rika saraswati <rikasaraswati@unika.ac.id>

Submission paper

rika saraswati <rikasaraswati@unika.ac.id> Fri, Apr 26, 2019 at 4:21 PM
To: john.eekelaar@law.ox.ac.uk

Dear John,

I would like sending my paper entitled "The 'Best Interests of the Child' in Custody Disputes in the Indonesian System of Family Law" as Mavis Maclean from Journal of Social Welfare and Family Law has suggested me to approach the Int J of Law Family and Policy (OUP) edited by you.

I enclosed paper full version, paper without name, table, title and cover letter. If there is any requirements need to be fulfilled, please contact me on this email.
I am looking forward to hearing from you. Thank you.

Yours Sincerely,
Rika Saraswati

5 attachments

Title.doc
23K

Table 1.doc
32K

cover_letter.doc
31K

Journal full version without authors' name.doc
178K

Rika Saraswati et.all-Journal of Social Welfare and Family Law-Full version.doc
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Submission paper

John Eekelaar <john.eekelaar@law.ox.ac.uk> Fri, Apr 26, 2019 at 7:55 PM
To: rika saraswati <rikasaraswati@unika.ac.id>
Cc: "Jens M. Scherpe" <jms233@cam.ac.uk>

Dear Rika,

I have now read your submission. The article sets out the development and current status of the 'best interests' principle clearly and accurately, and explains its application in Indonesian law. My problem with the paper however is that the findings consist of only four cases. I do not think this is substantial enough to warrant publication in the IJLPF. It may be that a broader picture of the status of the best interests principle in Indonesia could provide the necessary substance. I am sorry, since you have written a well-presented article, but pressure on space requires us to be very selective.

Best wishes,

John

Cc Dr Jens Scherpe,

Assistant Editor

From: rika saraswati [mailto:rikasaraswati@unika.ac.id]
Sent: 26 April 2019 10:22
To: John Eekelaar
Subject: Submission paper

Dear John,

[Quoted text hidden]

Submission paper

rika saraswati <rikasaraswati@unika.ac.id> Fri, Apr 26, 2019 at 8:12 PM
To: John Eekelaar <john.eekelaar@law.ox.ac.uk>

Dear John,
Thank your for your quick response. I can understand your objection on the four cases. I will try to find other cases from the courts even though the courts have a policy to limit researcher' access to obtain more verdicts.
In your opinion, how many verdicts are needed to support my paper? Thank you.
Best regards,
Rika
Sent from my iPhone
[Quoted text hidden]

Unika SOEGIJAPRANATA

rika saraswati <rikasaraswati@unika.ac.id>

Submission paper

John Eekelaar <john.eekelaar@law.ox.ac.uk> Fri, Apr 26, 2019 at 8:31 PM
To: rika saraswati <rikasaraswati@unika.ac.id>

Dear Rika,

You are always free to submit if and when you feel your paper meets the points I made.

Best wishes,

john

[Quoted text hidden]

rika saraswati <rikasaraswati@unika.ac.id>

International Journal of Law, Policy and the Family - Account Created in ScholarOne Manuscripts

International Journal of Law, Policy and the Family <onbehalfof@manuscriptcentral.com> Fri, Nov 13, 2020 at 6:39 PM
Reply-To: ijlpf@law.cam.ac.uk
To: rikasaraswati@unika.ac.id

13-Nov-2020

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Thank you for your participation.

Sincerely,
Prof Dr Jens M. Scherpe
Editor, International Journal of Law, Policy and the Family

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United Kingdom
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rika saraswati <rikasaraswati@unika.ac.id>

International Journal of Law, Policy and the Family LAWFAM-2020-006

International Journal of Law, Policy and the Family <onbehalfof@manuscriptcentral.com> Fri, Nov 13, 2020 at 7:47 PM
Reply-To: ijlpf@law.cam.ac.uk
To: rikasaraswati@unika.ac.id

13-Nov-2020

Dear Dr. Saraswati:

Your manuscript entitled "Accommodating the 'Best Interests of the Child' in the Right of Custody Disputes in the Indonesian System/s of Family Law" has been successfully submitted online and is presently being given full consideration for publication in the International Journal of Law, Policy and the Family.

Your manuscript ID is LAWFAM-2020-006.

Please mention the above manuscript ID in all future correspondence or when calling the office for questions. If there are any changes in your street address or e-mail address, please log in to ScholarOne Manuscripts at https://mc.manuscriptcentral.com/lawfam and edit your user information as appropriate.

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Thank you for submitting your manuscript to the International Journal of Law, Policy and the Family.

Sincerely,
Prof Dr Jens M. Scherpe
Editor, International Journal of Law, Policy and the Family

University of Cambridge
Gonville and Caius College
Cambridge CB2 1TA
United Kingdom

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3 **Manuscripts with Decisions**

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5 Most Recent E-mails

Manuscripts with Decisions

ACTION	STATUS	ID	TITLE	SUBMITTED	DECISIONED
	ADM: Scherpe, Jens • Accept (19-Mar-2021) *Archiving completed on 20-Jun-2021* view decision letter Contact Journal	LAWFAM-2021-025.R1	Accommodating the 'Best Interests of the Child' in the Right of Custody Disputes in the Indonesian System/s of Family Law *Files Archived*	19-Mar-2021	19-Mar-2021
a revision has been submitted (LAWFAM-2021-025.R1)	ADM: Scherpe, Jens • Minor Revision (18-Mar-2021) • a revision has been submitted *Archiving completed on 20-Jun-2021* view decision letter Contact Journal	LAWFAM-2021-025	Accommodating the 'Best Interests of the Child' in the Right of Custody Disputes in the Indonesian System/s of Family Law *Files Archived*	28-Feb-2021	18-Mar-2021
Revision option expired on 29-Jan-2021	ADM: Scherpe, Jens • Major Revision (30-Nov-2020)	LAWFAM-2020-006	Accommodating the 'Best Interests of the Child' in the Right of Custody Disputes in the Indonesian System/s of Family Law	13-Nov-2020	30-Nov-2020

ACTION	STATUS	ID	TITLE	SUBMITTED	DECISIONED
	• Revision option expired on 29-Jan-2021 *Archiving completed on 30-Apr-2021* view decision letter Contact Journal		*Files Archived*		

Decision Letter (LAWFAM-2020-006)

From: jms233@cam.ac.uk

To: rikasaraswati@unika.ac.id

CC:

Subject: International Journal of Law, Policy and the Family - Decision on Manuscript ID LAWFAM-2020-006

Body: 30-Nov-2020

Dear Dr. Saraswati,

Manuscript ID LAWFAM-2020-006 entitled "Accommodating the 'Best Interests of the Child' in the Right of Custody Disputes in the Indonesian System/s of Family Law" which you submitted to the International Journal of Law, Policy and the Family, has been reviewed. The comments of the reviewer(s) are included at the bottom of this letter.

The reviewer(s) have recommended publication, but also suggest some major revisions to your manuscript. Therefore, I invite you to respond to the reviewer(s)' comments and to revise your manuscript accordingly.

To revise your manuscript, log into https://mc.manuscriptcentral.com/lawfam and enter your Author Centre, where you will find your manuscript title listed under "Manuscripts with Decisions." Under "Actions," click on "Create a Revision." Your manuscript number has been appended to denote a revision.

PLEASE also ensure that you comply with the style guidelines of the journal, which can be found at https://academic.oup.com/lawfam/pages/General_Instructions - and particularly the referencing which requires full footnotes (with precise page numbers) rather than references at the end.

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When submitting your revised manuscript, you will be able to respond to the comments made by the reviewer(s) in the space provided. You can use this space to document any changes you make to the original manuscript. In order to expedite the processing of the revised manuscript, please be as specific as possible in your response to the reviewer(s).

IMPORTANT: Your original files are available to you when you upload your revised manuscript. Please delete any redundant files before completing the submission.

Once again, thank you for submitting your manuscript to the International Journal of Law, Policy and the Family and I look forward to receiving your revision.

Sincerely,
Prof Dr Jens M. Scherpe
Editor, International Journal of Law, Policy and the Family

University of Cambridge
Gonville and Caius College
Cambridge CB2 1TA
United Kingdom
ijlpf@law.cam.ac.uk

Reviewer(s)' Comments to Author:

The subject matter of this article is important and understudied in the literature on Indonesian family law. It is, therefore, original and significant.

However, in my view, it is not yet ready for publication. It contains many grammatical and spelling errors (eg 'doesn not' (p. 4), 'subjec's' (p. 5), 'Tears' (p. 11), 'bee' (p. 13), 'housewifwe' (p. 15), 'takerace' (p. 18)). I think that it also needs a clear statement of the argument in the introduction. The subject matter of the piece is clear, but the thesis of the article is less so.

I also suggest a restructure, putting the Indonesian legislation, kompilasi and relevant Supreme Court decisions in a section near the beginning, rather than introducing relevant provisions/decisions on a case-by-case basis. It would be beneficial for the reader to get an overall view of the legal framework early on.

Methodologically, I wondered why interviews were conducted in Semarang (and not any other parts of Indonesia) and why more general court judges were interviewed than religious court judges (given that many of the cases discussed appeared to involve Muslims). This goes to the question of whether the cases and literature was representative of Indonesian judicial practice. I also wondered why the author(s) appeared to rely on secondary accounts of cases provided by other scholars and not the actual cases discussed. Were those cases not available? One problem with this appears to be that the author(s) rely on interpretation by other scholars of these cases rather than the cases themselves? The article would be more authoritative, and the evidence presented more convincing, if the cases were cited directly.

This article contains some good analysis. But I wondered whether a more critical/analytical view could have been taken to some of the secondary material cited, and even some of the interview data. Also, the main impediment – effective enforcement/implementation – probably could/should be mentioned earlier.

Other suggestions: the article needs more pinciting, and it might be useful to give names to the cases (instead of just referring to them by number).

Date Sent: 30-Nov-2020

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rika saraswati <rikasaraswati@unika.ac.id>

Reminder: International Journal of Law, Policy and the Family

International Journal of Law, Policy and the Family <onbehalfof@manuscriptcentral.com> Sat, Jan 16, 2021 at 1:08 PM
Reply-To: ijlpf@law.cam.ac.uk
To: rikasaraswati@unika.ac.id

16-Jan-2021

Dear Dr. Saraswati,

Recently, you received a decision on Manuscript ID LAWFAM-2020-006, entitled "Accommodating the 'Best Interests of the Child' in the Right of Custody Disputes in the Indonesian System/s of Family Law." The manuscript and decision letter are located in your Author Centre at https://mc.manuscriptcentral.com/lawfam.

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This e-mail is simply a reminder that your revision is due in two weeks. If it is not possible for you to submit your revision within two weeks, we will consider your paper as a new submission.

Sincerely,

Prof Dr Jens M. Scherpe
Editor, International Journal of Law, Policy and the Family

University of Cambridge
Gonville and Caius College
Cambridge CB2 1TA
United Kingdom
ijlpf@law.cam.ac.uk

Decision Letter (LAWFAM-2021-025)

From: jms233@cam.ac.uk

To: rikasaraswati@unika.ac.id

CC:

Subject: International Journal of Law, Policy and the Family - Decision on Manuscript ID LAWFAM-2021-025

Body: 18-Mar-2021

Dear Dr. Saraswati,

Your resubmitted manuscript ID LAWFAM-2021-025 entitled "Accommodating the 'Best Interests of the Child' in the Right of Custody Disputes in the Indonesian System/s of Family Law" which you submitted to the International Journal of Law, Policy and the Family, has been reviewed. The reviewer was satisfied that the suggested improvements have been incorporated sufficiently so that the paper your be accepted for publication. However, they also commented that the paper needed some significant editorial work to be suitable for publication. The editors have therefore undertaken this editing. Please find attached the edited file.
There also were queries about three references.
Could we therefore ask you to work with the attached file in which the changes have been accepted and provide the proper referencing in the footnotes and then return the paper to us, ideally with the file name giving the date in which you submit and an indication that this is the final version.

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You may also click the below link to start the revision process (or continue the process if you have already started your revision) for your manuscript. If you use the below link you will not be required to login to ScholarOne Manuscripts.

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Once again, thank you for submitting your manuscript to the International Journal of Law, Policy and the Family and I look forward to receiving your revision.

Sincerely,
Prof Dr Jens M. Scherpe
Editor, International Journal of Law, Policy and the Family

University of Cambridge
Gonville and Caius College
Cambridge CB2 1TA
United Kingdom
ijlpf@law.cam.ac.uk

Date Sent: 18-Mar-2021

File 1: - Accomodating_the_best_interest_of_the_child_custody_18 March-edited-with changes accepted.doc

Decision Letter (LAWFAM-2021-025.R1)

From: jms233@cam.ac.uk

To: rikasaraswati@unika.ac.id

CC:

Subject: International Journal of Law, Policy and the Family - Decision on Manuscript ID LAWFAM-2021-025.R1

Body: 19-Mar-2021

Dear Dr. Saraswati,

It is a pleasure to accept your manuscript entitled "Accommodating the 'Best Interests of the Child' in Custody Disputes in the Indonesian System/s of Family Law" in its current form for publication in the International Journal of Law, Policy and the Family.

Thank you for your contribution. On behalf of the Editors of the International Journal of Law, Policy and the Family, we look forward to your continued contributions to the Journal.

Sincerely,
Prof. Jens Scherpe
Editor in Chief, International Journal of Law, Policy and the Family
jms233@cam.ac.uk

Date Sent: 19-Mar-2021

Close Window

International Journal of Law, Policy and The Family, 2021, 00, 1–17
doi: 10.1093/lawfam/ebab011
Article

Accommodating the 'Best Interests of the Child' in Custody Disputes in the Indonesian System/s of Family Law

Saraswati Rika*

*Department of Law, Soegijapranata Catholic University, Semarang, Central Java, Indonesia.
E-mail: rikasaraswati@unika.ac.id

ABSTRACT

This article discusses the implementation of the right of child custody in the Indonesian Family Law system, which under the Indonesian *Marriage Act 1974* does not explicitly regulate the form of custody and ensure the best interests of the child. The research aimed to examine the reasoning by judges (in both the Religious Court and State Courts) and their decisions in child custody disputes, the form of child custody that was granted, and to what extent the reasoning and decisions have considered the (best) interests of the child. A qualitative approach was adopted. The data was obtained by scrutinizing 31 court decisions across the Indonesian archipelago in cases related to divorce and child custody. The research found that judges granted the right of custody to the mother, father, or both parents, depending on various particulars of the case, and parental capability. The Judges' decision making considered the potential psychological and social effects on the children. However, they did not consider the history of domestic violence by the parents nor fully accommodate the best interests of the child/ren because their voices were not always heard.

I. INTRODUCTION

This article discusses the implementation of the principle of the (best) interests of the child in the Marriage Act 1974 (amended in 2019 through Act No. 16 of 2019) in relation to child custody disputes. The implementation of this principle can be seen in the judges' reasoning and decisions on the right of (sole or joint) custody in the State Court and Religious Courts.

Globally, many countries grant joint custody or joint parenting because sole custody is deemed no longer acceptable as it does not conform with the values of gender equality nor children's interests to maintain a relationship with both of their parents. The concept of joint parenting is not explicitly regulated in Article 41 of the Marriage Act 1974 which stipulates that either the mother or the father is obliged to care for and educate their children (depending on familial circumstances), with the Court able to decide that the mother is responsible for this if the father is incapable of doing so. If there is a dispute regarding the control of children, the Court will

make the decision on the basis of the child's interests. Unfortunately, there is no further explanation of the term of the 'interests of the child' in the Marriage Act 1974 and its implementing regulation.

Indonesian legislation that does regulate the 'best interests of the child' is the Child Protection Act 2002 as amended in 2014 through the Children Protection Act No. 35 (CPA) and again in October 2016 (when sanctions were tightened for some offences). Article 2(b) of the CPA and the explanation of this Act define of 'best interests' of the child as follows: 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration' (a definition taken directly from the UN *Convention on the Rights of the Child*, Article 3(1)). A full explanation, however, of what comprises 'best interests' itself has never been provided by the CPA, although the Marriage Act 1974 and the Marriage Act 2019 (which amended the Marriage Act 1974) does so only in the article related to the minimum age for marriage, raising it for girls from 16 years old to 19 years of age. Because there was no further explanation of the 'interests of the child', judges may have exercised their own authority to interpret and implement the Article in child custody disputes, with their decisions perhaps affected by their own knowledge and values.

The limited explanation of the form of child custody (i.e. whether it will be granted as a sole or joint custody) and the lack of guidance on the interest/best interests of the child could impede impartial decision making in child custody dispute. It is therefore important to explore judges' decision making in child custody disputes across the Indonesian archipelago and in both State and Religious Courts because the Marriage Act 1974 (as amended in 2019) is implemented nationally and in both judicial spheres. Research on judges' decision making on child custody in State and Religious Courts in every region has been undertaken by a number of Indonesian scholars.[1] Most concerned judges' reasoning on custody rights in dealing

1 M. Mansari, Iman Jauhari, Azhari *Yahya*, Muhammad Irvan *Hidayana*. 'Hak asuh anak pasca terjadinya perceraian orangtua dalam putusan hakim Mahkamah Syari'ah Banda Aceh [Child Custody after Parent Divorce in Judgment of the Banda Aceh Syar'iyah Court]' (2018) 4 (2) *Gender Equality: International Journal of Child and Gender Studies* 13; See A. Huzaimah. 'Problematika penyelesaian perkara hadhanah di Pengadilan Agama Kelas 1 A Palembang [Problems of Settling Hadhanah Case in Class 1A Palembang Religious Court]' (2013) 3 (1) *Nurani* 19–23; See A. Hariss, 'Tanggungjawab orangtua terhadap anak setelah perceraian (Studi kasus pada Pengadilan Negeri Kuala Tungkal) [Parental Responsibility for Children after Divorce (Case Study at the Kuala Tungkal District Court)]' (2017) 16 *Jurnal Lex Specialis* 24–34; See R. Rahmawati, 'Perlindungan hak asasi manusia bagi anak dan mantan istri pasca perceraian yang merupakan tanggung jawab ayah berdasarkan hasil putusan pengadilan agama manado [Protection of Human Rights for Children and Ex-wife Post-divorce as the Father Responsibility on the Basis of the Decision of the Manado Religious Court]' (2017) V(4) *Lex Administratum* 101–109; see N. N. Sukerti, I. G. A. A. Ariani, and I. G. A. A. A. Krisnawati, 'Penegakan hukum terhadap hak asuh anak akibat perceraian dalam praktik peradilan di Bali [Law Enforcement of Child Custody due to Divorce in Judicial Practices in Bali]' (2015) 41 (1) *Udayana Master Law Journal* 91–100; see A.

R. Saraswati and dan V. Hadiyono. 'Penghargaan hak berpendapat anak di pengadilan (studi kasus di Pengadilan Negeri Semarang) [The Principle of the Right of the Child to be Heard in Semarang State Court]' (2018) 13 (2) *Sawwa Jurnal Studi Gender* 1–21 http://journal.walisongo.ac.id/index.php/sawwa/article/view/3016; see E. Putra, 'Kompetensi pengadilan agama dalam penyelesaian gugatan perceraian dan hadhanah menurut hukum positif (studi kasus terhadap putusan Pengadilan Agama Sungai Penuh Nomor: 0062/Pdt. G/2011/Pa.Spn) [Competence of Religious Courts in Settling Divorce and

with the Marriage Act 1974 prior to its amendment in 2019 and when dealing with the *Kompilasi Hukum Islam (KHI* or 'Compilation of Islamic Law'). However, there was a lack of research on the implementation of the principle of the (best) interests of the child in decision making in both secular and religious courts. This research examines whether judges' reasoning is in accordance with the principle of the best interests of the child. The research also examines what kind of criteria were used by judges to establish the custody right and whether the values and biases of judges may have influenced their decision-making in regard to which parent was awarded custody.

II. MATERIAL AND METHODS

The data were collected through documentary research which comprised 31 court decisions in divorce and custody disputes in the State and Religious Courts across the Indonesian archipelago. Decisions were selected from the website of the directory of decisions by the Republic of Indonesia Supreme Court and on the basis that they involved a couple with children under the age of 18. The children's age is often an important consideration for judges when deciding the right of custody. Furthermore, a child's age can significantly affect her/his right to 'speak out' and to be heard in relation to custody proceedings, especially once she/he reaches 12 years of age.

A qualitative approach was adopted because its purpose is to understand the processes from the subject's (the judge's) point of view rather than measuring outcomes. Much lower numbers may be involved in this type of study to investigate fully the chosen topic and provide information rich data.[2]

III. THEORETICAL FRAMEWORK

1. Indonesian Family Law Related to the Best Interests of the Child and Child Custody

The State and Religious Courts both utilise much of the same legislation in handling civil cases including those related to marriage and divorce, as well as child custody cases, that is, the Marriage Act No. 1 of 1974 and its implementing regulation (*Peraturan Pelaksanaan*) No. 9 of 1975. The Religious Courts, however (including *Mahkamah Syar'iyah*) also apply other legislation, namely the Presidential Instruction No. 1 of 1991 on the Compilation of Islamic Law (*Kompilasi Hukum Islam, KHI*). The Compilation of Islamic Law is basically a collection of Indonesian Islamic jurisprudence which has been prepared and then issued to meet the legal needs and interests of Indonesian Muslims. It provides guidelines to judges in Religious Courts in their adjudication of cases and also provides increased legal certainty (Barmawi Mukri, 2001).The Indonesian Marriage Act 1974 regulates the interests of the child and child custody rights of parents. Unfortunately, there is no

Hadhanah Laws According to Positive Law (Case Study of Decision of the Sungai Penuh Religious Court Number: 0062/Pdt. G/2011/Pa.Spn)] (2016) 14 (2) *Al-Qishthu* 69–186.

2 D. E. Weingard, 'Grounded Theory and Qualitative Methodology' (1993) 19 (1) *IFLA Journal* 18 – 19; see also M. L. Kramer-Kile, 'Situating Methodology within Qualitative Research' (2012) 22 (4) *Canadian Journal of Cardiovascular Nursing* 27–31.

further explanation of the term of the 'interests of the child' in the Marriage Act other than that of Article 41(a) of the Marriage Act 1974 which regulates the right of custody in a manner common to both secular and religious courts. Article 41 states:

In the event of the termination of marriage due to divorce:

a. Both the mother and father are still obliged to care for and educate their children, solely based on the interests of the child; if there is a dispute regarding the control of the children, the Court makes a decision.
b. The father is responsible for all the maintenance and education costs of the child/ren, but if in reality he is unable to fulfil this obligation, the court can determine that the former wife bears these costs.
c. The Court can require ex-husbands to provide livelihood costs and/or determine obligations for ex-wives. Spousal maintenance does not apply in the event of a former wife's remarriage.

The Compilation of Islamic Law neither explicitly mentions the interests of the child nor the best interests of the child. The Compilation of Islamic Law regulates custody rights which differ from those outlined in the Marriage Act 1974 on several points, especially for children under 12 years. The Compilation directs that *hadhanah/hak asuh* or custody rights for children under 12 years old (that is not reached the age of discernment or *mumayyiz)* will be given to the child's mother, unless the mother fails to qualify as a 'good' mother according to the court's judgement, or the mother and the family from maternal line (who, in accordance with Muslim teaching embodied in the Compilation, are to be awarded custodial care when the mother does not qualify) either are no longer living or are inaccessible or are unable to look after the child; in such situations, the father then will be appointed guardian/custodian. If children are aged 12 or over, they have the right to choose whether to live with their mother or father (KHI, Article 156). The Compilation states that after divorce both parents have a responsibility to take care of and to educate the children; however, the father remains the party with the primary responsibility for supplying living and education payments for the children (with payment made to the custodial parent or other recognised custodial carer) until they are mature or reach 21 years of age (see also KHI, Article 149). As this legislation is applicable only to Muslims, it is not available to nor applicable to those whose matters come before the State Courts whose jurisdiction covers the family matters (such as divorce and custody) of Non-Muslims.[3]

There is jurisprudence to support judges in dealing with the issue of the best interests of the child: the Supreme Court (Mahkamah Agung) Decrees No. 102/K/Sip/1973, 423/K/Sip/1980 and 239/K/SIP/1990. These decrees, which consider the child/ren's interests and needs, state that the biological mother is the person who has the right to look after the child/ren.[4] In addition, Supreme Court Decree

3 M. Cammack, A. Bedner, and S. van Huis, 'Democracy, Human Rights, and Islamic Family Law in Post-Soeharto Indonesia' (2015) 5 *New Middle Eastern Studies* 1–24.

4 I. A. Inggi, Mulyadi, and Yunanto, 'Kajian perolehan hak asuh anak sebagai akibat putusnya perkawinan karena perceraian [Study of the Acquisition of Child Custody as a Result of the Marriage Breakdown due

No. 110 K/AG/2007 provides a guideline to judges in the Religious Court in determining child custody. It states that the determination of child care (*hadhanah*) based on Article 105 KHI is not applied if it is proven that the biological mother of the child is not fulfilling her obligation as mother, and the biological father has been proven to nurture the child and make the child's life more peaceful and better meets the spiritual and physical needs of the children.[5]

2. The Principle of the Right of Custody and the Best Interests of the Child

In the 2000s, sole custody (or sole care and control) no longer seemed to be considered appropriate in many jurisdictions, given that many working women and men sought custody of their children. Moreover, there had been a growing demand from the fathers' rights movement for men to be considered equally as parents and able to take care of children, even young children. They firmly rejected maternal preference, labelling it as highly discriminatory and outdated. The equal rights of a woman and a man as parents have become a new value to be considered as have the rights of the child to considerable, if not equal, access to both parents, including the non-custodial parent. Lawmakers began to try and accommodate those demands in their policies and legislation.

The concept of joint custody has been established in many jurisdictions.[6] This concept has helped judges making a custody or guardianship decision to decrease the risks of potential disputes (even violence) between parties (usually the mother and the father) as all parties are considered.[7] Cochran, however, argued that the primary caretaker preference and the joint custody preference each has its strengths and weaknesses. Both, however, reduce the difficulties arising from the uncertainty of the case-by-case rule. Under both arrangements, unless the parent opposing the preference can overcome the burden that is placed on him or her by the preference, the preferred arrangement prevails. The dangers of unfair bargaining (often a product of significant power differentials), inadequate financial support for the child and caretaker, and parental conflict as the result of uncertainty are also reduced, by the

to Divorce]' (2016) 5 (2) *Diponegoro Law Review* 1–17. http://www.ejournal-s1.undip.ac.id/index.php/dlr/

5 A. Suadi, 'Peranan peradilan agama dalam melindungi hak perempuan dan anak melalui putusan yang memihak dan dapat dilaksanakan [The Role of Religious Court in Women and Children Rights Protection through Partial and Executable Decision]' (2018) 7 (3) *Hukum dan Peradilan Journal* 353–74.

6 J. E. Paradise, 'The Disparity Between Men and Women in Custody Disputes: Is Joint Custody the Answer to Everyone's Problems?' (1998) 72 (2) *St John's Law Review* 567–80; see C. R. Ahrons, 'Joint Custody Arrangements in the Postdivorce Family' (1980) 3 .*Journal of Divorce* 189–205; see also J. A. Arditti, 'Differences between Fathers with Joint Custody and Noncustodial Fathers' (1992) 62 American Journal of Orthopsychiatry 186–94; see D. L. Chambers, 'Rethinking the Substantive Rules for Custody Disputes in Divorce' (1984) 83 (3) Michigan Law Review 477–569; see also J. B. Kelly, 'The Determination of Child Custody' (1994) 4 (1)The Future of Children 121–42; see J. B. Kelly, 'The Best Interests of the Child: A Concept in Search of Meaning' (1997) 35 Family and Conciliation Courts Review 384; see L. D. Elrod, 'Reforming the System to Protect Children in High Conflict Custody Cases' (2001) 28 (2) William Mitchell Law Review 491–551; see L. D. Elrod and M. D. Dale, 'Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance' (2008) 42 (3) Family Law Quarterly 381–418.

7 Elrod Ibid.; see Elrod and Dale ibid.

adoption of either preference. Nevertheless, there are disadvantages involved with each approach.[8]

On the one hand, granting custody to the primary caretaker reduces conflict by establishing one parent as the child's decision-maker, but it limits the involvement of the other parent in the child's life in a way that is harmful to the child. One the other hand, joint custody enables the child to develop a significant relationship with both parents, but it requires joint decision-making by parents who often have long been unable to work together and is likely to lead to substantial parental conflict.

Nonetheless, the differences between the primary caretaker and joint custody preferences can be reconciled and the interests of the child/ren be served and they can remain in contact with both parents and be free from parental conflict in a sole custody decision that distinguishes between physical custody and legal custody.[9] It should be noted that physical custody refers to the co-location of the child/ren and parent/s. When parents have joint physical custody, the child/ren generally spend most of their time with the parent who has been their primary caretaker but spends substantial, regular periods with the other parent. In some Western jurisdictions (for example, Australia), the legal presumption of 'equal shared parental responsibility' can involve shared physical custody which may entail a 50:50 arrangement under which each parent has physical custody of the child/ren for 50 per cent of the time (sometimes alternate weeks), but not necessarily, and decisions on various issues are determined by agreement of the parties. If the Court believes that shared parenting is not in the best interests of the child (for example, there is evidence of maltreatment or serious neglect of the child/ren or inability of the parent to parent due to alcohol or drug use, etc.), it can vary parenting orders so that 'sole parental responsibility' is awarded to the non-abusive parent or non-neglectful parent.

The best interests standard represents a willingness on the part of the court and the law to consider children on a case-by-case basis rather than adjudicating children as a class or a homogeneous grouping with identical needs and situations.[10] Although utilising this standard should help to remove judicial bias, difficulties remain as judges may make decisions in ignorance of scientific knowledge on the issue of custody or may make decisions on the basis of their own experience or prejudices.[11] Judges face complex situations when attempting to determine the best interests of each individual child based on the facts and circumstances of the individual child and family.[12] There are several criteria that have been identified that can be used to establish the 'best interests of the child' on custody rights cases, namely: (i) parental desires, (ii) children's desires, (iii) relationships between children, parents, siblings, and others who have a significant influence on the best interests of the children, (iv) adjustment of children at home, school and in community, (v) physical and mental health of people involved with the children.[13]

8 R. F. Cochran Jr, 'The Search for Guidance in Determining the Best Interests of the Child at Divorce: Reconciling the Primary Caretaker and Joint Custody Preferences' (1985) 20 (1) University of Richmond Law Review article 2.

9 Ibid.

10 Kelly (n 6); see also Elrod and Dale (n 6).

11 Ibid.

12 C. S. Bratt, 'Joint Custody' (1995) 67 Kentucky Law Journal 271–308.

13 Elrod and Dale (n 6).

To reduce the uncertainty engendered by the ill-defined and irregularly administered 'best interests' approach and to possibly reduce judicial discretion, statutory and judicial lists of 'best interests' factors have mushroomed in several jurisdictions. In the USA (where family law is state based rather than national as in Australia, the UK and Indonesia), some states provide eleven or more factors. For example, under the Michigan *Child Custody Act of 1970*,[14] the US State of Michigan defined the 'best interests of child' as:

> The sum total of the following factors (that are) to be considered, evaluated and determined by the court:
>
> a. the love, affection and other emotional ties existing between the competing parties and the child;
> b. the capacity and disposition of competing parties to give the child loe, affection and guidance and continuation of the educating and raising of the child in its religion or creed, if any;
> c. the capacity and disposition of competing parties to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in lieu of medical care, and other material needs;
> d. the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity;
> e. the permanence, as a family unit, of the existing or proposed custodial home;
> f. the moral fitness of the competing parties;
> g. the home, school and community record of the child;
> h. the reasonable preference of the child, if the court deems the child to be of
> i. sufficient age to express preference;
> j. any other factor considered by the court to be relevant to a particular child custody dispute.

Several countries have also made the principle of the child's best interests the primary concern in their family law legislation. These countries include Australia, New Zealand, and Scotland (which have defined the 'best interests of the child' largely in terms of other child rights, such as the right to be heard, a child's right to shelter, care, and to have contact with both mother and father after the parents' divorce or separation). Australia, for example, has amended the *Family Law Act 1975* (Cth) several times to meet the definition of the 'best interests of the child'. The 2006 changes involved several articles related to the 'best interests of children' after divorce or separation of their parents, particularly regarding shared parental responsibility. Article 60B of the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) states that the best interests of children are met by ensuring that parents have meaningful involvement in their children's lives (60B1) (unless such contact is

14 A. Roth, 'The Tender Years Presumption in Child Custody Disputes' (1976–1977) 15 Journal of Family Law 423–46.

contrary to another and more weighty principle that operates in deciding what is in the best interests of the child, that of a right to protection from acts of violence or being exposed to acts of violence that are physical, psychological or experiencing abuse, neglect and violence in the family.[15] Under these provisions, children have the right to know and be cared for by their parents (regardless of whether they live together or separately) and the right to have time and communicate with parents (or certain people) based on a schedule that has been arranged. Furthermore, parents together share the duties and responsibilities to maintain the welfare and development of their children (*Family Law Act* (Cth) 60B(2)).

In the UK, Scotland regulates the concept of the 'best interests of the child' by linking it with parental responsibility. Section 6 of the *Children (Scotland) Act 1995* provides a requirement for adults to submit matters relating to parental responsibility and their rights to their children aged 12 years or above that age because at that age the children are considered old enough and sufficiently mature to have an opinion.[16] New Zealand is even more progressive removing the criteria for 'age and maturity' as a basis for considering children's opinions.[17] Under *the Care of Children Act 2004* (NZ) all opinions and views expressed by children (both directly and through their representatives) must be considered even though it is possible to limit the age and maturity of the views/opinions of these children. Both the judge and the child's lawyer (or whoever represents the child in the court process) have an obligation to explain each step of the court process to the child in a way and in language that the child/ren can understand. Children over the age of 16 are given the opportunity to submit a request for a review of their life decisions.[18]

In determining who is to be considered the main caregiver, a US court examines which parent buys and washes their children's clothes, who bathes and their children, who instills discipline in the children, who prepares food for and feeds them, who helps them do their homework, who puts the child/ren to sleep at night and wakes them up in the morning, who cares for their child/ren when they are sick and takes them to the doctor, and who arranges the time for them to play with their friends.[19] According to Hetherington, Bridges and Insabella, women still tended (at least until the late 1990s) to play the role of primary caregivers more often than men; therefore, most decisions based on a standard of primary caregiver tended to award the mother custody.[20] More recent surveys of parental time spent in caregiving still reflect a

15 Z. Rathus, 'Shifting the Gaze: Will Past Violence be Silenced by a Further Shift of the Gaze to the Future under the New Family Law System?' (2007 21 (1) Australian Journal of Family Law 87–112.

16 M. Rayner, 'The Right of the Child to be Heard and Participate in Legal Proceedings'; Article 12 of the UN Convention on the Rights of the Child', Paper presented at the 1st World Congress on Family Law and Children's Rights, Sydney 5–9 July 1993.

17 M. Henaghan, 'Legally Rearranging Families: Parents and Children after Break up' in *Family Law Policy in New Zealand* (3rd edn) (M. Henaghan and B. Atkin, eds, Wellington, New Zealand: LexisNexis, 2007) 269–360.

18 R. Fitzgerald, 'How are Children Heard in Family Law Proceedings in Australia?' (2002) 6 Southern Cross University Law Review 177–203.

19 Cochran Jr (n 8), 33–4.

20 E. M. Hetherington, M. Bridges, and G. M. Insabella, 'What Matters? What Does Not? Five Perspectives on the Association between Marital Transitions and Children's Adjustment' (1998) 53 (2) American Psychologist 167–84.

disproportionate amount of time spent by mothers in caring for children, even where both parents work; and more women take parental leave than fathers, in particular to care for young or sick children or interrupt or adjust their careers for the caring role even in Western societies.[21]

IV. DISCUSSION

Each of the 31 verdicts collected from across the Indonesian archipelago demonstrated implementation of the principle of the best interests of the child in child custody disputes in either the State Court or the Religious Court. For analysis, these verdicts are divided into three sections.

1. Court Decisions that Granted the Right of Custody to the Mother

The reasons that Indonesian judges in the Religious and State Courts gave when they granted the right of custody to the mother were: the mother's request for custody, the father's adultery, the father having left years earlier with no subsequent communication, the presence of an accusation of domestic violence against the father and the failure of a party to be present at the court hearing, in which cases, the judges had to declare a *verstek* (default plaintiff in absentia) decision that grants the right of custody to the mother in cases where the father was absent without a valid reason, despite having been legally and properly summoned.

Judges' decisions to grant child custody to the mother is a form of primary caretaker award. Granting custody to the primary caretaker reduces conflict by establishing one parent as the child's decision-maker, but it limits the involvement of the other parent in the child's life in a way that is harmful to the child. However, it is also a way to protect the children from a toxic environment. For example, in the case of *AA v WP* (Case No: 217/Pdt.G/2014/PN.SMG) judges in Semarang State Court were concerned for the children's safety as there was an accusation of domestic violence against the father. His behaviour was the basis of the judge's reasoning and the decision to grant the mother the right of custody.

If the applicant is the mother and the divorcing or divorced couple had underage children, judges typically tended to grant child custody to the mother, unless the mother failed to qualify as a 'good' mother according to the court's judgement. The reasoning in the case of *AA v WP* (Case No. 217/Pdt.G/2014/PN.Smg) demonstrates this:

> . . .Given that the two children are still underage and psychologically [in] a closer relationship with the mother (the Plaintiff) because [of] the Plaintiff's day-to-day care . . ., then it is fitting for the children to be under the care and guidance of the Plaintiff. The Plaintiff's children follow and stay with the Plaintiff as their mother to adulthood and [until they] are independent, provided that if the Defendant as the child's biological father wishes to visit or

21 J. Baxter, '3: Gender Role Attitudes within Couples, Parents' Time in Paid Work, Child Care and House Work. In the Australian Institute for Family Studies (AIFS), Longitudinal Study of Australian Children Annual Statistical Report 2014.

> meet his children to give each other affection, the Plaintiff does not prevent and prohibit him.

The tender year's principle is in line with Indonesian legislation, such as the Marriage Act 1974, Article 105 the *KHI* which is used by judges in the Religious Court as a guidance to decide any such Islamic legal family matter, and the jurisprudence of the Supreme Court (*Mahkamah Agung*).

All decisions have cited the Marriage Act 1974 and the Religious Court also cited the *KHI* to determine the marriage breakdown, divorce and custody matters. However, only a few decisions cited the Child Protection Act and the jurisprudence. The jurisprudence cited comprised decree No. 239 K/SIP/1990 which states if a divorce cases involved very young children and the children still needed love and care from the mother, then the right of custody should be given to the mother (see *C v WH* in Case No. 441/Pdt.G/2018/PN.Jkt.BRT) and decree No. 906 K/Sip/1973 which states that the child/ren's interest must be used as the basis to determine which parents will have custody of the child/ren (see *ML v R* in Case No. 6/Pdt.G/2017/PN Pbu).

Two decisions cited the Child Protection Act of 2002 and 2014 as the judge's reason to give the right of custody to the mother (see *SbD v AH* (Case No. 0263/Pdt.G//2015/PA.Dps)) and *FZ v NS* (Case No. 0111/Pdt.G/2017/PA.Plg). These can be seen from judges' awareness of child protection and their understanding of the Child Protection Act and the rights of the child. Unfortunately, few judges are aware of this issue.

In dealing with the father's obligation to pay living costs and allowances to his child/ren, judges in some cases have approved the mother's request by considering the mother's demand and the father's earnings. Based on the decisions examined in this research, there were six mothers who had requested living costs and allowance for the child/ren's education. The amount of the mother's request varied, as did the father's ability to pay and the judge's decision was made on the basis of the evidence in court hearing. Some of the requests were approved even though the amount was less than the actual amount demanded and one of them was denied because the father did not have permanent job (see *AA v WP* in Case No. 217/Pdt.G/2014/PN.SMG). In this last case, the judge ordered that the mother met the living costs and allowances to the child/ren together with the father, in accordance with Article 41(b) of the Marriage Act 1974 (as amended in 2019) which states that:

> The father is responsible for all the maintenance and education costs that the child/ren, but if in reality he is unable to fulfil this obligation (indigent, missing, other new family obligations, persistant non-payment), the court can determine that the former wife (if that parent has care and control of the children on a day to day basis) bear these costs.

These court decisions have demonstrated that a mother who is physically and psychologically closer to the children will be granted the right of custody. Where the mother is granted the custody right under Article 41 of the Marriage Act 1974, the father remains the party with the main responsibility to meet the children's living

costs until they reached adulthood or independence, unless the father is unable to do, in which case the mother can be asked to do so (as shown above).

Judges have also ordered that the mother to give access to the father if he wants to visit his child/ren. For example, in *FZ v NS* (Case No. 0111/Pdt.G/2017/PA.Plg), judges in Palembang Religious Court state:

> . . .Considering that the three of the children of the Plaintif have decided to stay with the Plaintiff as their mother, and the judges have decided rgar outcome, the father still has a visitation right and a chance to walk out with the children. Therefore, the plaintif must allow the defendant to do that given that the children are their children. . .

There are cases involved mumayyiz children (i.e. those about to reach maturity) in *FZ v NS* (Case No. 0111/Pdt.G/2017/PA.Plg with the children are 19, 16, 13 years) and in *P v T* (Case No. 0058/Pdt.G/2008/PA.Stg the children are 17 and 15 years) The judges listened to the children who wanted to stay with their mother. The Judges also insisted that the fathers still had responsibility to pay for their children's living costs and education (until they reached 21 years of age or maturity); meanwhile, the mothers were ordered to give the fathers access to their children.

In AA *v WP* (Case No. 217/Pdt.G/2014/PN.SMG) also involving *mumayyiz* children (14 and 12 years old), there was no judges' statement that the children had been listened to nor their opinion heard regarding living with their mother or their father. They only stated that the children were still under age and psychologically tied to their mother because the mother was their everyday carer; therefore, the judges said the children should have their mother as custodian until they reached maturity and independence. The judges decided that the mother was the person with responsibility to pay the children's living and education costs (until the children reached independence and maturity), and she must give the father his right to visit the children. They dismissed the mother's request for the father to pay ten million rupiah a month for living and education costs because he was not able to provide such funds as he had no permanent job.

2. Court Decisions that Granted the Right of Custody to the Father

In these decisions, the father was granted the right of custody while the applicants for custody were the mother and/or father. The reasons can be based on the father's request which was supported by the mother's poor behaviour such as: her adultery, or often leaving the children at home and going out with friends till late, neglecting a child by failing to care for and educate him/her, or failing to permit paternal access. For instance, in *P v T* (Case No. 1599/Pdt.G/2020/PA.Tgrs) the father asked for custodian rights because since the divorce court decision, his ex-wife never gave him access to the child while she often gave the child to her parents rather than caring for the child herself. The father stated that he was able to care for the child and would give the mother access to the child. The judges approved this request; however, there is no reasoning in the decision that referred to the 'best interests of the child' or to any articles in the Child Protection Act.

However, in *OI v HS* (Case No. 45/Pdt. G/2011/PN Pbn) the judges did refer to the interests of the child in their decision. They judges insisted that determining the right of child custody was not made on the basis of the interests of the parents (as plaintiff and defendant) but on the interests of the child, that is under whose care of the child would have a better life and would be guaranteed a better future both morally and mentally. In this case, the child had been living with the father for two years while the mother had never contacted or visited the child. The judges decided to give the right of custody to the father without reducing the mother's right to contact with the child.

In cases involved *mumayyiz* children, considerations could vary, as demonstrated in the following cases. In *P v T* (Case No. 2802/Pdt.G/2017/PA.Smg), where the parties had children aged 17, 14, and 8 years old, the father had requested the right of custody of the youngest child. In this case, judges in the Semarang Religious Court granted the right of custody to father and the birth mother visitation rights only. Before making a decision, the judges asked for the children to be presented at the court and to exercise their right to choose whether they wanted to stay with their father or mother. All the children, including the youngest, stated that they wanted to stay with their father because the father (and his new wife) had looked after them well and there was no cruelty (unlike what had occurred during the marriage between their father and birth mother which had ended in divorce).

Based on the children's voice, witnesses and other evidence, the judges awarded the right of custody to the father because the children were happy with him (and his new wife). The children stated that their step mother had become the person who always prepared everything before they went to school, she was the one who washed their clothes, and that their father and his new wife treated them very well and made them happy. Moreover, this situation had been supported by the psychologist in her observation that the children, especially the youngest child, were happy and healthy children when living with their father and his new wife. On the other side, the judges found that the mother still made contact and visited to the children, but she lost the right of custody due to an unsupported allegation of cheating with another man and so having no (morally) proper house in which to live with children. The judge considered that this situation was not ideal for the development of the children psychologically, physically, and socially; moreover, the children had decided to stay with their father.

Based on these court decisions, it can be seen that judges have considered the matter and reasoned on the basis of which parent generally buys and washes the children's clothes, prepares food for and feeds them, and helps them do their homework.[22] Judges also considered the children's desires (not only the parents' desire), relationships between children, parents, and others who have a significant influence on their development, and the physical and mental health of people involved with the children.[23]

22 Cochran Jr (n 8), 33–4.
23 Elrod and Dale (n 6).

3. Court Decisions that Granted the Right of Custody to the Mother and Father

There are 10 court decisions in which judges have granted the child custody rights to the mother and father. Some of them involved *mumayyiz* children.

In *P v T* (Case No. 383/Pdt.G/2019/PA.Wtp), Watampoe Religious Court judges granted the right of child custody to the father and the mother on the basis of parental sharing undertaken by the parties—the plaintiff (the mother) had the right of custody for four days a week (Monday, Tuesday, Wednesday, and Thursday), and the defendant on Friday, Saturday, and Sunday. Both parties had made an agreement and promise to pay the maintenance, education and living costs for the child until the child is independent or mature. This agreement is very rarely made by Indonesian couples dealing with parenting arrangements. This agreement is a very good example for the Indonesian family law system, a model whose implementation should be considered in all divorce and child custody dispute cases.

In *WK v DP* (Case No. 538/Pdt.G/2013/PA.Wt), Wates Religious Court granted the right of child custody to the father and the mother. The judges stated that in the matter of the right of custody the main consideration is the children's welfare and the best interests of the child (citing Article 2 (b) of the Child Protection Act 2002 and the jurisprudence No. 110 K/AG/2007), for their daily life and the future. Based on the witnesses' testimony that the first child (male, 9 years old) had been living with the father and that the mother often freely visited the child while, on the other hand, the second child (female, 5 years old) had been living with the mother and the father could visit the child freely, the judges argued that the children's rights were being fulfilled and guaranteed by the father. Therefore, they decided that the children should remain under the custodianship of the father and the mother because if a child were removed from either party to the other it would negatively impact the child's mental health development.

However, in this case there was a judge who issued a dissenting opinion, arguing that a prior history of domestic violence committed by the father should be considered as the important factor in determining the right of custody (even though the father said that he has changed his behaviour) because the child been exposed to the violence committed by the father against the mother before he went to stay with the father. The judge also argued that the length of time the child had stayed with the father (10 months) was shorter than that spent with the mother (8 years); so, he argued that the right of custody should be given to the mother. The judge also argued that the accusation of infidelity against the mother was unproven and the accusation itself did not reduce the quality of the mother nor make her less preferable than the father who had been violent.

The dissenting opinion demonstrated the judge's awareness of the issue of domestic violence and the impact of the violence on the child's mental health development. Unfortunately, the dissenting opinion could not change the panel judges' decision. Domestic violence issues had been exposed by the plaintiff and defendant in some court decisions in this research, but only the judge in this case (in this research) demonstrated concern about the negative influence of domestic violence to the child/ren. The lack of consideration of domestic violence in dealing with the

right of custody in the rest of the court decisions examined in this research has demonstrated the lack of judicial awareness on this issue although the Eradication of Domestic Violence Act has been in place since 2004.

The issue of domestic violence does not appear to be considered important or needing to be considered because of the general assumption that the issue is covered by the Penal Code. Moreover, it is a result of the lack consideration of the best interests of the child in the Marriage Act 1974. Based on these court decisions, judges have not viewed this factor as a part of legal reasoning. Comparing to court verdicts in various other countries, the history and past records from the parent who had committed domestic violence would have been used as a reference to decide the right of custody. The basis used in determining child custody is the best interests of the child, where the child should not be affected by domestic violence and the child's opinion should be heard (regardless of domestic violence). If there is evidence of domestic violence, the judge would normally have ordered limited visitation for one of the parents who had committed the violence. This can be compared to the Australian Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth) which mentions that the best interests of children are met by ensuring that parents have meaningful involvement in their children's lives (s60B1) and children are protected from acts of violence or being exposed to acts of violence that are physical or psychological or experience abuse, neglect and/or violence in the family.

In the case of custody disputes requested by both parents and involving mumayyiz children, judges in some cases listened to the voice of the children to choose whether he/she will live with their father or their mother; however, in some cases, judges did not consider their voice. For example in *P v T* (Case No. 1454/Pdt.G/2010/PA.Plg), judges in Palembang Religious Court did not grant the right of custody of two mummayiz children to their mother even though the children had chosen to join their mother, yet the Court granted the custody of the underage child to the mother. The judges' reason for not giving the right of custody of the mumayyiz children to the mother was that the father had requested the right. The Judges considered that the father's eagerness to look after the children made this a 'win-win' decision in order to keep the children in a good state psychologically and socially.

The judges seemed worried that if the custodian right for mumayyiz children were granted to the mother, the mother would not have exercised adequate control of the children and also limited the father's access to the children. On the other hand, the mummayiz children would feel limited if they wanted to see or meet their father; and the judges feared that such a situation would create hostility between the children and both parents. The judges then argued that the decision was taken to maintain harmony and good relationships although the marriage had broken down. The judges also stressed that while custody was legally granted to the mother, a mother is not allowed to limit the father's access to the children nor the children's access to their father (meeting or being with him).

According to M. Syukri, a Palembang Religious Court judge, establishing a good ongoing relationship with both parents (wherever this is safety possible) is in accordance with the provisions of Article 7 of the Child Protection Act 2002 which was amended in 2014 and states that the custody holder has an obligation to give the

other party visitation time with the children or an opportunity to take the children for a walk or stay as needed and foster such a relationship in the best interests of the children, unless there are compelling reasons against this occurring (for example, drug addiction or abuse by the non-custodial parent). It is expected that after separation or divorce, the relationship between parents and children can be still be established and maintained in the vast majority of instances, and that the children will be able to have good communication with both parents, whether in times of happiness or difficulty.[24] (Maulana, 2018, 69).

P v T (Case No. 175/Pdt.G/2011/MS-BNA) was similar. The judges in Nanggro Aceh Darusallam Religious Court refused the request of a mother to look after all the children (18, 14, 9, and 3 years old), but was granted the right of custody of the children aged 9 and 3 years. The judges did not determine the right of custody of the children aged 18 and 14 years on the basis of the children's choice[25] (Mansari and Maulana, 2018). These cases demonstrate that children's voices are not always heard by judges in the Religious Court. The same opinion has also been expressed by judges in the Semarang State Court who argued that the children's voice is not always to be heard, except where the right to custody is contested by the father and the mother:

> Not always, even though the children are stated as mature according to the law, their becoming witnesses or giving statements in dealing with their beloved parents is not easy. Therefore, judges must be wise, the statements from children can be taken in writing and read at the court hearing and in order to maintain the children psychologically, the parents must not be in the court room (EN; 2018).

Legal scholars have argued that ignoring the children's voices has resulted in uncertainty for the children and opened the potential for the re-emergence of conflict on the right custody between the father and the mother.[26] The potential for new conflict may be reduced if the mother and the father have an agreement on sharing parental responsibilities (Mansari, 20180), as was the case in *P v T* (Case No. 5943/Pdt.G/2018/PA.Sby) and in *P v T* (Case No. 383/Pdt.G/2019/PA.Wtp). In the former case, the mother and father had three children, 16, 12 and 5 years old. The Surabaya Religious Court granted the right of custody of the 16 and 12 year olds to the father, and that of the 5-year-old child to the father and the mother based on the results of the mediation process. The agreement on parental sharing by the parties can reduce the potential new conflict, but the process itself has reduced the right of the mumayyiz children to be heard because the mediation process did not involve the children. This case differs from that of *P v T* (Case No. 383/Pdt.G/2019/

24 Huzaimah (n 1).

25 M. Mansari and R. Maulana, 'Kepastian hukum terhadap pengasuhan anak mumayiz pasca perceraian kajian putusan nomor: 175/PDT.G/2011/MS-BNA [Legal Certainty for Mumayiz Minor in Post-divorce Custody: An Analysis of Court Decision Number: 175/PDT.G/2011/MS-BNA]' (2018) 11 (1) Jurnal Yudisial 55–74.

26 Ibid.

PA.Wtp) because all the children were under 12-years old and the parents made a shared parenting agreement.

Based on several court decisions mentioned above, it can be seen that such decisions are undertaken with consideration of the effects on the child's life not only psychologically but also socially at the time when the decisions are made and for the future. Such situations had caused judges to decide that the right of custody would not be given to either the plaintiff or the defendant alone. Instead, both the plaintiff and the defendant were to remain in their current roles to care for the children, even though they had separated.

The use of the status quo (the current arrangement) means that judges made their decision based on the real existing situation and recognised that it was successfully operating as it was at the time (with parents already separated), and indeed as was desired by the children. The judges took into account how the situation was currently operating: with whom the children stayed every day, and which parent took care of the children every day and fulfilled the children's needs as well as the emotional ties of the children. Based on this status quo, the judges could make a decision for joint custody to be awarded but only if both parents could demonstrate that they do really have meaningful contact with their children although they live separately.

The legal reasoning has demonstrated that the closeness of the child to one or both of the parents has been used by judges in determining the right of custody. The absence of one of the parents in giving attention, care, raising, and educating becomes the main consideration factor for judges to deny the right of custody. However, this does not mean that it renders the responsibilities of the other parent moot. The responsibilities set forth by Article 41 of the Marriage Law remain until the child comes of age.

V. CONCLUSION

Based on the examples provided above of judges' reasoning and decision making, it can be concluded that judges in the State Court and the Religious Court have accommodated the (best) interests of the child principle in all the cases examined. There are several indicators that determine that these courts have accommodated the principle of the best interests of the child. First, the Supreme Court has issued several decrees to support the Marriage Act 1974 and the KHI. These decrees are used as judges' guidance in dealing with a custody dispute and the custody right between the mother and the father, and the interests of the child.

Judges have implemented Article 14 of the Child Protection Act 2002 (amended 2014) to fulfil children's rights after parents' separation, such as providing for allowances, and living and education costs. However, the courts do not have any jurisdiction to control the father's of awareness of his duty to fulfil his responsibility to provide education and living costs for his child/ren, unless the mother makes an application in a legal suit to the father to fulfil his responsibility.

The research found that judges granted the right of custody to a mother, father, or both parents, depending on various particulars of the case in which children were involved, including parental capability, and the status quo. Judges' decision making considered the potential psychological and social effects on the children. However,

for cases related to domestic violence, it seems that judges have not viewed this factor as a part of legal reasoning. Compared to court decisions in various other countries, the history and past records from the parent who had committed domestic violence would have been used as a factor in deciding the right of custody.

Judges, however, did not fully accommodate the best interests of the child/ren because children's voices in child custody disputes were not always sought, nor heard if they indeed spoke. Therefore, it is necessary to establish in Indonesian Family Law systems and procedures to accommodate the principle of the best interests of the child more comprehensively than in the Marriage Act 1974 (as amended in 2019) and its implementing regulations.

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