

## **The Portrait of Children Custody Rights in Indonesia: A Study of Mother's Rights in Child Custody from Gender Perspective**

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### **Abstract**

Divorce separates not only husband and wife but also parents and children. After the divorce, the role of the mother is identified as the best caregiver for the child. While the father's role is only limited to providing for the child's needs. The question is "whether a mother is the only one with custody rights of a child who has not been mumayiz or is not 12 years old yet? The study was carried out in a descriptive juridical method, with a gender approach, from two things: (1) the normative basis for determining child custody after divorce and (2) determining child custody for the father in a religious court. The findings of this study proved that caring for unmarried children is not the absolute right of a mother. Fathers also have the same rights, even more than a mother. The principle of "the best interest of the child" can be easily enforced by placing the custody rights of the father and mother equally.

Keywords: children, court, custody, gender, rights

### **Abstrak**

Perceraian bukan hanya memisahkan antara suami dan istri, namun juga orang tua dan anaknya. Pasca perceraian, peran ibu sangat identik sebagai pengasuh terbaik bagi anak, sementara peran ayah hanya sebatas menafkahi. Pertanyaan dasar dari tulisan ini adalah apakah hanya seorang ibu yang berhak mengasuh anak yang belum mumayiz atau belum berusia 12 tahun?. Kajian dilakukan secara deskriptif yuridis, dengan pendekatan gender, dari dua hal: (1) landasan normatif penetapan hak asuh anak pasca perceraian, serta (2) penetapan hak asuh anak kepada ayah di Pengadilan agama. Temuan kajian ini adalah pengasuhan anak yang belum mumayiz bukan hak mutlak seorang ibu. Ayah turut mempunyai hak yang sama, bahkan bisa lebih dari seorang ibu. Dengan menempatkan ayah dan ibu secara setara, prinsip the best interest of child dapat dengan mudah diterapkan dalam penentuan pengasuhan anak.

Kata kunci: anak, asuh, hak, gender, pengadilan

## **INTRODUCTION**

Separating husband and wife through a divorce institution can negatively affect children. Divorce can reduce affection for children, thus affecting their behavior. Children can feel sad, stressed, depressed, and even lose motivation. This condition tends to encourage children to deviate from the norm, to commit crimes. Owens, in his research, found that children also experience stress when their parent's divorce (Wanda M. Williams-Owens, 2017). Children who lose their fathers tend to suffer emotionally due to fear, insecurity, and worries about their future. Boys who lost their fathers were six times more likely to commit a crime than children with intact families. Daughters are also not free from criminal acts after separating from their fathers. The loss of a father figure causes him to be trapped with narcotics and illegal drugs, alcohol, to early sexual activity that causes pregnancy in his teens. Burhanuddin gives another example in his research on children from broken homes (Burhanuddin et al., 2021, p. 46). Children who are victims of broken homes due to their parents' divorce tend to be closed and temperamental. Lack of love, guidance, supervision and education from their parents also hinders intellectual development. His new family

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environment was not conducive to child development because his parents had remarried. It shows that post-divorce child care is critical, including the appointment of child custody.

Various provisions have normatively stated that divorce is not to separate parents and children. However, it is undeniable that divorce can create distance between one parent and his child, even both. Parents' attention to their children will gradually decrease, especially if one or both already have a new partner. As a result, parents often fight over their children after a divorce occurs. The phenomenon of child custody disputes is one of the most disputed cases in the Religious Courts. Based on data from the Religious Courts Case Data Bank, the majority of conflicts in the Religious Courts are marital disputes, including disputes over child control. The number of conflicts over child control is relatively stable at >1,000 cases per year in all religious courts throughout Indonesia. Data in 2018 shows a total of 1,258 cases regarding child custody. In 2019, there were 1,412 cases, and in 2020 there were 1,230 cases (Directorate General of the Religious Courts Agency, 2022). This case data does not include a counterclaim related to child custody in a divorce case. Several cases of fighting over child custody that has gone viral in Indonesia include the struggle for child custody between artists Marshanda and Ben Kasyafani, Nikita Mirzani and Sajad Ukra, to the couple Tsania Marwa and Atalarik Syah.

Launching from the online media *popbela.com*, referring to the case of artists in Indonesia, childcare disputes seem "gray" (Johanna Elizabeth, 2017). The Compilation of Islamic Law has stipulated that children not yet 12 years old are the mother's rights. However, in reality, the child is sometimes handed over to the father. This impression becomes commonplace because the social construction that has been built imaged the mother as the best caregiver for the child.

Based on this background, the author wants to examine post-divorce child custody as a review of Article 105 of the Compilation of Islamic Law. Is it only a mother who has the right to care for children after a divorce? And only a father only should provide for the child?. The child referred to in this paper is a child who has not been *mumayiz* or is not yet 12 years old. The child does not have "independent suffrage," so the judge's decision will determine the child's future. Child custody in this paper is examined from a gender perspective.

Some literature has discussed a lot about child custody. Among them are writings by Mohamad Faisal Aulia et al. about Child Custody in Families with Gender Justice Perspective (Aulia et al., 2021). In contrast to this paper, Aulia et al. only focus on the provisions of Articles 105 and 156 of the Compilation of Islamic Law by including some opinions of classical fiqh scholars. Aulia et al. found at least two things. First, the provisions of Article 105 and Article 156 of the Compilation of Islamic Law are not gender-responsive. Aspects of morality, health, education, and child care are not the basis for custody rights. This provision only places rights based on gender. Second, aspects of morality, health, education and maintenance that support child care are not only owned by certain genders.

Maryanih et al. conducted a legal analysis of Article 156 of the Compilation of Islamic Law concerning determining child custody due to divorce (Maryanih. Andi Akram et al., 2021). This paper focuses on the provisions of Articles 105 and 156 of the Compilation of Islamic Law. This study shows that normatively biological mothers are a priority in child custody. However, these rights may be transferred under certain conditions. Judges' considerations are no longer based on written law but can consider the environment and child psychology.

Child custody from the perspective of the Compilation of Islamic Law and the Syafi'i School is the focus of Sunarto's writings (Sunarto et al., 2020). This paper focuses on the age limit of

children who are called not *mumayiz*. If the Compilation of Islamic Law stipulates that children aged 12 years and over can choose a caregiver. Madhzaab Syafi'i believes that children aged 7 years already have the right to vote because, at that age, the child can distinguish what is good or bad for himself.

Some articles also focus on determining the father as the holder of custody but do not look at it from a gender perspective. These include the works of Nisa Nur Amalia et al. (Amalia et al., 2018), Arnengsih et al. (Arnengsih, Mohamad Sar'an, 2020), and also the writings of Naslah et al. (Naslah et al., 2021). Each of these articles refers to a specific case within a limited scope. Amalia focused on one decision at the Surabaya Religious Court, Arnengsih focused on a decision at the Bogor Religious Court, and Naslah at the South Jakarta Religious Court. Several similar writings take samples from various decisions of the Religious Courts.

## **RESEARCH METHOD**

The review of child custody rights from a gender perspective is carried out in a descriptive juridical manner with a gender approach from two things: (1) how is the normative basis for determining child custody after divorce, both from the side of legislation and from the side of classical fiqh. (2) how to determine the custody of the child to the father in the religious court. In conclusion, it is hoped that this paper can answer a big question: is it only a mother who has the right to take care of a child who has not been *mumayiz*, in accordance with the provisions of Article 105 letter (a) of the Compilation of Islamic Law? The primary data in this paper comes from writings on the determination of child custody in the laws and regulations and classical fiqh, as well as the decisions of the judges of the Religious Courts. As secondary data, the author refers to literature sources related to the scope of this paper's study.

Reading from a gender perspective means separating gender identity (sex) and gender identity (gender). Terminologically, the Big Indonesian Dictionary does not distinguish between gender and gender. The word "gender" can mean the type/genus of male and female biological tools in the human body. It can also mean the distinguishing nature between men and women, both physically and spiritually. At the same time, the word "gender" is only defined as gender. It is one of the factors that cause misunderstandings among Indonesians in interpreting gender.

In essence, gender is different from gender. Fakihi describes gender as a classification of humans based on the biological tools of the human body, such as men with the characteristics of having sperm production equipment and women having reproductive organs. Gender is a product of inherent social and cultural construction like men and women (Fakihi, 2008, p. 8). Nurmila views gender as human nature given by God without the right to choose for humans. Meanwhile, gender is an ideal construction built by society so that gender construction can be different based on time and place, can change, and can be exchanged between men and women (Nurmila, 2019, p. 8). Based on this opinion, a common thread can be drawn that gender (sex) is the distinction between men and women based on biological tools (Anatomical Sex). In contrast, gender is a distinction based on the nature built by social construction (Gender Identity).

Gender construction then gives birth to gender roles that are formed according to gender. One example is that women are biologically innate to have reproductive organs, so women should be responsible for caring for, nurturing, and educating children. Thus, it is natural for men to have

the means of sperm production so that he is "assigned" to fertilize and provide for women and their children. According to Fakhri, this division of tasks is normal and does not cause problems. However, it becomes a problem if the structure of gender roles creates gender inequality, both for men and women (Fakhri, 2008, p. 76). When correlated with this Article, the provisions for determining child custody rights after parents separate can give rise to gender inequality, both for the mother and the child's biological father. The assumption that a mother has the right to child custody because of her nature clearly discredits the role of a father in child care. On the other hand, this assumption becomes a moral burden for a mother. Post-divorce, women as biological mothers are given excessive responsibility. They are required to live independently after divorce and are also charged with the obligation to take care of children.

Gender theory was chosen as the perspective in this paper because the determination of child custody is very closely correlated with the gender and gender of the parents. Are men as "men" and a "father", and women as "women" and a "mother." The author sees gender theory as being able to "translate" the provisions regarding child custody holders, especially Article 105 letter (a) of the Compilation of Islamic Law. To measure gender inequality, the author borrows Fakhri's gender inequality indicator. According to him, gender inequality can be assessed from indications of subordination, marginalization, violence, stereotypes, and workload. Meanwhile, the assessment of gender justice uses indicators of access, control, participation, and benefits (Nurmi, 2015, p. 4).

Judges in building legal constructions, especially in a legal vacuum, consist of three forms of structure: analogy, determination, and *argumentum a contrario* (Juanda, 2017, p. 160). The legal analogy is a construction that is carried out by analogizing the law of something to the situation of something similar. Legal determination is also known as legal refinement, where the law is taken subtly so that it seems as if no party is to blame. *Argumentum a contrario* is a legal construction where the judge decides against the law. The analysis of the Religious Court's decision on child care in this case focuses on the *argumentum a contrario* decision.

## **RESULTS AND DISCUSSION**

### **Reconstruction of the Normative Foundation for Child Custody After Divorce**

Child care after divorce is not regulated in detail in the laws and regulations in Indonesia. Article 41 of the Marriage Law states that the father and mother, for the sake of the child, are obliged to maintain and educate their child despite a divorce. Letter (b) in this Article stipulates explicitly that the responsibility for the child's living expenses is handed over to the father. However, it is possible that a mother can be charged with the same responsibility based on a court decision. Article 49 of the Marriage Law stipulates that both father and mother can have power over their child revoked if two things happen: (1) he neglects his obligations to the child, and/or (2) he misbehaves as a parent.

The Child Protection Act also does not regulate the rights of parents over their children after divorce. Article 14, paragraph (2) of the Child Protection Law states that in the event of a divorce, the child has the right to a personal relationship with each parent, to receive care, education, maintenance, and protection, and to obtain living expenses from both parents. Custody of children is specifically regulated only in divorce in mixed marriages. According to the provisions

of Article 29 of the Child Protection Law, children in mixed marriages are given the right to choose in the care of one of their parents.

The rules regarding child custody are only found in Article 105 of the Compilation of Islamic Law. This Article, in principle, regulates the rights of the mother, the rights of the child, and the father's obligations after the divorce. Mothers are given the right to take care of children who have not been *mumayiz* (hereinafter only referred to as "children"), children (who have been *mumayiz*) are given the right to choose their care, while fathers are charged with child care costs.

If a mother is the main priority in raising children, then the father is not the second priority. Article 156 of the Compilation of Islamic Law classifies custody of children sequentially from mother, maternal grandmother, father, paternal grandmother, biological sister, and paternal aunt. However, this custody is not absolute. A person can lose custody if it is deemed inappropriate to take care of a child. Custody rights can be transferred to other relatives as stipulated in the Article above. The Compilation of Islamic Law separates the responsibilities of parents towards their children after divorce. The father is responsible for the child's upkeep, while the mother is responsible for the upbringing.

The Compilation of Islamic Law does not provide a deeper explanation of the provisions of Article 105 and Article 156. To examine the provisions of these two articles, the author tries to raise the normative basis for child custody in the provisions of Islamic law. Bearing in mind, the explanation in the Compilation of Islamic Law states that the material law in the Religious Courts is Islamic law, and the Compilation of Islamic Laws is composed of applied law in resolving cases in the religious courts.

Referring to the Qur'an, a breastfeeding child is prioritized to be in the care of his mother. Surah al-Baqarah (2): 233 describes the position of a mother to breastfeed her child and the role of a father to provide for it. Al-Qurtubi, in his interpretation, interprets this verse as women whose husbands divorce while they have children. This verse shows that mothers have more right to breastfeed their biological children than other women. On the other hand, weaning a child who is still a baby can be dangerous for the child. This verse also shows that biological mothers are more entitled to raise children because of their tenderness and affection (Al-Qurtubi, 2006, p. 106).

Similarly, Wahbah Zuhaili interprets this verse about the role of a divorced husband and wife. The mother's role in breastfeeding precedes others because she is seen as more affectionate and gentle to the child she conceived and born. The separation between mothers and children who are still breastfeeding is also seen as bringing suffering, both to the mother and to the child (Zuhaili, 2009, p. 730).

At-Tabari refers to Abu Ja'far stating that breastfeeding for biological mothers is a suggestion, not a command. At-Tabari does not deny that biological mothers have the right to breastfeed. However, if it is related to Surah At-Thalaq (65): 6, then another woman can replace the birth mother to breastfeed her child. This verse explains that if parents find it challenging to provide wages for women who can breastfeed, the biological mother can breastfeed her child (At-Tabari, 1994, p. 53). Quraish Shihab, as quoted by Nurwahyudi, means that the obligation to breastfeed is not only borne by the biological mother. The word *al-walidat* has a different meaning from the word *ummahat*, which is indicated for mothers, including biological mothers and mothers who can breastfeed (Nurwahyudi, 2017, p. 108). Thus, most classical fiqh figures believe that the command to breastfeed is a recommendation. The biological mother is not obliged to breastfeed her child

unless the father cannot pay wages to the breastfeeding woman or the child refuses other than the mother's milk.

Classical fiqh studies prioritize the mother as the holder of child custody. According to Sayyid Sabiq, the mother is the primary custody holder after a divorce, especially if the child is breastfeeding. A mother is seen as better educated, more patient in dealing with children, and has more free time than a father (Sabiq, 2004, p. 680). Wahbah Zuhaili has the same opinion. A mother is seen as having more rights as a child custody holder after a divorce or the death of her husband because of her tender heart (Zuhaili, 1985, p. 720). Both of these opinions are based on the hadith of the Prophet narrated by Ahmad, Abu Daud, Baihaki and Hakim (It was narrated from Abdullan ibn 'Amir, a woman came and asked the Messenger of Allah, complaining about her ex-husband who wanted to take her child, while she was pregnant with him, gave birth to him, nursed him and took care of him. Then the Messenger of Allah said, "You are more entitled to take care of the child as long as you are not married again"). And from the fatwa of Abu Bakr As-Shidiq on the custody dispute of 'Ashim bin Umar between Umar bin Khatab and his ex-wife (Umar bin Khattab was about to take 'Ashim bin Umar, his mother then reported this dispute to Abu Bakr As-Shidiq, he then said that the caress of hands, laps and love).

All schools place the mother as the main priority for child custody. The comparison of the order of the holders of child custody is as follows (Al-Juzairi, 2002, p. 520):

- a. The Hanafi Madhhab places the person most entitled to raise children in order: mother, a grandmother from mother, father, a grandmother from father, sibling, half-sister, then mother-in-law.
- b. The Maliki Madhhab gives custody to the mother, grandmother from mother, aunt from mother, either biological father or mother, grandmother aunt from mother, a grandmother from father, father, biological sister, aunt from father, both biological father as well as the same mother, then the niece of brothers and sisters.
- c. The Shafi'i Madhhab sequentially gives custody to the mother, grandmother from the mother, father, then grandmother from the father. After that, custody is given to female and male relatives.
- d. The Hambali Madhhab gives custody to the mother, maternal grandmother, father, father's grandmother, biological sister, mother's sister, father's sister, mother's aunt, both biological, mother and father, aunt from father, whether biological, mother or father, niece of sister, niece of brother, then female cousin from father's path.

Classical scholars provide conditions that a holder of custody must meet. The general requirements are *baligh*, reasonable, can educate children, trustworthy, then Muslim. For women and men, special conditions apply. Specific requirements for women include: a mother has not remarried another man, has a mahram relationship, does not stop caring for her even though she does not have a salary, and does not live with someone the child hates. The special requirement for the man is to have a mahram relationship. There must be a woman who can help care for the children, such as a wife, mother, or aunt. The scholars also require that the holder of custody does not leave their foster child 133 km away.

Custody becomes void if the above conditions are not met. Custody rights can also be revoked if the child custody holder leaves the child to a faraway place, the caregiver suffers from a dangerous disease, is ungodly, or lacks religious knowledge. A mother can lose custody of her if she

takes her child to a place that is not accessible to her father. She also loses custody if she remarries another man (Zuhaili, 1985, p. 726).

Efforts to reconstruct the normative basis for child custody are carried out by re-reading the above rules from a gender perspective. The separation between anatomical sex and gender identity is done to avoid gender bias in determining child custody holders. Anatomical sex is gender, a biological condition of humans as nature that has existed since birth. Gender identity is the identity, personality, and role based on gender, created and constructed from the paradigm of society. If sex cannot be changed, gender can change over time, place, situation, and conditions.

Judging from the juridical grounds above, several reasons for placing mothers in particular and women in general in child care, viewed from a gender perspective, are available in Table 1.

Table 1 Parenting Provisions in Gender

Parenting Terms	Sex/Gender
Child care costs	Gender Identity
Breastfeeding	Anatomical Sex
Gentle and affectionate	Gender Identity
Baligh, sensible	Gender Identity
Trustworthy, selfless care	Gender Identity
Mahram relationship	Anatomical Sex
Don't leave children	Gender Identity
Educated and able to educate children	Gender Identity
Healthy physically and spiritually	Gender Identity

Table 1 shows that the biological factors that influence child rearing are the condition of the child who is still breastfeeding and the child's mahram relationship. A mother is considered worthy of raising children because of her nature to breastfeed children. The mahram relationship is also natural because it involves the sex of the child and the caregiver. The social factors based on gender construction are gentle, affectionate, mature, intelligent, trustworthy, educated, healthy, and do not leave children.

Anatomical sex affects child custody rights only in two circumstances. First, the situation where the child is still breastfeeding, so it requires a caregiver who can provide breast milk. In this condition, a mother certainly takes precedence over the father. Women are naturally given the advantage of conceiving, giving birth, and breastfeeding children, things men cannot do. However, according to At-Tabari's opinion, this condition is only a suggestion, not an obligation. So, other women can replace the birth mother by breastfeeding. In its development, formula milk products have been available to replace breast milk. Second, the situation in which the relationship between the mahram and the child must be considered. Children cannot be raised by people who are not the mahram. Just as a daughter cannot raise a son from an uncle or aunt, and vice versa. This is to avoid seclusion between them when the child is an adult.

Gender Identity greatly influences the views of classical scholars in determining child custody holders. This shows that the selection of mothers or women as caregivers is the result of social construction and stereotypes of women. Men or fathers in particular, although not explicitly stated, are seen as unable to raise children, rude, angry, lacking in affection, incapable of educating, and only born to work. This means that the determination of child custody is only based on

prejudice against the nature of men and prejudice against the nature of women. As a result, there is a gender bias in determining who has the right to take care of children after divorce. Thus, looking from a gender perspective, it can be concluded that gender inequality and gender discrimination occur in the normative foundation of post-divorce child custody.

### **Father & Child Custody in Religious Court Decision**

Reviewing the considerations in determining custody in the Religious Courts from a gender perspective, the author focuses on the decision that establishes the father as the holder of custody. This is done to get an overview of social conditions and judges' considerations, especially in disputes over child custody.

The child's biological father sued his ex-wife because it was deemed inappropriate for child custody. The Panel of Judges found two contradictory attitudes between Plaintiff and Defendant in child care. First, the biological mother as Defendant, has been living with her children since she separated from her husband, but does not care about her children. Defendant often smoked at night, causing his youngest child to have pneumonia. Their children were only supervised for by Defendant's mother and Defendant's children's private tutor. Second, the biological father, as Plaintiff, even though he lives separately from his children, always pays attention to the needs of his children. Plaintiffs fulfill their daily requirements, education and private tutoring, to school pick-ups. Based on these legal facts, the Panel of Judges believes that Defendant, as the mother, does not deserve custody of her children. Decision number 3346/Pdt.G/2016/PA.Sby was handed down deviating from the provisions of Article 105 letter (a) of the Compilation of Islamic Law. The father is designated as the holder of child custody (Amalia et al., 2018, p. 31).

Case number 0915/Pdft.G/2017/PA.Bgr places the mother as Plaintiff and the father as Defendant. Based on the provisions of Article 105 letter (a) of the Compilation of Islamic Law, Plaintiff demands custody of Plaintiff's and Defendant's children. The considerations of the Panel of Judges based on the principle of "best interest of child" include: (1) Since Plaintiff and Defendant have lived separately, the child has been living together and is being cared for by Defendant as his biological father. (2) The child is essentially sick and undergoing a period of therapy, until the case is tried, the condition of the child's health development continues to improve. (3) The child while in his father's care, is healthy, comfortable and not neglected (Arnengsih. Mohamad Sar'an, 2020, p. 130). Based on these considerations, the final decision fell by establishing the father as the holder of custody.

A court decision has determined a mother is the holder of child custody through a court decision. Two years later, the father, as Plaintiff, filed for the cancellation of child custody from the mother as Defendant, and transferred it to Plaintiff. At the trial, the Panel of Judges found the following legal facts: (1) Defendant, as the biological mother, brought an Australian child after the divorce. To meet with his child, Plaintiff must agree to the conditions determined by Defendant, such as paying a sum of money and being supervised by an Australian contact center. The Panel of Judges assessed this fact as a situation where Defendant did not give Plaintiff the broadest possible access to have contact with his child. (2) The Defendant is married to an Australian citizen (non-Muslim) who has a different religion than his child. The Panel of Judges considered that religious differences, even between Defendant and her husband, would affect the children's beliefs (Naslah



et al., 2021, p. 14). In the end, through Decision number 2887/Pdt.G/2017/PA.Js, the Panel of Judges transferred custody of the child to Plaintiff as the biological father.

The decision on the determination of child custody to his father is broadly summarized in the writings of Maryanih et al. (Maryanih. Andi Akram et al., 2021, p. 142):

- a. Decision number 858/Pdt.G/2020/PA.Bks stipulates the father as the holder of custody because the mother has schizophrenia, so she is considered incompetent to take care of the children.
- b. Decision number 521/Pdt. G/2020/PA.JU handed over custody to the father because it was proven that the mother often went to nightclubs with other men. Mothers are seen as inappropriate in setting a good example for their children.
- c. Decision number 4972/Pdt.G/2019/PA.JT believes that fathers are more responsible, give attention, meet all the needs of children, and positively impact children. Mothers are seen as unworthy because they are too busy working, so they don't have time for their children. So custody of the child is assigned to the father.
- d. Decision number 726/Pdt. G/2020/PA.JU found legal facts that the mother had remarried another man. The Panel of Judges considered that the marriage was too fast, so it did not give the child the opportunity to get to know and adapt to his stepfather. In the interests of the child's emotional growth, custody is assigned to the father.
- e. Decision number 292/Pdt.G/2018/PA.JU stipulates the father as the holder of custody because the child prefers to live with his father rather than his mother.

The determination of the father as the holder of custody can also be found in the cassation decision number 574 K/Ag/2016. Mothers are seen as unfit to raise children because of their attitude. Mothers often leave their children abroad and hand them over to domestic helpers. Mother was also known as a drug addict and porn addict and refused rehabilitation. Thus, for the child's good, the father is given the right to the child's upbringing (Ivana et al., 2020, p. 300).

Some of these decisions show that child custody is not an absolute right of a mother. Although Article 105 letter (a) of the Compilation of Islamic Law is very clear, the Religious Courts judges interpret it differently. The judge ruled out normative rules because they were deemed not in accordance with the legal facts found (Arnengsih. Mohamad Sar'an, 2020, p. 133). Islami (Islami et al., 2019, p. 192), in his writings, concludes that the legality of child care falling to the father is: (1) for the sake of the child in accordance with the provisions of the Child Protection Law, (2) based on the normative basis for revocation of guardianship, and (3 ) does not fulfill the conditions of *hadhanah*. There are several reasons why mothers are seen as inappropriate and appropriate as custodians, including: (1) the mother's health is disturbed, both physically and mentally, (2) the habits and behavior of the mother will have a negative influence on the child, (3) the mother's routine so that she does not have free time with the child, and (4) the child is comfortable living with his father.

Based on the judge's considerations above, it can be understood that child care is not based on gender. The judge, in his consideration, did not look at the father and mother in terms of gender but looked at the ability of each individual to raise children. Fathers and mothers before the court are treated fairly and equally by removing gender stereotypes and social paradigms based on each individual's ability, worth and worth. Thus, both fathers and men generally have the same ability to raise children, even more than mothers or women.

The considerations above show that the judge considers the interests of the child and the future of the child. The judges mainly refer to the Jurisprudence of the Supreme Court of the Republic of Indonesia Number: 110 K/AG/2007 dated December 7, 2007. This jurisprudence states that in the case of child care, it is necessary to look at the interests of the child, not to see who has the most right but who does not cause harm to the child. Thus, the principle of the child's best interest becomes one of the main factors in determining child custody holders. This principle does not look at the gender of parents or children but at who can provide more benefits for children. Several criteria in determining child custody rights include: (1) the relationship between children and their parents, (2) parental participation in parenting, (3) communication between children and their parents, (4) the capacity of parents to fulfill children's needs, (5) the personal maturity of parents, and (6) the lifestyle of the parents (Asnawi, 2022, p. 199). This criterion shows that child care must be in the child's best interests. Child custody is not about who is more entitled but who is more worthy, worthy, and able to give the best influence to the child.

## **CONCLUSION**

This study found two things based on the studies in the two discussions above. First, there is a gender bias in the juridical basis for determining child custody, both in the Compilation of Islamic Law and in classical *fiqh* studies. Re-reading the normative rules on child custody shows that the provision of mothers as the absolute holder of child custody results from social construction and stereotypes attached to men and women. Second, several cases in the religious courts show that not all mothers are considered worthy and proper as holders of child custody. Settlement of child custody disputes in the Religious Courts is no longer based on gender. However, all parties are treated and judged equally, considering the child's best interests. These two findings show that it is not only a mother who has the right to take care of a child who has not been *mumayyiz*, as stipulated in Article 105 letter (a) of the Compilation of Islamic Law. Fathers also have the same rights as a mother in child care. In some conditions, even more than a mother, fathers have the same ability to care for, nurture, and educate their children. By placing the father and mother equally, the principle of the child's best interest can be easily applied in determining child care.

The statutory provisions full of gender inequality in the household are not only a matter of child custody. Many researchers have discussed the rights and obligations of husband and wife in the dated house from a gender perspective. However, few discuss the rights and obligations of ex-husbands and ex-wives after divorce. The author's hope, the study of gender in post-divorce rights and responsibilities, does not only develop in child custody holders but can also persist during the iddah period, iddah maintenance, mut'ah, joint property, and others.

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