

The Best Interests of the Child and the Disparity of Judicial Reasoning on Custody of Non-*Mumayyiz* Children

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Abstract

This study examines the disparity in judges' considerations in determining child custody for children who have not yet reached *mumayyiz* age, through a case study of Decision of the Yogyakarta Islamic Court No. 348/Pdt.G/2021/PA.YK and Decision of the Jepara Islamic Court No. 1492/Pdt.G/2021/PA.Jepr. The primary focus lies in analyzing the reasons and legal foundations underlying the divergent rulings. The findings indicate that the Jepara Islamic Court's decision tends to adopt a legal realism approach, prioritizing factual conditions and the best interests of the child even when they diverge from normative legal provisions. Meanwhile, the Yogyakarta Islamic Court's decision seeks to balance normative legal rules with factual considerations in a more proportional manner.

Keywords

Judicial disparity — child custody — the best interests of the child — *mumayyiz* — children's rights

A. Introduction

Law Number 1 of 1974 on Marriage regulates child custody in cases of divorce through Article 36, which grants the court the authority to determine custody based on the best interests and welfare of the child. This provision emphasizes that custody should be awarded to the parent who is most capable of providing optimal protection and education. This approach is consistent with Presidential Instruction No. 1 of 1991 concerning the Compilation of Islamic Law (KHI), which draws upon the United Nations Convention on the Rights of the Child. Article 105 of the KHI serves as a fundamental legal basis for judges in determining child custody, stipulating that custody of children who have not yet reached *mumayyiz* age belongs to the mother, that *mumayyiz* children may choose whether to be cared for by their father or mother, and that the responsibility for maintenance costs remains with the father.

The protection and fulfillment of children's rights constitute a crucial aspect of human development (Nurdin 2021). The custody of children who have not yet reached *mumayyiz* age represents a complex issue in judicial practice, as it has a direct impact on the child's future. In this context, judges play a central role in determining child custody based on considerations of the child's best interests and overall welfare (Fuad 2022). This study focuses on two court decisions, namely the Decision of the Yogyakarta Islamic Court Number 348/Pdt.G/2021/PA.YK and the Decision of the Jepara Islamic Court Number 1492/Pdt.G/2021/PA.Jepr, which were selected as the objects of research based on both sociological and philosophical considerations. Sociologically, the selection of the Yogyakarta Islamic Court decision is grounded in the richness of Javanese culture, which is considered to possess strong normative values. This cultural richness is reflected in the judicial approach adopted by the judges, which is closely aligned with the local social and cultural context. Meanwhile, the Jepara Islamic Court decision is examined based on its unique social dynamics, as Jepara is widely known as a carving city, giving rise to a strong cultural identity that influences the mindset and social behavior of the local community. Philosophically, the Yogyakarta Islamic Court decision is of particular interest because it demonstrates distinctive characteristics in handling child custody cases involving non-*mumayyiz* children, addressing complex issues such as domestic violence, differing perspectives on child education, and psychological impacts on the child, ultimately resulting in the award of custody to the mother (Baihaqqi 2023). In contrast, in the Jepara Islamic Court decision, custody was granted to the father on the grounds that the child had been living with him for the 18 months, and that the child's mother raised no objection to the custody being awarded to the father in consideration of the child's future interests.

The central issue addressed in this study is the existence of judicial disparity, which refers to distance, difference, or inequality in certain respects. In the context of this research, the disparity manifests in the differing judicial considerations between the Decision of the Yogyakarta Islamic Court Number 348/Pdt.G/2021/PA.YK and the Decision of the Jepara Islamic Court Number 1492/Pdt.G/2021/PA.Jepr in determining custody of children who have not yet reached *mumayyiz* age. There is a pressing need to gain a deeper understanding of the reasons underlying these divergent judicial approaches and to examine how such differences may contribute to the development of legal understanding and the protection of children's rights (Muhammad Khoirun Nizam 2023).

Scholarly studies addressing disparities in judicial decisions on the custody of non-*mumayyiz* children remain relatively limited, particularly those that explicitly examine differences in judges' legal reasoning across comparable cases. Most existing research tends to focus on individual decisions or single procedural trajectories, rather than offering comparative analyses across different courts and socio-legal contexts. Tania's (2023) examines divergent rulings between a court of first instance and an appellate court regarding child custody. In the case she analyzed, the court of first instance denied custody to the mother based on psychological considerations affecting the child, whereas the appellate court granted custody to the mother on the grounds that the child continued to require maternal affection and care. Tania's analysis highlights methodological and juridical differences in judicial reasoning within the same case. However, the study is confined to a single litigation pathway and does not compare decisions issued by different courts with distinct social and factual backgrounds (Tania 2023). Another relevant work is Nawawi's thesis (2020). His study demonstrates that a child's psychological and mental condition may serve as a legitimate basis for judges to award custody to the father, notwithstanding normative legal provisions that generally assign custody of non-*mumayyiz* children to the mother. This study emphasizes the centrality of the principle of the best interests of the child in judicial custody determinations. Nevertheless, its analytical scope is limited to a single court decision and does not engage in comparative analysis (Nawawi 2020). Building upon these two studies, my research seeks to address the existing gap by conducting a comparative analysis of two custody decisions issued by different Religious Courts, namely the Yogyakarta Islamic Court and the Jepara Islamic Court (Saleh et al. 2020). By examining contrasting judicial approaches, underlying considerations, and socio-legal contexts, this study contributes to a deeper understanding of judicial disparity in child custody cases involving non-*mumayyiz* children, while also enriching discussions on legal reasoning, child protection in judicial practice.

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Based on the findings of previous studies, it is evident that judges in certain cases frequently render decisions that do not strictly adhere to normative legal regulations, but are instead grounded in the principle of the child's best interests. Nevertheless, there has been no study that specifically examines disparities in judicial reasoning across two custody cases arising from different locations and socio-legal contexts, as reflected in the Decision of the Yogyakarta Islamic Court Number 348/Pdt.G/2021/PA.YK and the Decision of the Jepara Islamic Court Number 1492/Pdt.G/2021/PA.Jepr.

Judicial legal reasoning also constitutes an essential foundation of this study, emphasizing the interpretation of Islamic legal sources and relevant legal principles (Khalid 2014a). Judicial legal reasoning plays a crucial role in assessing whether a judicial decision embodies justice (*ex aequo et bono*), ensures legal certainty, and delivers social utility (Darojad 2022). Although no single, rigid theoretical framework governs judicial decision-making, judges are nonetheless required to consider various factors, including the principle of the best interests of the child, parental fitness, the child's relationship with each parent, the parents' ability to provide religious education, as well as parental agreements and mediation in matters of ḥaḍānah (Saepullah 2021). Collectively, these theories provide a holistic analytical foundation for understanding judicial decisions concerning the custody of non-*mumayyiz* children.

B. Method

This study employs a combination of library research and field research methods. The research focuses on written legal regulations and other relevant legal sources, with particular emphasis on an analysis of the Decision of the Yogyakarta Islamic Court Number 348/Pdt.G/2021/PA.YK and the Decision of the Jepara Islamic Court Number 1492/Pdt.G/2021/PA.Jepr. In terms of its nature, this research adopts a descriptive-analytical legal research approach, aimed at describing the disparities between the court decisions under examination based on the collected data, which are subsequently analyzed and synthesized. The approach applied in this study is normative-juridical, integrating positive law with prevailing societal norms while ensuring alignment with the principles of the best interests of the child. Data were obtained from primary sources in the form of court decisions and interviews with judges, as well as secondary sources including books, scholarly articles, and doctrines of Islamic law. Data collection methods consisted of literature study and interviews. Data analysis was conducted using a qualitative approach, employing deductive reasoning grounded in the analytical framework proposed by Miles and Huberman. The analysis was presented descriptively through stages of data collection and reduction, theoretical application and

interpretation, data display, and conclusion drawing. The conclusions drawn are expected to offer relevant solutions based on the results of the processed data analysis (Soegiyono 2016).

C. Basic Concepts of Custody Rights for Non-*Mumayyiz* Children

According to Law Number 39 of 1999 on Human Rights, Article 1 point 5, a child is defined as an individual under the age of 18 who is unmarried, including a child who is still in the womb (Pemerintah Republik Indonesia 1999). The position of a child within the family structure reflects a vital role, as children shape household dynamics and may even serve as a key determinant of the overall quality of family life. It is therefore unsurprising that Islamic family law provides specific regulations concerning the care, upbringing, and maintenance of children (Puspitasari 2019). Moreover, children are regarded as subjects of human rights protection, entitled to education, care, and protection in accordance with religious values and cultural norms (Padang and Gunawan 2023).

In Islamic law, two terms are commonly used to refer to child care and custody, namely *kafālah* and *ḥaḍānah*, both of which relate to the maintenance and upbringing of children (Syarifuddin 2011). The distinction between the two lies in their respective scopes: *ḥaḍānah* primarily refers to the parents' obligation to care for and educate a child until reaching a certain age, whereas *kafālah* denotes the responsibility of providing for the child's material and basic needs. The concept of *ḥaḍānah* is extensively discussed in fiqh literature, particularly in practical contexts where spouses have separated while their children continue to require care and nurturing (Rahmah 2018).

Under positive law, custody of children under the age of 12 is generally granted to the mother, while children who have reached *mumayyiz* age are entitled to choose whether to live with their father or mother, with the obligation of financial maintenance remaining the responsibility of the father (Mansari et al. 2018). The period of *ḥaḍānah* ends when a child is deemed capable of managing his or her own affairs. Scholarly opinions differ regarding the determination of this age threshold; however, the Ḥanafī school holds that boys reach this stage at the age of seven and girls at the age of nine (Qonita 2023). Within the Compilation of Islamic Law (KHI), the age limit of *ḥaḍānah* is regulated in greater detail under Articles 98 and 105. A child is considered capable of standing independently or legally mature at the age of 21, provided that the child does not suffer from physical or mental disabilities and has never been married. Prior to reaching this age, parents act as the child's legal representatives in all legal acts. In cases of divorce, custody of a child who has not yet reached *mumayyiz* age or is under 12 years old is granted to the mother, whereas a *mumayyiz* child may choose either

the father or the mother as the custodian, with the costs of maintenance borne by the father (Badriyah 2022). The determination of the age limit for *ḥaḍānah* should not be viewed merely as a chronological parameter, but rather as a consideration that encompasses physical maturity, the child's needs, and the overall welfare (*maṣlahah*) of the child.

In Islamic law, the period of child custody generally applies until a boy reaches puberty, while for a girl it continues until she marries and consummates the marriage. However, exceptions apply in situations where a wife has separated from her husband or where a grandmother assumes responsibility for the child's care; in such cases, the custody period is commonly limited to seven years (Utami 2019). When a child has not yet reached *mumayyiz* age, custody is granted to the mother, and once the child attains *mumayyiz* age (approximately seven years old), the child is afforded the right to choose whether to live with the father or the mother. The custody period ultimately ends when the child reaches adulthood and is capable of independent living. The holder of custody rights must satisfy legal, moral, and ethical qualifications. Within the legal framework, Law Number 23 of 2002 on Child Protection stipulates that every child has the right to be raised by his or her own parents, unless lawful reasons or legal provisions indicate that such an arrangement would not serve the child's best interests (Maryati 2021). In fiqh discourse, the requirements for a custodian, as articulated by Sayyid Sābiq in *Fiqh al-Sunnah*, include having reached maturity, possessing sound *'aql* (reasoning), being capable of educating and caring for the child, demonstrating trustworthiness, not having remarried, being free from chronic illness, and adhering to Islam.

Classical Islamic jurists generally conclude that the maternal family holds a stronger right to child custody than the paternal family (Aahraa and Malek 1998; Rafiq 2014). Accordingly, the order of custody prioritizes the mother, followed by the maternal grandmother, and subsequently other female relatives in a prescribed sequence. More specifically, the order of custodial entitlement is as follows: the mother; the maternal grandmother and her ascendants; the paternal grandmother; the child's full sisters; uterine sisters; consanguine sisters; the daughters of full sisters; the daughters of consanguine sisters; the daughters of uterine sisters; the mother's full sisters (maternal aunts); the mother's uterine sisters; the mother's consanguine sisters; the daughters of paternal sisters; the daughters of full brothers; the daughters of uterine brothers; the daughters of consanguine brothers; the father's full sisters (paternal aunts); the father's uterine sisters; the father's consanguine sisters; maternal aunts from the father's maternal line; maternal aunts from the mother's paternal line; and paternal aunts from the father's paternal line (Ar-Romadlony 2011). However, if the child has no eligible female relatives from among the *maḥram* category, or if such relatives exist but are unable to provide

care, custody is transferred to male relatives who are maḥram or who maintain a blood relationship (*nasab*), in accordance with the hierarchical order applied in matters of inheritance (Karman 2015). The determination of custody for children who have not yet reached *mumayyiz* age involves multiple factors that influence the decision-making process regarding custodial arrangements. These factors encompass psychological, social, and economic aspects, all of which play a crucial role in the decisions rendered by judges or other competent authorities.

D. Custody of Non-*Mumayyiz* Children: Legal Rules

Wahbah al-Zuḥaylī identifies five fundamental rights that must be guaranteed to every child, namely the right to lineage (*nasab*), breastfeeding (*riḍā'*), care and custody (*ḥaḍānah*), maintenance (*nafaqah*), and guardianship (*wilāyah*) (Az-Zuhaili 2011). *Ḥaḍānah* is regarded as an obligatory duty, as neglecting a child is tantamount to exposing the child to harm and destruction. The increasing rate of divorce underscores the importance of regulating child custody, given that parental responsibility for post-divorce caregiving is equivalent to the responsibility of child maintenance during marriage (Nawawi 2020). The Qur'an, in Surah al-Taḥrīm (66): 6, commands parents to protect their families from the fire of Hell, a directive that encompasses the duty to nurture and educate children. Similarly, Surah al-Baqarah (2): 233 affirms a child's right to be breastfed for two years and the father's obligation to provide financial support to the mother in a fair and proper manner. This verse emphasizes the principles of justice, cooperation, and joint decision-making in the upbringing and care of children.

Specifically, a hadith narrated by Ahmad and Abū Dāwūd states that a mother has a stronger right to the custody of her newborn child as long as she has not remarried. Another concrete illustration can be found in the account involving 'Umar ibn al-Khaṭṭāb and his son 'Āṣim, in which Abū Bakr al-Ṣiddīq awarded custody to the mother despite a dispute between the mother and the child's grandmother. Other prophetic traditions likewise affirm the precedence of the mother in matters of child care, owing to her compassion and tenderness (Ibnu Qayyim, Tahqiq Abdul Qadir, and Syu'aib Al-arna 2016). Fiqh maxims further emphasize that a mother is more entitled to the custody of a child who has not yet reached *mumayyiz* age due to her greater patience and affection. Nevertheless, in practical application, custodial arrangements may vary depending on the specific circumstances and capacities of each parent (Al-Khin 2012).

Within the Indonesian legal context, the Compilation of Islamic Law (KHI) equates custodial authority with *ḥaḍānah* in Article 1 letter (g), defining it as the care and upbringing of a child until he or she reaches adulthood or becomes capable of independent living. Article 105 of the KHI regulates the maintenance of children

who have not yet reached *mumayyiz* age in detail. First, paragraph (a) outlines the obligation of the custodian to provide maintenance and physical care, including food, clothing, housing, and other basic physical needs. Second, paragraph (b) addresses the responsibility for the child's education and development, encompassing moral, intellectual, and spiritual guidance, as well as the inculcation of values and ethics in daily life. Third, paragraph (c) emphasizes the obligation to safeguard and protect the child's property rights by managing the child's assets prudently in order to serve the child's financial interests. In addition, Law Number 35 of 2014 concerning the Amendment to Law Number 23 of 2002 on Child Protection underscores the importance of considering a child's physical and mental maturity in determining custody. The definition of a child as a person under the age of 18, as stipulated in Article 1 point 1 of the Law, indicates that a child's physical and mental maturity constitutes a key factor that must be taken into account in custody determinations.

Article 2 of Law Number 4 of 1979 further affirms that every child has the right to maintenance and to the protection of his or her living environment in order to ensure that the child's growth and development are not impeded. Meanwhile, Article 41 of Law Number 1 of 1974 on Marriage stipulates that both the father and the mother remain jointly responsible for the care and education of their children, with primary consideration given to the best interests of the child, and that the court is authorized to render a decision in the event of a dispute. Based on these statutory provisions, it can be concluded that a child's physical and mental maturity constitutes a primary factor in determining custody of children who have not yet reached *mumayyiz* age, in line with the principles of child protection and the best interests of the child.

E. Overview of Two Different Court Decisions on the Custody of Non-*Mumayyiz* Children

1. Case 348/Pdt.G/2021/PA.YK

The factual background of the Decision of the Yogyakarta Islamic Court Number 348/Pdt.G/2021/PA.YK concerns a child custody (*ḥaḍānah*) claim filed by a mother against her former husband. The couple was married on 30 March 2014 and divorced on 10 July 2015. During their marriage, they resided in Yogyakarta and had one daughter. The plaintiff sought to be granted custody of the child on the grounds that she was capable of providing proper care and expressed concerns regarding the child's condition should custody remain with the defendant. The plaintiff alleged the existence of verbal abuse, threats, and fundamental differences in parenting principles during the marriage. The defendant denied certain aspects of the plaintiff's claims, proposed a shared custody arrangement, and argued that

the plaintiff had disregarded reconciliation efforts. Court-mandated mediation resulted in a partial agreement concerning child maintenance; however, it failed to produce a comprehensive settlement, particularly with respect to the amount of financial support. The plaintiff's concern regarding the potential psychological impact on the child constituted one of the key issues examined during the proceedings.

During the proceedings, the plaintiff submitted various forms of documentary evidence, including photocopies of identity cards, the divorce certificate, and an extract of the child's birth certificate, all of which were examined and duly stamped (*nazegelen*) to verify their authenticity. The plaintiff also presented medical examination reports and photographic evidence showing bruises on her neck allegedly resulting from acts of violence, as well as electronic evidence in the form of WhatsApp conversations, photographs taken at a local police station (*Polsek*), and audio recordings of the child. In response to the evidence submitted, the defendant acknowledged certain pieces of evidence but objected to several audio recordings of the child contained on a compact disc (CD), arguing that the content had never been previously disclosed. In addition to documentary evidence, the plaintiff also presented witnesses who provided testimony regarding the parenting patterns and the condition of the relationship between the parties following the divorce. The witnesses stated that, despite ongoing differences of opinion and recurring disputes, the defendant continued to fulfill his obligations by providing financial support and visiting the child regularly in accordance with the agreement reached by both parties.

The established legal facts indicate that the child born of the marriage was born on 15 October 2014 and, following the divorce, has been properly cared for by the mother, including in terms of religious education. Although instances of verbal abuse by the defendant against the plaintiff were established, mediation efforts were nevertheless pursued, albeit without success. From an economic perspective, the plaintiff was considered to have greater financial stability, as she is employed by a state-owned enterprise, whereas the defendant operates a refillable drinking water business. Following the divorce, neither party has remarried, and both have contributed to the upbringing of the child. In rendering its decision, the judges took into account various factors, including the best interests of the child and the respective capacities of the parents, in order to arrive at a decision that is fair and beneficial.

In its judgment dated 9 September 2021, the Yogyakarta Islamic Court granted the plaintiff's claim. Custody of the child was awarded to the plaintiff, while the defendant was granted access rights to meet the child. The plaintiff was also

ordered to bear the court costs amounting to IDR 695,000 (six hundred and ninety-five thousand Indonesian rupiah). The panel of judges held that, although mediation had been conducted and failed to produce a principal agreement or a deed of settlement, the case was nonetheless required to be adjudicated on juridical grounds based on the established legal facts and the available evidence. In this regard, the plaintiff was deemed to have fulfilled the requirements to act as the child's custodian in accordance with the Child Protection Law and the provisions of Islamic law, whereas the defendant failed to convincingly demonstrate his capacity to provide care without adversely affecting the child's psychological condition.

In an interview with one of the judges who adjudicated this case, it was explained that the decision was not based solely on statutory texts, but also on the real-life context of the parties involved. The judge considered the plaintiff to be deserving of custody, as she fulfilled both the formal and substantive requirements and had demonstrably provided proper care for the child to date (Ulil Uswah 2023). The evidence submitted, including the divorce certificate, complaint letters, medical reports, and electronic evidence, substantiated the plaintiff's claim. The judge further emphasized the importance of prioritizing the best interests of the child in judicial decision-making, particularly with regard to the child's psychological condition and future life stability. The decision was rendered with careful consideration of legal norms, evidentiary facts presented during the proceedings, and principles of justice.

2. Case 1492/Pdt.G/2021/PA.Jepr

The factual background of the Decision of the Jepara Islamic Court Number 1492/Pdt.G/2021/PA.Jepr originated from a claim filed by the plaintiff on 2 September 2021 concerning the determination of child custody (*ḥaḍānah*) over his daughter born from his marriage to the defendant. The parties had been divorced since 2014 and, in 2019, agreed that the child would reside with the plaintiff in Singapore. The plaintiff filed the claim in order to strengthen the legal standing of the existing custodial arrangement. During the proceedings, mediation failed to produce an agreement; however, the defendant raised no objection to the child being placed under the plaintiff's care.

During the evidentiary stage of the proceedings, the plaintiff submitted documentary evidence consisting of personal identification documents, including photocopies of the plaintiff's identity card and passport issued by the Government of Singapore; documents relating to the child, namely the national identity card, family card, birth certificate, and divorce certificate; as well as a written statement signed by the defendant on 30 August 2021. Two witnesses also provided

supporting testimony, including information regarding the child's living conditions in Singapore, participation in online schooling, and the child's sense of comfort while residing with the plaintiff over the preceding 18 months. Additional evidence in the form of a video call recording showed the child expressing her desire to continue living with her father. In rendering its decision, the judges took into careful consideration the child's interests and well-being. Notably, the panel of judges attached significant weight to the child's expressed wishes conveyed through the video call, indicating her preference to remain in the plaintiff's care.

In its decision dated 15 November 2021, the panel of judges ruled that custody of the child be awarded to the plaintiff, while granting visitation rights to the defendant. The court's legal considerations encompassed the validity of the plaintiff's legal representation, the court's jurisdiction, and the fulfillment of both formal and substantive requirements of the claim in accordance with the applicable laws and regulations.

Although Article 105 of the Compilation of Islamic Law (KHI) stipulates that custody of children under the age of 12 is generally vested in the mother, the fact that the defendant had voluntarily relinquished custody to the plaintiff constituted a decisive consideration. Furthermore, in an interview with the judge who adjudicated the case, it was stated that the decision was also grounded in Supreme Court Jurisprudence Number 110 K/AG/2007, which emphasizes the principles of *maṣlaḥah* and the best interests of the child. The judges determined that custody should be granted to the father due to his fulfillment of parental responsibilities and the child's expressed wish to live with him, as conveyed during a video call. Additional considerations were derived from the opinions of classical scholars as articulated in *Kifāyat al-Akhyār* (Volume II), which identify moral integrity, physical and mental health, and sound reasoning as key criteria for custodial eligibility. The defendant was deemed to have failed to meet these criteria due to immoral conduct, drug abuse, and prolonged abandonment of the child, resulting in a stronger emotional bond between the child and the father (Ali Sofwan 2024).

F. Disparities in Judicial Considerations in the Two Decisions

The rulings in the two child custody cases, namely the Decision of the Yogyakarta Islamic Court Number 348/Pdt.G/2021/PA.YK and the Decision of the Jepara Islamic Court Number 1492/Pdt.G/2021/PA.Jepr, demonstrate differences in judicial considerations, even though both courts took into account psychological aspects, child welfare, and the principle of the best interests of the child. In the Decision of the Yogyakarta Islamic Court Number 348/Pdt.G/2021/PA.YK, custody of the child was awarded to the mother as the plaintiff, on the grounds that she was deemed more capable of providing a stable environment and prioritizing the

child's best interests. The plaintiff argued that the defendant had engaged in acts of violence that adversely affected the child's psychological condition. Although the defendant denied these allegations, the judges nevertheless granted custody to the mother, considering that the child's welfare would be better ensured under her care.

By contrast, in the Decision of the Jepara Islamic Court Number 1492/Pdt.G/2021/PA.Jepr, the judges awarded custody to the father as the plaintiff. This decision was based on the fact that the child had been residing with the father in Singapore for the preceding 18 months and was found to be in good physical and mental health. The judges also took into account that the mother, as the defendant, did not meet the legal requirements for custodianship, as well as economic considerations, noting that the father possessed sufficient financial resources to meet the child's needs. The divergence between these two decisions reflects the inherent complexity of child custody cases, requiring judges to consider a wide range of factors, including family circumstances and parental characteristics that may influence the final outcome. Nevertheless, the principle of the best interests of the child remains the primary foundation underlying both judicial determinations (Tania 2023).

G. Reasons and Legal Basis in the Two Decisions

In the Decision of the Yogyakarta Islamic Court Number 348/Pdt.G/2021/PA.YK, the judges granted the plaintiff's claim as the child's mother, based on legal considerations and facts revealed during the court proceedings. As explained in the interview findings, several formal requirements had to be satisfied to establish the court's jurisdiction and the legal standing of the parties. In terms of absolute jurisdiction, it was affirmed that both parties—the plaintiff and the defendant—as well as their child, were Muslims. Relative jurisdiction was determined based on the territorial competence of the Yogyakarta Islamic Court, as stipulated in Article 118 paragraph (1) of the *Herziene Indonesisch Reglement (HIR)* or Article 142 of the *Rechtsreglement voor de Buitengewesten (R.Bg)*, in conjunction with Article 73 of Law Number 7 of 1989 on Religious Courts. The mediation process, which constitutes a formal procedural requirement in contentious cases, was only partially successful, particularly with respect to the legal force of child custody and child maintenance arrangements. The panel of judges considered the mediation unsuccessful in its entirety because it was not formalized in a deed of settlement. In assessing the positions and arguments of the parties, the judges noted that the plaintiff, as the biological mother, sought sole custody of the child, whereas the defendant proposed a shared custody arrangement. Accordingly, it may be concluded that the defendant partially acknowledged and partially contested the

plaintiff's claim, resulting in both parties bearing the burden of proof in accordance with Article 163 of the HIR (Ussu 2014).

At the final stage of deliberation, the judges evaluated the evidentiary materials submitted by the plaintiff, including photocopies of the divorce certificate, extracts of the birth certificate, copies of court decisions, complaint letters, and medical examination reports, all of which were deemed to satisfy both formal and substantive requirements. Based on this evidence, it was established that the child had been properly cared for and nurtured by the plaintiff. Although the defendant was financially capable, he failed to demonstrate the capacity to provide psychologically healthy caregiving. The judges referred to Article 14 paragraph (1) of Law Number 35 of 2014 on Child Protection, which affirms a child's right to be raised by his or her own parents, unless lawful reasons justify an alternative arrangement. The plaintiff was proven to have satisfied the requirements of *ḥaḍānah* under Islamic law. Within the framework of legal realism theory, the judges assessed the case not solely on the basis of written law, but also by taking into account rational and objective considerations such as the best interests of the child and parental suitability (Weruin 2017). The decision awarded custody to the mother, with primary consideration given to the protection of the child's physical and psychological well-being, particularly in light of the existence of violence during the period of shared caregiving. Based on these considerations, the author argues that the plaintiff's claim was indeed properly granted, as it adequately accounted for the child's best interests, the parents' respective capacities, and the principle of legal certainty.

In the proceedings of the Decision of the Jepara Islamic Court Number 1492/Pdt.G/2021/PA.Jepr, several compelling grounds formed the basis for granting the plaintiff's child custody claim. The court's legal considerations commenced with the legal standing of the plaintiff's legal counsel, which was deemed valid in accordance with Law Number 18 of 2003 on Advocates. Accordingly, the plaintiff was represented by duly authorized legal counsel in filing the claim. Furthermore, the absolute jurisdiction of the Jepara Islamic Court was affirmed pursuant to Article 49 of Law Number 3 of 2006, as amended by Law Number 50 of 2019 on Religious Courts. The claim was filed with the Jepara Islamic Court following the divorce between the plaintiff and the defendant, pursuant to Article 39 of Law Number 1 of 1974 in conjunction with Article 73 paragraph (1) of Law Number 7 of 1989, as most recently amended by Law Number 50 of 2009 on Religious Courts. Subsequent considerations encompassed the evidentiary materials submitted, including documentary evidence and witness testimony, as well as the defendant's acknowledgment and lack of objection to the award of custody to the plaintiff. Although Article 105 of the Compilation of

Islamic Law (KHI) provides that custody of a child who has not yet reached *mumayyiz* age should generally be vested in the mother, the judges ultimately prioritized the principle of the best interests of the child in rendering their decision.

Based on the findings of the documentary review and interviews, the judges established that over the preceding 18 months the child had been under the care of the father in Singapore, in good physical and mental health, and had received adequate affection and fulfillment of daily needs, including proper education. The father, as the plaintiff, operates businesses both in Indonesia and abroad, thereby ensuring the child's material stability. Another significant consideration was grounded in jurisprudence and classical legal texts, even though such references were not explicitly cited in the written judgment. In Supreme Court Decision Number 126 K/Pdt/2001 dated 28 August 2003, it was held that child custody should be granted to the party closest to the child, which does not necessarily mean the mother. In line with the theory of judicial legal interpretation, the judges engaged in interpretive reasoning with respect to Islamic legal sources and relevant legal principles, leading them to conclude that in certain cases a child may be more closely attached to the father, as was the case in the present dispute (Khalid 2014b).

Supreme Court Jurisprudence Number 110 K/AG/2007 is also used as a guiding reference, affirming that the best interests of the child take precedence over purely normative custodial rights. Where the mother frequently travels without clear justification, resulting in the child experiencing a lack of attention, custody may be awarded to the father. In such cases, factual considerations—including parental attention, affection, availability of time, and the child's sense of comfort—are assessed to determine the party most suitable to assume custody. Furthermore, Supreme Court Circular Letter (SEMA) Number 1 of 2017 serves as an additional legal basis for judicial reasoning, strengthening the decision through two principal considerations: first, the factual fulfillment of parental responsibilities by the father following the divorce; and second, the child's expressed wish to reside with the father, as revealed through a video call interaction between the child and the panel of judges.

Other considerations preventing the mother from being granted custody were articulated on rational and objective grounds. The judges referred to *Kifāyat al-Akhyār*, Volume II, which outlines the requirements for *ḥaḍānah*, including sound mental capacity, adherence to Islam, *'iffah* (moral integrity and chastity), trustworthiness (*amānah*), permanent residence, and the absence of remarriage. Failure to meet these requirements may result in the revocation of custodial rights (Lubis n.d.). In this context, the judges identified several compelling factors that disqualified the mother from obtaining custody, namely mental instability, a

tendency toward habitual intoxication, drug abuse, the presence of dangerous contagious diseases, and a pattern of leaving the child unattended. These factors constituted a strong legal and factual basis for denying custody to the Respondent. Ultimately, the court granted the Petitioner's claim by determining that the nine-year-old daughter should be placed under the custody of her biological father. Nevertheless, the judges emphasized the importance of maintaining communication between the child and her biological mother by granting visitation rights and ensuring the Respondent's continued involvement in the child's life. The court further stressed the Petitioner's obligation not to sever the child's relationship with her mother, in accordance with child protection principles. This decision was rendered based on careful legal reasoning, substantiated facts, and a thorough consideration of the child's best interests, grounded in positive law, judicial precedents, and authoritative Islamic legal scholarship (Ali Sofwan 2024).

H. Justice and the Best Interests of the Child: Judges' View

The judges' perspectives on disparities in first-instance child custody decisions reflect a profound concern for justice and the best interests of the child. The judges acknowledged that the continuity of child custody constitutes a primary responsibility of the court. Accordingly, they maintained that first-instance courts are justified in granting such custody decisions, given their urgency in safeguarding the child's welfare and psychological stability (Ulil Uswah 2023). The judges emphasized that the paramount consideration in both cases was the child's well-being, as the rulings demonstrated that custody by a particular parent more effectively supported the child's development and happiness. In their view, rejecting such decisions would amount to disregarding the fundamental legal principle that places the child's best interests above all other considerations (Ali Sofwan 2024). Furthermore, the judges warned that failure to uphold these custody decisions could result in custody being granted to an unsuitable party, thereby jeopardizing the child's welfare. While recognizing the existence of disparities in judicial outcomes, the judges underscored the importance of consistency in custody rulings to preserve justice and legal certainty. They argued that internal evaluation of judicial decision-making processes is necessary to ensure greater consistency. Beyond strictly technical legal considerations, the judges highlighted the necessity of adopting a holistic approach that takes into account the broader family context and environmental factors affecting the child (Rahman 2023).

The disparity between the two court decisions opens space for evaluating the factors underlying such differences. This disparity largely stems from judges' considerations of the best interests of the child within unique and complex

contexts. In Decision of the Jepara Islamic Court Number 1492/Pdt.G/2021/PA.Jepr, the judges emphasized the proven positive environment resulting from the child's care under the father. In contrast, in Decision of the Yogyakarta Islamic Court Number 348/Pdt.G/2021/PA.YK, the focus was placed on protecting the child from potential violence. These differing emphases contribute to legal uncertainty and the absence of clear assessment standards. Another source of disparity lies in divergent interpretations of formal and substantive legal requirements. The Jepara Islamic Court prioritized the continuity of care provided by the father, whereas the Yogyakarta Islamic Court stressed the fulfillment of formal legal requirements by granting custody to the mother. This disparity also reflects an imbalance in the interpretation of Islamic legal norms. Judicial subjectivity, particularly in assessing parental suitability, further contributes to the emergence of disparate rulings. A comprehensive evaluation of these factors is therefore necessary to formulate clearer and more consistent guidelines for child custody decision-making, in order to ensure greater legal certainty and justice.

I. Conclusion

The conclusion of this study reveals the reasons and legal foundations underlying judicial considerations in determining child custody for children who have not yet reached *mumayyiz* age in two court decisions. In the Decision of the Jepara Islamic Court Number 1492/Pdt.G/2021/PA.Jepr, the judges adopted the theory of legal realism, which prioritizes factual realities and lived experiences over the mere application of statutory provisions. Although, normatively, custody of a non-*mumayyiz* child should be granted to the mother, the judges based their decision on factors such as the father's actual caregiving role, the child's physical and mental condition, and the overall welfare of the child, which justified awarding custody to the father. Similarly, the Decision of the Yogyakarta Islamic Court Number 348/Pdt.G/2021/PA.YK also referred to statutory regulations; however, these were interpreted contextually by taking into account relevant evidence related to the child's welfare. Based on such considerations, custody was ultimately granted to the mother.

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