



## JUDGING THE APPLICATION OF PROGRESSIVE LEGAL THEORY IN CHILD CUSTODY DISPUTES: A CASE ANALYSIS OF DECISION NO. 0334/PDT.G/2019/PA.GDT

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### Abstract

Article 105 of the Compilation of Islamic Law grants child custody primarily to the mother, ensuring the child's welfare. However, Decision No. 0334/Pdt.G/2019/PA.Gdt diverges from this, granting partial custody to the father. This research employs Sadjipto Rahardjo's progressive legal theory to analyze the decision. Despite the contradiction with Article 105, the decision embodies progressive legal values. The judge courageously adopts a joint custody model, prioritizing the child's welfare and justice. This approach allows both parents to care for the child, preserving the child's bond with each parent. The research contributes by showcasing how progressive legal principles can shape custody decisions, ultimately enhancing justice.

*Keywords:* Joint Custody; Progressive Law; Justice.

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### Abstrak

Pasal 105 Penyusunan Hukum Islam memberikan hak asuh anak terutama kepada ibu, menjamin kesejahteraan anak. Namun, Keputusan No. 0334/Pdt.G/2019/PA.Gdt menyimpang dari ini, memberikan hak asuh sebagian kepada sang ayah. Penelitian ini menggunakan teori hukum progresif Satjipto Rahardjo untuk menganalisis keputusan tersebut. Meskipun bertentangan dengan Pasal 105, keputusan tersebut mewujudkan nilai-nilai hukum yang progresif. Hakim dengan berani mengadopsi model hak asuh bersama, mengutamakan kesejahteraan dan keadilan anak. Pendekatan ini memungkinkan kedua orang tua untuk mengasuh anak, menjaga ikatan anak dengan setiap orang tua. Penelitian ini berkontribusi dengan menunjukkan bagaimana prinsip-prinsip hukum yang progresif dapat membentuk keputusan hak asuh, yang pada akhirnya meningkatkan keadilan.

*Kata Kunci:* Hak Asuh Bersama; Hukum Progresif; Keadilan.

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## INTRODUCTION

Humans in the way of nature are destined to live life in pairs, as Q.S Ar-Rum: 21 explains that Allah Swt has made humans love and complement each other. The effort to complement each other in this case is implemented in marriage. Marital relations will spur the human biological system to work properly. The meeting between sperm and ovum produces further offspring with the destiny of Allah Swt. The offspring can be a baton for humans to carry out their service as servants of Allah Swt for the earth.<sup>1</sup>

Marriage seeks to unite two souls in a relationship that is *sakinah*, *mawaddah*, and *rahmah*. Article 1 of Law No. 1 of 1974 concerning Marriage also implicitly explains that people who will enter into marriage must be oriented towards forming a lasting and harmonious family. Marriage is expected not to end in divorce, but expectations sometimes do not match expectations. The relationship between two different human souls may not be united. At this stage, the seeds of divorce appear. Divorce can occur due to conflicts that cannot be suppressed.<sup>2</sup>

Islam does not prohibit divorce. Divorce is permissible if it is the only way for the couple to get a better life. However, Islam requires couples to resolve post-divorce disputes, one of which is related to child custody.<sup>3</sup> Parents who have separated may not live under the same roof. This situation certainly requires the child to follow one of the two. Children under 12 years of age should follow their mother as per Article 105 of the Compilation of Islamic Law. This rule does not always run textually. If the mother is deemed incapable of caring for the child, then the custody of the child will move to the father.<sup>4</sup>

Normatively, the Compilation of Islamic Law is fixated on the regulation of child custody with a split custody model.<sup>5</sup> Issues regarding child custody owned by one party (split custody) often invite further problems. The party who obtains custody of the child based on court provisions will prevent the other party from meeting the child. Even though legally and clearly the child is the result of the relationship between the two, so they need their love. The presence of the mother and father plays an important role in the child's life. Children should not only feel one-sided affection because it will create new problems.<sup>6</sup>

The judge of the Gedong Tataan Religious Court in decision No. 0334/Pdt.G/2019/PA.Gdt confirmed joint child custody. The child custody lawsuit demanded by the plaintiff was accompanied by a divorce lawsuit. The wife requested that the court impose a judgment of divorce on her relationship with her husband, as well as requesting that the custody of the child be granted to her. The provisions of the Compilation of Islamic Law support the wife's claim for custody of the children. However, the judge in his decision only partially granted the wife's request, by granting partial custody of the children

<sup>1</sup> Mahmud Mahmud, "Keshalahan Ibu Mengantarkan Kesuksesan Pendidikan Anak," *ITTIHAD* 14, no. 26 (2016).

<sup>2</sup> Rustam Latupono, La Jamaa, and Abu Bakar Kabakoran, "Penyelesaian Konflik dalam Rumah Tangga Studi Kasus Penyebab Perceraian Di Kota Ambon," *TAHKIM* 19, no. 1 (2023): 67–81.

<sup>3</sup> Umul Khair, "Pelaksanaan Hak Asuh Anak Setelah Terjadinya Perceraian," *JCH (Jurnal Cendekia Hukum)* 5, no. 2 (2020): 291–306.

<sup>4</sup> F Tatia Septia, "Analisis Peralihan Hak Asuh Anak Di Bawah Umur Dari Ibu Ke Ayah (Studi Putusan Nomor 685/PDT. G/2022/PA. LT)" (2023), accessed November 2, 2023, <http://eprints.unram.ac.id/id/eprint/35279>.

<sup>5</sup> Bruce Hawthorne, "Split Custody as a Viable Post-Divorce Option," *Journal of Divorce & Remarriage* 33, no. 3–4 (January 1, 2000): 1–19, accessed November 2, 2023, [https://www.tandfonline.com/doi/abs/10.1300/J087v33n03\\_01](https://www.tandfonline.com/doi/abs/10.1300/J087v33n03_01).

<sup>6</sup> Despi Trianti et al., "Problematika Pendidikan Anak Pasca Perceraian Orangtua," *Enlighten: Jurnal Bimbingan Konseling Islam* 3, no. 2 (2020): 106–121.



to the husband. Therefore, the judge implemented joint custody.<sup>7</sup> The judge's verdict granting custody of the children to the wife and husband has caused debate. The provisions relating to child custody used as legal arguments do not confirm this. Joint child custody is also not found in statutory terms.<sup>8</sup> The judge seemed to break through the normative path of Indonesian law with his considerations.

Decision No. 0334/Pdt.G/2019/PA.Gdt has actually been researched by Jauhar in his thesis. However, the perspective he used only revolves around the normative level, so the conclusions given provide a positivistic view, by contrasting it with Article 105 of the Compilation of Islamic Law.<sup>9</sup> Legal positivism has been challenged by some legal scholars. The argument put forward for the lawsuit is that positivism in some cases does not reflect the value of justice. It makes the law not apply properly, whereas, the law was created for humans, not the other way around-humans were created for the law. The applicability of the law should actually be adjusted to social benefits, as conveyed by the progressive legal theory initiated by Sadjipto Rahardjo.

According to Rahardjo, judges in their decisions must reflect a sense of justice, even if it is not in accordance with textual legal provisions. Judges should not just be the mouthpiece of the law that is "blind" to social benefits. The temporary conjecture is only the author's initial idea. In order to see the reflection of progressive law in Decision No. 0334/Pdt.G/2019/PA.Gdt, the author must comprehensively analyze the details that form the basis of justice in the formulation of progressive law. After that, the concept of joint child custody in progressive law will appear. This research aims to explore progressive legal values that are reflected in child custody decisions, so that such patterns can be implemented in other family law cases.

## METHOD

This research is normative research by examining literature related to joint child custody. Based on library research, the research uses primary data sources consisting of primary legal materials and secondary legal materials.<sup>10</sup> The primary legal material used is decision No. 0334/Pdt.G/2019/PA.Gdt regarding the Child Custody Lawsuit. The decision relates to the implementation of joint custody in a child custody lawsuit. Primary legal materials in the form of decisions will be further analyzed with secondary legal materials relating to child custody literature and Sadjipto Rahardjo's progressive legal theory.

<sup>7</sup>"Direktori Putusan," accessed February 25, 2024, <https://putusan3.mahkamahagung.go.id/direktori/putusan/d64b3ac81bbb179aa2ad78867bb201f5.html>.

<sup>8</sup> Renita Ivana and Diana Tantri Cahyaningsih, "Dasar Pertimbangan Hakim Terhadap Putusan Perceraian Dengan Pemberian Hak Asuh Anak Kepada Bapak," *Jurnal Privat Law* 8, no. 2 (December 2, 2020): 295–302, accessed February 25, 2024, <https://jurnal.uns.ac.id/privatlaw/article/view/48423>; Andi Arizal et al., "Kedudukan Hak Asuh Anak Akibat Cerai Hidup," *Jurnal Litigasi Amsir* 9, no. 2 (February 20, 2022): 151–159, accessed February 25, 2024, <http://journalstih.amsir.ac.id/index.php/julia/article/view/78>.

<sup>9</sup> Muhammad Awaluddin Jauhar, "Konsepsi Pengasuhan Bersama Terhadap Hak Asuh Anak Di Bawah Umur (Analisis Putusan Pengadilan Agama Gedong Tataan No 0334/PDT. G/2019/PA. GDT)" (Fakultas Syariah dan Hukum UIN Syarif Hidayatullah Jakarta, n.d.).

<sup>10</sup> Galang Taufani Suteki, "Metodologi Penelitian Hukum (Filsafat, Teori, Dan Praktik), Cetakan Ke-3" (Depok: PT Raja Grafindo Persada, 2020).



## RESULT AND DISCUSSION

### 1. Forms of Child Custody in Legal Perspective: A Comparison between Islamic and Statutory Law

Divorce often has an impact on child custody problems, as said by Saputra and Mulyana.<sup>11</sup> The two parties usually dispute the desire to care for the child as if the divorce had not occurred. A child custody lawsuit becomes the main way for one party to live with the child. However, this desire must be accompanied by the attitude and ability of the parents who can guarantee the physical, psychological, and spiritual care of the child, because, after all, welfare is the main thing in this matter.

Child welfare can be achieved if the child custody holder has care. A child who grows up without the care of his or her parents may grow up without a clear direction in life. The main focus in this case is the integration between parental commitment and child welfare. This commitment is also included in the category of maintenance responsibilities towards children, both morally and formally. Like the rights and obligations created by marriage, child custody responsibilities are also a consequence of divorce.

The problem of childcare is related to two things. *First*, when a husband or wife jointly contests the custody of a child, causing a dispute between the two. This type of event often dominates child custody issues in court, as found by Islami<sup>12</sup> and Faizah.<sup>13</sup> *Second*, when both parents do not have the responsibility to care for their children, it has a negative impact on psychological development, as well as the loss of children's welfare, as found by Mone<sup>14</sup> and Hasanah.<sup>15</sup> Actually, the second case does not fall into the category of child custody law issues. Child custody suits only relate to the first type of incident.

Education, services, protection, and care of children are the responsibility of parents until the child reaches adulthood. This is regulated by several laws, one of which is Law No. 35/2014 on Child Protection. The articles contained in the Law are broadly related to the fulfillment of children's rights in Indonesia. Article 14 states that children have the right to be cared for by their own parents, except when circumstances do not allow for the good of the child, such as when there is a divorce or similar situation. However, this does not preclude the relationship or interaction between parents and children.

In relation to welfare guarantees, Article 26 obliges parents to protect, nurture, and educate children in accordance with their talents and interests based on their abilities. If parents are unable to fulfill this obligation for various reasons, then the responsibility can be transferred to the family in accordance with applicable regulations. Furthermore, Article 33 explains that when the family is unable

<sup>11</sup> Aldi Saputra and Muhamad Tanto Mulyana, "Pelaksanaan Hak Asuh Anak Atas Penetapan Pengadilan Yang Berkekuatan Hukum Tetap Berdasarkan Undang-Undang Nomor 35 Tahun 2014 Tentang Perlindungan Anak," *De Juncto Delicti: Journal of Law* 2, no. 1 (2022): 1–13.

<sup>12</sup> Irfan Islami, "Legalitas Penguasaan Hak Asuh Anak Dibawah Umur (Hadhanah) Kepada Bapak Pasca Perceraian," *Jurnal Al-Qadau: Peradilan Dan Hukum Keluarga Islam* 6, no. 2 (2019): 181–194.

<sup>13</sup> Faizah Faizah et al., "Peran Lembaga Swadaya Masyarakat Dalam Penyelesaian Hak Asuh Anak Pasca Perceraian Di Banda Aceh," *SYARIAH: Journal of Islamic Law* 3, no. 1 (2021): 70–92.

<sup>14</sup> Harry Ferdinand Mone, "Dampak Perceraian Orang Tua Terhadap Perkembangan Psikososial Dan Prestasi Belajar," *Harmoni Sosial: Jurnal Pendidikan IPS* 6, no. 2 (2019): 155–163.

<sup>15</sup> Uswatun Hasanah, "Pengaruh Perceraian Orangtua Bagi Psikologis Anak," *Agenda: Jurnal Analisis Gender dan Agama* 2, no. 1 (2020): 18–24.

to carry out the responsibility for the welfare of children, a person or legal entity that meets the requirements can be appointed to replace the family in accordance with a court decision.

The court actually bases all its decisions on the good of the child. In the doctrine of the Compilation of Islamic Law article 105 explains it. Children who are not yet 12 years old or not yet mumayyiz have their care handed over to the mother. When exceeding these criteria, the child has the right to choose with whom he will live together, in other words, child custody can apply flexibly according to the wishes of the child. In this regard, Supreme Court Decision No. 102/Sip/1973 confirms that the mother is the prioritized party in child custody decisions, especially for young children. The reason is related to the best interests of the child. The priority of child custody by the mother can be revoked if she is not able to take care of the child properly.<sup>16</sup>

Like the law, fiqh has prioritized children's custody rights based on certain classifications. These classifications are hierarchical, just like the priority in inheritance law.<sup>17</sup> Detailed classification is very important to resolve child custody issues that arise after divorce. The intended classification begins with giving priority child custody rights to the female group. If the female group is unable, then the rights switch to the male group.

The first group of priorities held by women is of course related to the mother's right to care for her child. The mother's mother (grandmother) becomes the next priority if the mother is unable to carry out her mandate properly. The third child custody priority is given to sisters. The mother's aunt (mother's sister) is the next in the hierarchy before custody of the child goes to the sister's daughter. Paternal aunts (father's sisters) are at the last level of priority for custody of the child. If the female group cannot take care of the child, then the male group in the order of heirs (father, grandfather, brother, son, and uncle) becomes the party entitled to take care of the child.<sup>18</sup>

Legislation and fiqh clearly determine the priority of child custody in a hierarchical manner. Interestingly, both shape the idea of child custody in a split custody model. Split custody is a model of child custody that is based on physical division so that one parent gets full custody of the child. In the context of the modernity of child custody, a model of joint custody has been found. Broadly speaking, joint custody implements joint custody of the child, one party may not monopolize the care of the child, even if a divorce has occurred.<sup>19</sup>

Join Custody is an important option to consider in child custody disputes. Mason reveals - as cited by Kruk - that the historical view of child custody must be changed. The mention of child custody status should not be monopolized by one party by referring to the "father's side", or the "mother's side", as happens in child custody disputes. This is because -according to Kruk- such designations indicate the granting of full authority over the interests of the child to one party, resulting in the child custody

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<sup>16</sup> Ira Yuni Rachmawati, "Analisis Yuridis Terhadap Hak Asuh Anak Dalam Putusan Pengadilan Pacitan Perkara Nomor 802/Pdt./2019/PA.Pct" (2022).

<sup>17</sup> Tarmizi Tarmizi and Asni Zubair, "Status of Inheritance for Heirs Who Take Their Own Share: A Case Study in Mattoang Village," *Ekspose: Jurnal Penelitian Hukum dan Pendidikan* 21, no. 1 (2022): 1307–1316.

<sup>18</sup> Slamet Arofik, "Pengasuhan Anak (Hadhanah) Perspektif Sayyid Sabiq Dan Wahbah Zuhaili," *Jurnal Usratuna* 2, no. 1 (2018).

<sup>19</sup> M Natsir Asnawi, "Penerapan Model Pengasuhan Bersama (Shared Parenting) Dalam Penyelesaian Sengketa Hak Asuh Anak," *Al-Iqtishadiyah: Ekonomi Syariah dan Hukum Ekonomi Syariah* 5, no. 1 (2019): 61–76.

holder strictly limiting the child's encounters with parties who do not have custody.<sup>20</sup> In fact, children also have the right to socialize massively with their parents.

## *2. Analyzing Child Custody Decision No. 0334/Pdt.G/2019/PA.Gdt: Legal Events and Legal Considerations*

Decision-making by judges in the civil sphere is based on at least two aspects, namely consideration of legal events and consideration of the law used as a basis. In relation to legal events, the author will describe the sitting of the case that was considered by the judge, starting from the peace efforts, presentation of the argument of the claimant, answers from the defendant, testimony, and conclusions submitted by the parties. The stages of the legal events above will be presented briefly without compromising the essence.

The divorce suit was filed by the Plaintiff as the wife against the Defendant as the husband. The lawsuit was registered at the Registrar of PA Gedong Tataan under registration number 0334/Pdt.G/2019/PA.Gdt dated July 19, 2019. The husband and wife involved in the lawsuit were married on September 28, 2014, as per the Marriage Certificate No.0376/035/IX/2014 issued by the Religious Affairs Office of Tanjung Karang Barat Sub-district, Bandar Lampung City. Both were blessed with a baby who was born on June 11, 2015. After the marriage, they were involved in an ongoing dispute. The judge decided to divorce the two. However, the Plaintiff also requested child custody. The included child custody claim was opposed by the Defendant as the father of the disputed child.

The judge of the Gedong Tatan Religious Court based on Decision No. 0334/Pdt.G/2019/PA.Gdt has decided on the enactment of joint child custody. Initially, the plaintiff as the mother of the child who was the object of the lawsuit asked the panel of judges to hand over custody of the child to her, in accordance with the provisions of Article 105 of the Compilation of Islamic Law. However, the defendant claimed that the plaintiff could not guarantee the future welfare of the child, due to economic reasons. In order to make a decision based on justice, the judge finally decided on joint custody. Based on this explanation, more detailed legal considerations are contained in the following foundations:

### *a. Philosophical Foundation: Value of Justice*

The operation of the judiciary under the auspices of the Supreme Court must adhere to the principles of judicial power set out in law, which are specifically explained in Law No. 48 of 2009 on Judicial Power. Article 2 paragraphs (1), (2), and (3) of the regulation explain that the judiciary in Indonesia must be based on the values of justice based on God Almighty. The justice carried out must also be accompanied by the values of Pancasila. In accordance with the substantial mandate of the law, the symbolic form of the value of justice in all judicial proceedings is reflected in the head of each decision which contains the words "For the Sake of Justice Based on Almighty God."

The head of the above decision philosophically contains the true meaning of justice. However, the reality in court is sometimes different. It turns out that many court practices only favor forms of legal positivism, thus only emphasizing procedural aspects and seeing the law only as a set of rules. Formal justice, which is the "spirit" of the law, is often overlooked. If this reality is justified, then the

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<sup>20</sup> Edward Kruk, *Child Custody, Access, and Parental Responsibility: The Search for a Just and Equitable Standard* (Father Involvement Research Alliance, 2008).



head of the decision should contain the sentence "Based on Justice Based on Legislation", however, this is not the case.<sup>21</sup> Legal justice cannot operate alone without the values of moral justice and social justice, because both have been explicitly stated in Article 5 paragraph (1) of Law No. 48/2009 on Judicial Power.<sup>22</sup>

The value of comprehensive justice that contains a philosophical framework is found in the consideration of Decision No. 0334/Pdt.G/2019/PA.Gdt. The panel of judges was of the opinion that the Plaintiff and the Defendant had behaved well in the care of the child because they had never committed violence that endangered the child. The child custody dispute above does not indicate an attitude of disrespect in the upbringing of the child while still living together. When they were still living together, Plaintiff often took care of the children's daily lives, while Defendant focused on earning a living. When they were no longer living together, Defendant played a greater role in the child's upbringing by accompanying the child on a daily basis. However, this was influenced by the pressure of the situation, in the sense that Plaintiff did not intentionally abandon her childcare responsibilities, because the child was living with Defendant. The judge's fairness in the joint custody decision was based on the philosophy of child custody, namely the existence of care for children that can ensure their welfare in the future. Therefore, both are entitled to care for the child because of the value of philosophical justice.

b. Sociological Foundations: For the Good of the Child

Nominally, the care of children aged 12 years and under is left to the mother, in accordance with the provisions of Article 105 of the Compilation of Islamic Law. Legislation and Islamic law at the textual level are of this opinion. However, the actual care is given to the party that can meet the needs of the child. This means that the needs of the child are an important indicator that can be taken into consideration by the judge to determine the party entitled to care for the child, without considering a particular gender. Children's needs can mean a guarantee of children's welfare to be able to develop properly in accordance with human dignity. This is stated in Article 4 of Law No. 23 of 2002 concerning Child Protection as amended by Law No. 35 of 2014 and Supreme Court Jurisprudence No. 110 K/AG/2007 on November 13, 2007.

The reference from a sociological point of view, the law is expected or even should be able to reflect the values that become the conviction of the community in social life. This shows that the law must be sensitive to the dynamic and developing social situation of society, not only today but also in the future with various changes in all aspects of life. Therefore, the law should not be a static and rigid norm, but the law must be able to respond to new ideas in order to create benefits in people's lives.<sup>23</sup>

The judge's consideration in decision No. 0334/Pdt.G/2019/PA.Gdt emphasizes that childcare is not only about ownership that exists at a normative level. Childcare must be based on considerations of the benefit of the child. The judge considers that the conception of shared parenting/joint custody can bring more benefits in this case. The paradigm of split parenting/split custody contained in the Compilation of Islamic Law is considered to raise new problems, related to the idea that children are

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<sup>21</sup> Yunanto Yunanto, "Menerjemahkan Keadilan Dalam Putusan Hakim," *Jurnal Hukum Progresif* 7, no. 2 (2019): 192–205.

<sup>22</sup> Nurul Mahmudah, "Aspek Sosiologis Dalam Putusan Pengadilan Pada Perkara Cerai Gugat," *Nizham: Jurnal Studi Keislaman* 7, no. 01 (2019): 106–122.

<sup>23</sup> Amrullah Ahmad, *Dimensi Hukum Islam Dalam Sistem Hukum Nasional* (Jakarta: Gema Insani, 1966).

objects of ownership that can be freely restricted. Sometimes the party entrusted with custody limits the child to meet the other party. Whereas children need love and attention from both parents.

The judge ruled that custody of the disputed child was in joint custody with the following provisions: custody of the child was in the Defendant's "grasp" on Monday-Friday when the child was attending formal education, the Plaintiff had custody on Saturday and Sunday when the child was enjoying a day off. Meanwhile, the child's developmental needs must be carried out by mutual agreement between Plaintiff and Defendant as biological parents. The decision seems to emphasize that the contextuality of the child's educational situation is the main benchmark for judges in making the best decision for all parties. This consideration is based on the social context which is based on the benefit of the child.

### 3. Analysis of Child Custody Decision No. 0334/Pdt.G/2019/PA.Gdt: A Progressive Law Perspective

Sadipto Rahadjo is a professor who is credited with delivering the legal paradigm in Indonesia to become more humanist. Through the idea of progressive law, Sadipto provided a space to criticize the legal-formal paradigm guided by the majority of legal practitioners in Indonesia at that time. Sadipto broke the "old-fashioned" legal habits with a positivistic spirit.<sup>24</sup> In the level of progressive law formulated by Sadipto, there are 9 concepts:<sup>25</sup>

- a. Rejecting the legal realist school of law, sociological jurisprudence, and critical legal studies. In short, progressive law does not recognize the advantages of normative law in the form of written regulations or legislation. Written law is often only a representation of the wishes of the ruler who does not accommodate the interests of his people.
- b. Rejecting the positivistic view that order will only work in the formal institutions of the state. Legal order can be realized through the form of community participation which has formed its norms. Therefore, the role of society in the legal system is an unavoidable provision.
- c. Reaffirming that the purpose of the law is to protect the people. Progressive law accommodates this by striving towards the ideal of law. Legal ideals will not work without considering the values recognized by society, so as to protect their interests. Such protection means eliminating legal entities that are detrimental and even oppress society for the sole reason of enforcing positive legal provisions.
- d. Law is not a technology that has no conscience. Progressive law rejects the legal status quo which in its application does not contain moral values. Moral values that must be considered include the human conscience which can know good and bad more clearly. In this case, conscience functions as a source for constructing appropriate decisions for the welfare of society, even though it is not in accordance with the textuality of positive law.
- e. The orientation of the establishment of legal institutions is based on the desire of the community to live happily and prosperously through the implementation of a just law. The law must not shackle people's interests in living happily. However, consideration of people's happiness must be the main benchmark in the operation of legal institutions.
- f. Progressive law seeks to implement laws that are "pro-people" and "pro-justice". The purpose of these two jargons is related to the inclusiveness of the role of law which must side with justice

<sup>24</sup> Satjipto Rahardjo, *Membedah Hukum Progresif* (Jakarta: Kompas, 2006).

<sup>25</sup> Nurhadi Nurhadi, "Teori Hukum Progresif Dalam Menyelesaikan Sengketa Bisnis Perbankan Syariah," *Jurnal Hukum Samudra Keadilan* 14, no. 2 (2019): 154–167.



and the interests of society. These two aspects can mean providing legal partiality to all individuals without discrimination.

- g. Progressive law seeks to emphasize the perspective of "law for people", not "people for the law". The running of the law is not based on textual egoism, but in order to meet the needs of people who are trying to get justice. If it is felt that the existing law does not reflect the value of justice, then the law should be considered for improvement. Humans should not be forced in any way to enter into a legal system that is not humanist, in order to fulfill the demands of legal textuality.
- h. Humans determine the proper functioning of the law. Law cannot be said to be an absolute and final institution without renewal based on existing social realities. The increasingly developing social reality certainly changes the direction of society's interests. Apart from that, social reality also provides a different perspective in understanding a problem. The law must be able to respond to this well, without denying legal reform according to the benefit of social reality.
- i. Encourage the law to always be in the process of becoming (law as a process, law in making). The consequences of law which is interpreted "as a process" emphasize legal renewal that is relevant to current developments, while adhering to the main principles of justice, as well as protecting the rights and interests of society.

The ruling of the panel of judges in decision No. 0334/Pdt.G/2019/PA.Gdt can be said to be a representation of resistance to legal-formal law that does not fulfill the prerequisites of justice. Written law in the first progressive legal concept is considered a form of law based on the wishes of the ruler. The ruler in this case is not only the president or prime minister, but also the people who have the authority to draft legislation.<sup>26</sup> The Compilation of Islamic Law can be said to be the implementation of madhab fiqh dominated by the Syafii madhab. This is because, in its drafting, the parties involved are Muslim scholars who mostly still adhere to the Syafiiyah school of thought. The provisions of Article 105 of the Compilation of Islamic Law are very much in line with the dogmas of classical ulama madhab fiqh.<sup>27</sup>

The inclusion of classical fiqh ideas in the Compilation of Islamic Law is not wrong. Throughout the history of law formation, political factors have always influenced the form and outcome of applicable laws.<sup>28</sup> However, considering the Compilation of Islamic Law as a final and absolute rule is wrong. The concept of progressive law emphasizes the law to always process continuously. The process in question is related to the implementation of the law which should adjust to social benefits, even though it is contrary to textual provisions.

Humans play a major role in the ongoing process of law formation. Humans have a conscience that is able to filter considerations of goodness in society. This conscience is not owned by legal positivism which considers that the law will be fair if it follows the rules in the text.<sup>29</sup> Proses perjalanan gagasan hak asuh anak mengalami perubahan secara signifikan pada tahun 2007. Supreme Court Decision No. 110 K/AG/2007 became a new idea of child custody, by providing a wide opportunity for fathers to care for children, as long as it can accommodate their interests. The decision is certainly a

<sup>26</sup> E. Sumaryono, *Etika Dan Hukum: Relevansi Teori Hukum Kodrat Thomas Aquinas* (Yogyakarta: Kanisius, 2002).

<sup>27</sup> Muhammad Zainuddin Sunarto and Ahmad Baidawi, "Hak Asuh Anak Dalam Perspektif KHI Dan Madzhab Syafi'i," *Jurnal Hakam* 4, no. 1 (2020): 1–20.

<sup>28</sup> Abdul Latif Mahfuz, "Faktor Yang Mempengaruhi Politik Hukum Dalam Suatu Pembentukan Undang-Undang," *Jurnal Kepastian Hukum dan Keadilan* 1, no. 1 (2020): 43–57.

<sup>29</sup> M Yasin Al Arif, "Penegakan Hukum Dalam Perspektif Hukum Progresif," *Undang: Jurnal Hukum* 2, no. 1 (2019): 169–192.

representation of progressive law "at that time", given the rigidity of the formal legalization of child custody rights normatively.

The Compilation of Islamic Law and Jurisprudence No. 110 K/AG/2007 is still guided that child custody can only be given to one of the parents. It turns out that it raises new problems, when the decision has been *inkracht*, the parent who won the lawsuit often limits the child to meet the other party who did not get custody of the child.<sup>30</sup> Although in some decisions there appears to be a threat of revocation of child custody because of this, the threat is not effective, considering that filing a lawsuit for revocation of child custody requires a lot of energy and money. In the end, the child custody paradigm has seen a new chapter since the judge introduced joint custody in Decision No. 0334/Pdt.G/2019/PA.Gdt.

The facts of the trial proved that both parents were well-behaved towards the child. They were mentally, financially, and physically capable of taking care of the children and ensuring their proper development. The division of parenting roles was considered a middle ground in the child custody dispute. This middle ground is able to bridge the desires of the parties to take care of the baby who is the successor of the next generation. The values of humanity and justice are reflected in this. Laws are made for people, not the other way around. The provisions regarding child custody are designed to accommodate the rights of children to always feel the love of their parents. In addition, the substance of the child custody rules also shows that the existing regulations serve to bridge the desire of parents to channel their affection to their children. Joint child custody is the right step to integrate these interests in a humanist manner.

Progressive law always emphasizes the goal of creating laws based on the principle of justice, with justice that can bring as much happiness as possible to humans. This principle of morality is in accordance with the concept of utilitarianism initiated by Jeremy Betham.<sup>31</sup> In order to see that the concept works, we can consider it based on past events. Then draw the conclusion that such conditions can bring great benefit to humanity.

Joint custody is a solution that can be considered in a child custody lawsuit. Robert Bauserman stated in his research that children who are in joint custody do not have significant behavioral and emotional problems. Children who live with divorced parents certainly have a tendency to have emotional problems, but joint custody can prevent these problems, although not all of them can be resolved. In Robert's study, children of divorce who were in joint custody had better self-esteem and quality of formal learning than children in sole custody.<sup>32</sup>

Parenting with a split custody model can bring problems, one of which is related to the father's provision of maintenance to his child. The father's obligation after divorce is to provide maintenance to his wife and children. Child custody given to the mother makes the father not fulfill his obligations in providing maintenance. The court has actually given the mother the option to file for execution, but this

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<sup>30</sup> Rita Pranawati, Naswardi, and Julhadi, *Pengawasan Pemenuhan Hak Pengasuhan Anak Di Indonesia* (Jakarta: Komisi Perlindungan Anak Indonesia (KPAI), 2017).

<sup>31</sup> Zainal B Septiansyah and Muhammad Ghalib, "Konsepsi Utilitarianisme Dalam Filsafat Hukum Dan Implementasinya Di Indonesia," *Ijtihad* 34, no. 1 (2018): 27–34.

<sup>32</sup> "Children Likely to Be Better Adjusted in Joint vs Sole Custody Arrangements," accessed November 2, 2023, <https://www.apa.org/news/press/releases/2002/03/custody>.

is often not done for various reasons.<sup>33</sup> A practical solution to avoid this is to grant custody of the children to the father.

The results of this research can also be used as a complement to the judge's consideration in decision No. 0334/Pdt.G/2019/PA.Gdt. The judge said that children will need the functions and roles carried out by each party. The child will learn about the nature of affection, tenderness, love, and empathy from the mother, while the father will teach the child firmness, resilience, and consistency. The judge gave the widest possible opportunity for both parties to take care of their children as best they could. According to him, divorce should not have a bad effect on children by showing the harmony of their parents, even in conditions of divorce. Children must still be given the same portion of affection as when they used to live together.

Joint custody decided by the judge is based on considerations that can provide a sense of satisfaction to all parties. Joint custody can also have a good impact on the growth and development of children. Because this aspect illustrates that the decision No. 0334/Pdt.G/2019/PA.Gdt has fulfilled the substance of progressive law, with the prerequisite that the law must provide great happiness and benefit to society. If these benefits conflict with each other, then the law should favor the greatest benefit.

#### 4. *Implementation of Progressive Law in Child Custody Decision: No Further*

Progressive law is considered a contradiction of legal textual rules. This assumption is not entirely true and not entirely wrong. The genealogy of progressive law is indeed used to oppose the absurdity of textual law which is often a problem for law enforcers. Judges or interested people make the sound of the article a "minefield" for the enforcement of justice. In the sense that the law enforcer actually knows that the decision with the article will bring justice to the community, but he does not dare to break through the article on the grounds of the positivistic paradigm that has become his belief. Supposedly, law enforcers must dare to break through articles that are contrary to the value of justice. At this stage, progressive law plays its role.<sup>34</sup>

Progressive law enforcement must rely on legal morality. The progressive rule of law designed by Sadipto Rahardjo provides a wide opportunity for law enforcers to use their minds and consciences to find justice.<sup>35</sup> This allows law enforcers to obey the sound of the article or break through it. Thus, progressive law should not be associated as an opposition to the sound of the article, but the implementation of the sound of the article that must be contextualized based on the benefit of reality. Morality, which is the "life" of progressive law, must be attached to law enforcers so that progressive law is not misused: such as making decisions that are not in accordance with the article on the grounds of progressivity, but the decision does not reflect the value of justice.

The legal contextualization of the article can be reflected in decision No. 0334/Pdt.G/2019/PA.Gdt as explained in the previous sub-chapter, the paradigm of child custody is actually based on considerations of benefit for children, with a psychological and sociological point of view. If you look in detail, the judge does not necessarily provide an understanding that the child custody claim must be decided as joint child custody. The main consideration used by the judge was the psychological condition of the parents. The two people in the facts of the trial were equally fit to ensure good childcare.

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<sup>33</sup> Meivanza Dwi Aurellia and Abdul Halim, "Urgensi Pembentukan Lembaga Eksekutor Terhadap Pemenuhan Hak Perempuan Dan Anak Pasca Perceraian," *Jurnal Usm Law Review* 6, no. 2 (2023): 752–65.

<sup>34</sup> Muhamad Beni Kurniawan, "Politik Hukum Mahkamah Konstitusi Tentang Status Anak Di Luar Nikah: Penerapan Hukum Progresif Sebagai Perlindungan Hak Asasi Anak," *Jurnal Ham* 8, no. 1 (2017): 67–78.

<sup>35</sup> Al Arif, "Penegakan Hukum Dalam Perspektif Hukum Progresif."

The portion of the division of roles in childcare decided by the judge is numerically unbalanced. Mothers only have the opportunity for parenting time on Saturdays and Sundays (school holidays). While the father can be with his child from Monday to Friday (school admission). The decision was influenced by the consideration of the continuation of education for the child because he is studying Early Childhood Education in the father's village. The author argues that this decision will minimize further mental problems for the child. The child, who has been studying in that place for a long time, has certainly found comfort in his environment. In order to avoid the potential for the school to move - by moving to another school near the mother's location - it is better for the decision to be as follows.

However, joint custody does not always bring benefits. In fact, split custody can sometimes ensure the growth and development of children, one of which is when there is the potential for neglect. Joint custody can also be potentially bad if both parents are still likely to be in constant conflict. Such conflicts may take place based on the intensity of their meetings under the joint custody parenting model. The child will see the dispute as a bad impression that can add to the mental burden.<sup>36</sup> In such conditions, joint custody does not support the substance of goodness child custody, namely care that can ensure the mental and physical growth and development of children so that they become good future generations.

Thus, joint custody should not be implemented arbitrarily without considering other related aspects. Child custody issues must be based on considerations of benefit to the child and both parents. The form of split custody or joint custody can be used by the judge with careful consideration. Joint Custody is only an alternative form if split custody is deemed not to provide benefits in a case. The role of progressive law is to emphasize that if joint custody is considered better to apply, then the judge can implement it, even though joint custody is not regulated in the relevant laws or regulations.

## CONCLUSION

Decision No. 0334/Pdt.G/2019/PA.Gdt can be said to be a decision that implements progressive law. The judge dared to "bump" into the legal-formal path of the Compilation of Islamic Law which only accommodates split custody in the post-divorce childcare model. The progressive law reflected in the decision is expected to be able to provide complete justice, by considering the benefits of all parties: child, mother, and father. Welfare conditions can be more assured with joint custody. However, joint custody in progressive legal review cannot be applied haphazardly, there are several things that must be considered, namely the potential for conflict and neglect. When these two things have the potential to arise, then the joint custody model does not need to be applied in child custody decisions. The implication of this study is to ensure that progressive laws are applied in child custody cases so that they can create justice and broad benefits. In addition, the implementation of progressive laws must always be evaluated to ensure their benefits for society.

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<sup>36</sup> Robert E. Emery, "Psychological Perspectives on Joint Physical Custody" (2021): 37–50, accessed November 2, 2023, [https://link.springer.com/chapter/10.1007/978-3-030-68479-2\\_3](https://link.springer.com/chapter/10.1007/978-3-030-68479-2_3).

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