court must seriously consider the no-fault divorce system for three reasons. **First**, Islamic jurisprudence accommodates two divorce systems, namely, fault-based divorce and no-fault divorce. No-fault divorce is seen in the *khuluk* (*khul*) divorce model, which is divorce by agreement between husband and wife with the payment of a certain amount of *iwadh* or ransom money by the wife to the husband and ends with the pronouncement of divorce by the husband to his wife. This concept in Islamic jurisprudence was developed without looking for the fault of one party that explores moral issues. **Second**, *Khuluk* institutions have been adopted by Islamic marriage law in Indonesia through Article 124, Article 148, and Article 161 of the Compilation of Islamic Law and other regulations such as Book II of the Indonesian Supreme Court. This paves the way for non-fault-based divorce to be accommodated. The provisions in the KHI state that divorce with *khuluk* must be accompanied by reasons, but it is necessary to clarify the understanding that "*reason for divorce*" does not have to be synonymous with "*mistake*". People who want to divorce

should be amicable because they feel that they are no longer compatible with each other or the parties feel that they cannot achieve the expected goals of marriage, then this includes divorce that already contains reasons, without the need to point out or find fault with the other party.

**Third**, the fault-based divorce currently in effect, namely, divorce that tends to find weaknesses or denigrate the couple and reveal them in front of the judge's court, does not accord with the teachings of Islam. The current court process is as if people are spreading rumours or *fitnah*. Referring to the moral message of Surah Al-Hujurat verse 12 Allah SWT, *fitnah* (slander) is likened to a person eating the flesh of his dead brother. Allah SWT forbids His servants to look for the faults of others. It is forbidden to denigrate or reveal the disgrace of others, let alone a couple who once lived together and are the parents of their children. Divorce proceedings in the Religious Court seem to be an effort to legalize *fitnah* (slander) because they are institutionalized by the State in the name of proof of the case.

In determining child custody, both childcare models, either joint custody or sole custody, are good to use as long as they are based on the best interests of the child.

## Conclusion

The principle of making divorce difficult, which is one of the important principles of the Indonesian Marriage Law, is followed up with an enumerative mention of the reasons for divorce in the Indonesian Marriage Law and its implementing regulations (PP. Number 9 of 1975) including the Compilation of Islamic Law which applies specifically to Muslims. In law enforcement, there has been a shift in the meaning of the provision "*divorce must be based on reasons*" towards finding fault with a husband and wife by means of a power struggle of evidence to determine who is wrong and who is right. This condition leads to a very serious impact on determining post-divorce custody which tends to lead to a sole custody system and is less accommodating of the joint custody model.

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## **Acknowledgment**

None

## **Funding Information**

None

## **Conflicting Interest Statement**

The authors state that there is no conflict of interest in the publication of this article.

## **History of Article**

Submitted : December 8, 2023

Revised : February 12, 2024; April 26, 2024

Accepted : April 29, 2024

Published : May 8, 2024