Indonesian Religious Court Decisions on Child Custody Cases: Between Positivism and Progressive Legal Thought

Suci Ramadhan[1], JM. Muslimin[2]

[1]Institut Agama Islam Nasional Laa Roiba, Bogor, Indonesia
e-mail: suciramadhan95@gmail.com
[2]UIN Syarif Hidayatullah, Jakarta, Indonesia
e-mail: jm.muslimin@uinjkt.ac.id

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Abstract: *Indonesian judges of Religious Court in deciding child custody cases have different legal reasoning. Some preferred to use juridical reasoning and others use progressive and sociological reasoning. This different legal reasoning causes various insights in the meaning of justice for child custody. This study aims to analyze the positivistic and progressive Islamic legal thought in judges' decisions of child custody cases. This is normative legal research with statutory and case approaches. The legal material is six judges' decisions and is supported by books, scientific article, statutes, and interview. Then, it is analyzed by content analysis. The result states that judges who use textual reasoning tend to decide that child custody is the mothers right, referring textually to an article 105 of the Islamic Law Compilation. Meanwhile, the other judges who prefer to contextual reasoning, decide that child custody is the fathers right. The textual reasoning is steered by legal-positivism: logical coherence of the text is the main method in concluding decision. The contextual reasoning is driven by sociological as well as critical-progressive thought: deconstruction of legal text, contra legem approach by qiyâs (analogy) and istiḥsân (legal teleology), to produce the justice values based on child interests and parents conditions.*

Abstrak: Hakim pengadilan agama di Indonesia dalam memutus perkara hak asuh anak mempunyai penalaran hukum yang berbeda. Beberapa hakim menggunakan pendekatan yuridis sementara beberapa hakim lainnya menggunakan pendekatan progresif dan sosiologis. Perbedaan pertimbangan hukum ini menyebabkan putusan yang berbeda dalam mengartikan keadilan bagi kasus hak asuh anak. Studi ini bertujuan untuk menganalisis pemikiran hukum positifistik dan hukum Islam yang progresif dalam perkara hak asuh anak. Penelitian ini menggunakan pendekatan undang-undang dan kasus. Bahan hukum yang digunakan adalah enam putusan hakim dan didukung dengan buku, artikel ilmiah, undang-undang serta wawancara hakim, kemudian bahan hukum dianalisis menggunakan analisis isi. Hasil studi ini menunjukkan bahwa hakim yang menggunakan pertimbangan tekstual cenderung memutus bahwa hak asuh anak adalah hak ibu, sebagaimana ketentuan pasal 105 Kompilasi Hukum Islam. Sementara, hakim yang menggunakan pertimbangan kontekstual memutus bahwa hak asuh anak adalah hak ayah. Pertimbangan tekstual tersebut berdasarkan penalaran hukum positifistik melalui koherensi logis dari teks sebagai metode utama dalam memutus perkara. Adapun pertimbangan kontekstual berdasarkan penalaran sosiologis sebagaimana pemikiran progresif kritis melalui dekontruksi teks hukum, pendekatan *contra legem* dengan *qiyâs* (analogi) dan *istiḥsân* (interpretasi teleologi) guna menghasilkan nilai-nilai keadilan berdasarkan kepentingan anak dan kondisi orangtua.

Keywords: *Judge Decision; Religious Court; Progressive Legal Thought; Child Custody.*

INTRODUCTION

Roscoe Pound stated that justice is not only a juridical problem but a social problem that is constantly changing (Nalbandian, 2008; Priban, 2018) He also distinguishes

between legal justice and social justice (Pound, 2017: 12). Soerjono Soekanto views that justice is a harmonious relationship between humans in society and between humans and society according to prevailing morals, this is what we know as sociological justice. Justice based on habits, socio-culture, patterns of behavior and relationships between humans in society. It can be said that legal justice is not just based on formal procedures on state normative legal texts which are often far from morality and societal norms. (Sholahudin, 2016: 43)

Efforts to realize justice ultimately fall into the hands of the judge as the holder of the power of justice who is authorized to adjudicate every problem faced by the community. Judges do long and complicated reasoning and thinking try to form decisions that meet the values of justice for the parties, especially in cases of child custody after the termination of their parents' marriage bond due to divorce (Khisni, 2011: 28-29). In Indonesian law, juridically, child custody is indeed a mother's right based on Article 105 letter (a) Compilation of Islamic Law (*Kompilasi Hukum Islam*, 1991). However, judges as justice enforcers need to re-examine how progressive law in this case achieves substantial justice so that it does not always make decisions based on a normative juridical approach.

As the decision of the judge of the Sukoharjo Religious Court Number 0145/Pdt.G/2015/PA.Ska who decided custody of the child to his father by applying contextually to Article 105 letter (a) Compilation of Islamic Law, while the judge's decision at the appeal level of the Semarang Religious High Court Number 249/Pdt.G/2015/PTA.Smg considered that there are no reasons and factors that invalidate the mother's right to care for her child, so the judge decided that the child is more beneficial under the care of the mother as mandated by Article 105 letter (a) Compilation of Islamic Law (*Kompilasi Hukum Islam*, 1991). However, the judge at the cassation level based on Decision Number 406 K/Ag/2016 decided to cancel the judge's decision at the appeals level because the judge misunderstood the contextual issue of child custody.

Meanwhile, in terms of child custody cases which were decided by the Pangkajene Religious Court judge Number 12/Pdt.G/2015/PA.Pkj stated that children are more beneficial if they are cared for by the father, but the decision at the first level was agreed at the appeal level based on Decision Number 79/Pdt.G/2015/PTA.Mks by deciding that custody of the child is given to the father. Likewise, when this case was filed for cassation at the Supreme Court, the judge based on Decision Number 237 K/Ag/2016 considers that the problems and interests of the child are more secure under the care of the father.

In order to determine the position of the current research, a review of previous studies that have relevance to the current research was conducted. (Islami & Sahara, 2019) stated that the granting of child custody to the father needs to be considered several aspects, such the interests of the child and the mother's behavior based on legal consideration and the requirements for child custody. (A et al., 2016) emphasized that the determination of child custody is basically flexible, not fixated on the provisions of the law which only decides child custody rights to the mother but also to the father, as in the case studied by (Amalia et al., 2018; Elimartati & Firdaus, 2018; Ivana & Cahyaningsih, 2020; Mansari et al., 2018) regarding the granting of custody of the child to the father. It is supported by (Maswandi, 2017) which argued that the judge must really consider the guarantees for a better social life and child welfare. Other

research conducted by (Fanani, 2017) with a gender approach which emphasizes that Article 105 of the Compilation of Islamic Law is a legal provision that is not gender responsive, because it only regulates custody of mothers. Another case study was conducted by (Sanjaya, 2015) based on the enforcement of procedural justice, and research by (Sukerti et al., 2015) which conducted based on empirical studies with a legal pluralism approach.

Based on all the studies that have been analyzed, the researchers only reviewed child custody based on the legal approach, case approach, conceptual approach, gender approach but has not discussed on a holistic and comprehensive research analysis to the level of how the judge's reasoning discourse is in the concept of legal formation and Islamic legal justice regarding child custody matters. In addition, the current research methods also include methods that have never been studied based on the search for these literatures. Therefore, this research article gives new insight to contribute to the literature related to child custody problems.

RESEARCH METHODS

This research is a type of normative legal research with statutory and case approaches (Putra, 2014). The research data uses legal materials in the form of judges' decisions regarding child custody cases that have been decided by the Religious Courts, Religious High Courts and Supreme Court, as follows:

a. Sukoharjo Religious Court Decision, Number 0145/Pdt.G/2015/PA.Ska.
b. Semarang Religious High Court Decision, Number 249/Pdt.G/2015/ PTA.Smg.
c. Supreme Court Decision, Number 406 K/Ag/2016.
d. Pangkajene Religious Court Decision, Number 12/Pdt.G/2015/PA.Pkj
e. Makassar Religious High Court Decision, Number 79/Pdt.G/2015/ PTA.Mks
f. Supreme Court Decision, Number 237 K/Ag/2016.

Data collection techniques come from documentation studies and interviews. Research data were analyzed using content analysis through logic and reasoning model with IRAC (Issue, Rule, Argument, and Conclusion) (Weruin, 2017: 391). The IRAC model is the basic of a legal analysis, which helps to see even complex legal issues in a simple context so as to be able to identify the problem correctly, find the right rules and laws for the problem identified, so as to be able to draw the right conclusion. The way of IRAC model works is use the concept of inductive reasoning and deductive reasoning. (Harris, 2019)

RESULTS AND DISCUSSION

Judge's Decision as a Product of Legal Thought

In the context of the task of judges in the Indonesian legal system, decisions are a form of judge's thinking that does not just appear in the judicial process but is carried out through logical and complicated reasoning, excavation and legal discovery, to later become a source of law or what is called jurisprudence (Aisyah, 2018; Undang-Undang Nomor 48 Tahun 2009 Tentang Kekuasaan Kehakiman, 2009; Visegrady, 2015). The construction of the judge's decision consists of three main parts, namely the head of the decision, legal considerations and the decision. The urgency of having a decision head that reads *"Demi Keadilan Berdasarkan Ketuhanan Yang Maha Esa"* is a manifestation of the judge's efforts to achieve

justice based on religious norms and values. So, every decision must be accountable and the responsibility lies in legal considerations. So, legal considerations are important things that must be compiled using the right reasoning from a judge. (Yunanto, 2019: 197)

The decisions of the panel of judges of first instance, appeals and cassation have different nature and technicalities. The judge's decision at the first level is a judex facti decision related to the case examination technique. Even though the appeal decision is judex facti, it is only corrective in the course of the case examination at the first level. Meanwhile, the supreme judge as judex juris is obliged to examine the coherence and correctness of legal decisions and legal procedures made by the courts below him. The Supreme Court judge has no right to hold a separate trial by carrying out a legal proof process, debate and inviting the conflicting parties to court (Muslimin, 2005: 200-201). In the trial at the cassation, the supreme judge is tasked with examining social facts carefully and thoroughly about the meaning and nature of and behind the facts of the case, tracing other supporting evidence, seeking solutions, then giving legal considerations and making them legal facts in the trial according to the reference of the decision. (Artadi, 2011: 119)

The phenomenon that court judges in deciding cases tend to use a legal justice approach that is centered on legal texts, so they pay less attention to the social justice approach. This causes judges to prioritize the principle of legal certainty rather than their obligation to uphold justice for the community. The use of a perspective that standardizes legal texts as a basis for justice will have implications for failure so that there is a dysfunction of the purpose of the law itself. (Yunarti, 2017: 77-78)

According to John Rawls, the failure of judges in deciding cases is a form of injustice. He emphasized the need for an orderly and impartial legal administration. Rawls explained that an important element to achieve justice is the existence of substantive justice which refers to the results and elements of procedural justice. The judge's decision is considered good if it is able to provide a sense of justice for the parties and is decided based on the professionalism of judges with high moral integrity. In addition, the judge's decision does not only contain the value of legal certainty but also the values of legal justice, moral justice and social justice. Decisions issued by judges must also truly reflect the principles of justice, the principle of certainty and the principle of benefit for the litigants (Rawls, 1971: 206-207). Achmad Ali, a legal expert, agreed on the importance of these three principles in a decision (Ali, 2017: 179). Gustav Radbruch emphasized that the judge must decide first based on justice, not the law. This is because the legal certainty in the law demands to be applied regardless of whether the decision is fair or not. (Leawoods, 2000: 498)

As explained, it is not easy for judges to decide a case because they are usually faced with incomplete, vague, or unclear legal rules in regulating a problem. However, judges are prohibited from rejecting a case on the grounds that there is no law or unclear, but it is necessary to make reasoning and legal exploration as stipulated in Article 10 paragraph (1) of Law No. 48 of 2009 concerning Judicial Power. Based on these provisions, judges are given authority to decide cases through various legal discovery efforts, one of which is by overriding statutory regulations so that judges do not use the existing normative juridical considerations, or even contradict the existing articles in the law throughout the article. This is considered irrelevant to

the development and sense of community justice. (Muhammad, 2014: 436-437)

The effort to find such a law is known as *Ius Contra Legem*. Judges can act *contra legem* and this is allowed with consideration if a case does not have clear rules or there are no rules governing a legal issue (Mushthofa, 2019: 6) as accordance with the provisions of Article 5 paragraph (1) of Law Number 48 of 2009 Concerning Judicial Power. Thus, judges have a very decisive role in realizing decisions that have the value of justice, certainty and legal expediency. When judges are likened to the mouthpiece of the law, thinking progressively can be the right effort, because legal texts have weaknesses so it is necessary to understand the meaning behind the text. (Fitri, 2011: 35-36)

Decision Analysis: Finding Laws to Achieve Justice for Children

The essence of legal discovery lies in how judges play their role as law enforcers, formulators and explorers of justice values. Based on the 6 (six) decisions studied, the legal findings made by judges are generally only limited to interpretation of the text of the law and then building a policy and judicial decision. To reveal policy-making in judicial decision-making, Feeley and Rubin exploded interpretivist legal theory, namely the idea that due process is a matter of interpreting a constitution (where there is a constitution), statutory texts or common law. The destruction of this interpretive theory is welcomed because this theory is only one or two steps away from a discredited legal theory even though such theories are quite widely used in the legal system in Indonesia (Thomas, 2005: 6-7). However, in the analysis carried out on the six decisions, it was found that there were several attempts at discovery and legal reasoning carried out by judges on child custody cases to achieve progressive justice.

According to the judge of Sukoharjo Religious Court in the decision, number 0145/PDT.G/2015/PA.SKA, child care is regulated by the law contained in Article 41 of Law Number 1 of 1974 in conjunction with Article 105 letter (a) Compilation of Islamic Law. According to the law, the maintenance of children who have not mumayyiz (not yet 12 years old) is the right of his mother. It is a proven legal fact that the age of the child is 9 years, so that legally the mother should have the right to care for and care for the child. However, the judge at the first level has other considerations based on the sociological approach, namely that the child is closer to his father, the growth and development of the child is also going well and the fulfillment of moral and material needs is also fulfilled. On the philosophical aspect, the judge decided that it was better for the child to be raised with the father because the child's growth and maintenance had been good with his father. Thus, judges carry out legal construction with argumentum per analogium (Muwahid, 2017; Ramadhan, 2021: 37). This method is used by the judge to apply the provisions for the maintenance of the father which is not actually regulated in the legislation by equating the incident with a concrete event regulated in Article 105 letter (a) of the Compilation of Islamic Law. (*Kompilasi Hukum Islam*, 1991)

In the decision, number 249/PDT.G/2015/PTA.SMG, the judge of Semarang Religious High Court prioritized the text approach of Article 105 letter (a) Compilation of Islamic Law, Article 2 and Article 4 of Law Number 23 concerning Child Protection, the hadith of the Prophet Muhammad and the opinions of scholars in the book of fiqh. On the sociological aspect, the judge considered that the closeness of the child occurred because during the divorce the child was with his father. Therefore, the

judge at the religious high court granted the appeal from the Appellant and canceled the decision number 0145/PDT.G/2015/ PA.SKA. The different methods of legal discovery and reasoning used by these judges resulted in different decisions. Judges at the appellate level tend to use an authentic text approach.

The judges of the Supreme Court in their decision, Number 406 K/Aug/2016, tend to have the same pattern of reasoning and legal discovery with the decision 0145/PDT.G/2015/PA. SKA which is not only based on Article 105 letter (a) Compilation of Islamic Law in the case quo. The Supreme Court judge considered that the judge's legal discovery at the first level was appropriate because it was carried out in accordance with good reasoning based on philosophical, juridical and sociological considerations. If viewed on the law discovery, the judges have made several progressive Islamic law discoveries to realize justice for children, as follows:

Table 1
Decisions and Legal Discovery Methods

Decision Number	Legal Discovery Methods
0145/Pdt.G/2015/PA.Ska	Judge in making law discoveries using *ijtihâd qiyâsi* method that is by crossing the issue of child custody over the mother with the issue of child custody over the father because the law is not yet known. Indications of the cause of this happening because of the similarities *`illat* the law between the two cases.
249/Pdt.G/2015/PTA.Smg	Judges use legal discovery method with a textual approach based on *şarîh* and *qat`i al-dalâlah* consideration, so there is no room for *ijtihâd* there.
406 K/Aug/2016	Judge makes legal discovery using *istişlâhiyyâh* method based on aspects of the benefit of *istiḥsân*.

Based on the table 1, the judge considers that the application for the determination of child custody cannot apply the Article 105 letter (a) Compilation of Islamic Law, which provides custody of children who have not been mumayyiz or not yet 12 years old to the mother. This is due philosophically and sociologically, that the child care carried out by the father after the divorce is going well. The growth and development of children is also considered good from various aspects. So, by doing *ijtihâd qiyâsi*, child custody is more beneficial if given to the father.

In the same case of child custody, in decision number 12/PDT.G/2015/PA.PKJ, the judge of Pangkajene Religious Court assessed sociologically that the father took good care of the child through consideration of moral, religious, and health aspects. Meanwhile, on the legal aspect, the judge considered from two points of view, namely the purpose of child protection and child care. In this decision, the judge makes legal discoveries systematically, namely integrating one regulation with other regulations as part of the legal system as a whole. Judges interpret holistically the provisions contained in the Article 105 letter (a) Compilation of Islamic Law (*Kompilasi Hukum Islam*, 1991) and the provisions of Article 2 letter (b) and Article 4 of Law Number 23 of 2002 concerning Child Protection (Undang-Undang Nomor 23

Tahun 2002 Tentang Perlindungan Anak). Through these two regulations, the judge properly considered the interests and benefits of the child.

Then, the judge's decision at the Makassar Religious High Court, number 79/Pdt.G/2015/PTA.Mks, confirmed the results of the Pangkajene Religious Court judge's decision on the case of child care given to the father, which considered the values of interests and benefits for children. In the Supreme Court decision's, number 237 K/Aug/2016, judged that although the mother considered herself capable of taking care of her child, the fact was that the child had long been comfortable and close to his father's care. With consideration for the interests of the child, it would be better off if he remained in the care of the father without compromising the role of the mother in devoting love to her child. If viewed on the findings of Islamic law, the judges have made several progressive Islamic law discoveries to realize justice for children, as follows:

Table 2
Progressive Islamic Law Discovery Method

Decision Number	Legal Discovery Methods
12/Pdt.G/2015/PA.Pkj 79/Pdt.G/2015/PTA.Mks 237 K/Aug/2016	Judges use legal discovery Islam by istiṣlâhiyyâh is the method legal considerations that are based on aspects of the benefit of istiḥsân.

Based on the child custody case as described in table 2, the judge in the Pangkajene Religious Court, Makassar Religious High Court and the Indonesia Supreme Court agreed that the child's development and growth was going well, there were no elements that could make the child suffer in the care of the child. Then through the discovery of law *istiḥsân* with approach *istiṣlâhiyyâh*, child custody will be more beneficial if given to the father.

Progressive Thoughts of Supreme Court Justices on Child Custody

The judge's efforts in carrying out his judicial duties to ensure the best protection for children have taken into account various aspects to ensure a good future for children. Especially the conditions that must be met by the caregiver, so that the child can grow and develop properly (Mansari et al., 2018: 104). That will then underlie the form of justice in child custody decisions. According to Mukti Arto, there are several indicators that can state that the judge's decision is fair or not, namely:

1. If the party who is entitled to what according to the conscience of justice is his right in the case, whether requested or not requested in the petitum.
2. The party who is obliged to fulfill what according to the conscience of justice is his obligation, both the opposing party and the third party who is his responsibility. Example: In a divorce there is a wife and a husband, but the rights of children should also be given.
3. There is a balance between the two sides and there is no discrimination. Plaintiffs and Defendants are treated equally.
4. Neither side wins illegally.
5. There is a guarantee of legal certainty that the judge's decision can be executed

Mukti Arto stated that if the verdict was fair, then it would be beneficial. There is no conflict between justice and expediency,

or with legal certainty because it is proportional. As in the case of child custody, the value of justice is the interests and walfare of child. For example, the child is more comfortable with the father, let it be with the father and if it is closer and comfortable with the mother, leave it with the mother (*Personal Interview with Mukti Arto, 15 October 2020*). What needs to be emphasized is that parents still have access to give love and attention to their children, and should not abdicate their responsibility as parents in caring for their children (R. M. Ali & Khairuna, 2017: 422-423). That's one way of considering a child custody lawsuit. However, sometimes judges view that child custody is in the interests of the parents, even though child custody is in the child interests and the child rights. Although there is no standard definition of the best interests of the child, this term generally refers to the considerations that judges decide on the best type of service, action, and order to serve a child and who is best suited to nurture and care for him.

Best interest determinations are generally made taking into account a number of factors related to the child's circumstances and the circumstances of the parent or caregiver and capacity to parent, with the safety and well-being of the child being the primary concern (Child Welfare Information Gateway, 2020: 2). It is also stated in Article 3 paragraph (1) of the Convention on the Rights of the Child that all actions concerning children carried out by government or private social welfare institutions, judicial institutions, or legislative bodies, must consider the best interests of the child as main considerations of (Convention on the Rights of the Child 1989), and parents are still obliged to maintain and take care of their children to adulthood, as also stipulated in the decision of the Panel of Judges (Maswandi, 2017: 29). Ahmad Ibrahim stated the issue of parenting is not seen as an enmity between parents, but as a judicial effort to provide the best future for children. Other considerations in child custody cases can be examined only as far as the welfare of the child is concerned. (Ibrahim, 1980: 60)

The judge's interpretation of a law, of course, allows the choice to be used in the decision. Legal rules or principles may be interpreted differently by different judges. However, what is flawed in this limited view is the implication of the applicable law for judges to interpret it differently, such as in the decision 0145/PDT.G/2015/PA.SKA and decision 249/PDT.G/2015/PTA.SMG regarding child custody cases, where the judge applies the Article 105 letter (a) but in the decision a different conclusion is found. In decision 0145/PDT.G/2015/PA.SKA, the judge stated that he had given custody of the child to the father, while in decision 249/PDT.G/2015/PTA.SMG, the judge handed custody of the child to the mother.

According to the Supreme Court judges, the interpretation of Article 105 letter (a) cannot be applied simply to all cases of child custody, it needs to be viewed top down and down top. As Gustav Radbruch stated there can be laws that are so unjust and so socially harmful that validity, and the indeed legal character itself, must be denied (Radbruch, 2006: 14). The judge's decision is dynamic for the sake of justice in a case he is examining. For judges, justice is number one, while legal texts that are collected in a compilation and statutory regulations are number two. If the legal text is not able to provide justice (for the case he is examining), then legal discovery is the most appropriate way for judges to provide justice. So, the discovery of the law is in order to find justice, how the decision can provide justice by using contra legem, interpretation through *qiyâs* (analogy) and looking at the

purpose of law *istiḥsân*. (*Personal Interview with Mukti Arto, 15 October 2020*)

CONCLUSION

The case of child custody is quite a dilemma because it involves the life and welfare of the child after the divorce of his parents. Judges are the spearhead in providing justice for children, in this case the role of judges is needed through progressive thinking and reasoning. Progressive legal thinking practiced by judges is not only based on a textual approach. The textual approach will not only injure the value of the benefits that exist within the scope of child custody issues but will also have an impact on the benefit of the child. To provide progressive thinking, legal discovery becomes an important means so that judges' reasoning can run under the direction of progressiveness.

Based on the decision of judges number: 0145/Pdt.G/2015/PA.Ska, 249/Pdt.G/2015/PTA.Smg, 406 K/Ag/2016 and 12/Pdt.G/2015/PA.Pkj, they use *istiṣlâhiyyâh* method with *qiyâs* and *istiḥsân* approaches. Although there are judges at the cassation level who tend to use a textual approach, the final result at the cassation level is that the Supreme Court judge cancels the decision because it is deemed not to fulfill the values of justice and benefit for children. The Supreme Court judges that in terms of child custody, the important point of legal considerations is how to guarantee the life, growth, and welfare of the child by one party, the mother or the father, without neglecting the role of both in pouring love on children. Thus, it can be said that the progressive legal paradigm can be obtained through contextual sociological reasoning rather than textual juridical reasoning.

REFERENCES

A, I. I., Mulyadi, & Yunanto. (2016). Kajian Perolehan Hak Asuh Anak sebagai Akibat Putusnya Perkawinan Karena Perceraian. *Diponegoro Law Review*, *5*(2), 1–17.

Aisyah, N. (2018). Peranan Hakim Pengadilan Agama dalam Penerapan Hukum Islam di Indonesia. *Jurnal Al-Qadau: Peradilan Dan Hukum Keluarga Islam*, *5*(1). https://doi.org/10.24252/al-qadau.v5i1.5665

Ali, A. (2017). *Menguak Teori Hukum (Legal Theory) dan Teori Peradilan (Judicialprudence), Termasuk Interpretasi Undang-undang (Legisprudence)* (Edisi Pert). Kencana.

Ali, R. M., & Khairuna, Z. F. (2017). Hak nafkah anak pegawai negeri sipil setelah perceraian (Studi kasus mahkamah syar'iyah banda aceh). *Samarah*, *1*(2), 416–434. https://doi.org/10.22373/sjhk.v1i2.2376

Amalia, N. N., Mediawati, N. F., Rosnawati, E., & Phahlevy, R. R. (2018). Analisis Yuridis Putusan Hakim Nomor 3346/Pdt.G/2016/PA.Sby tentang Ayah sebagai Pemegang Hak Asuh Anak. *Res Judicata*, *1*(1), 34–46. https://doi.org/10.29406/rj.v1i1.1037

Artadi, I. (2011). Hakim Agung Dan Pembaharu Hukum Menuju Pengadilan Yang Bersih. *Syiar Hukum*, *13*(2), 119–127. https://doi.org/10.29313/sh.v13i2.654

Child Welfare Information Gateway. (2020). *Determining the Best Interests of the Child*.

Convention on the Rights of the Child 1989.

Elimartati, & Firdaus. (2018). Hak

Hadhanah dalam Putusan Pengadilan Agama. *Juris (Jurnal Ilmiah Syariah)*, *17*(2), 233–243. https://doi.org/10.31958/juris.v17i2.1195

Fanani, A. Z. (2017). Sengketa Hak Asuh Anak dalam Hukum Keluarga Perspektif Keadilan Jender. *Jurnal Muslim Heritage*, *2*(1), 153–176. https://doi.org/10.21154/muslimheritage.v2i1.1050

Fitri, H. (2011). Peran Hakim Peradilan Agama dalam Mewujudkan Keadilan dan Kepastian Hukum melalui Putusan. *Juris (Jurnal Ilmiah Syariah)*, *10*(1), 27–39. https://doi.org/10.31958/juris.v10i1.919

Harris, F. (2019). *Materi tentang legal reasoning dalam kegiatan Pendidikan Khusus Profesi Advokat (PKPA) 2019*.

Ibrahim, A. (2018). Defining the welfare of the child in contested custody cases under Malaysian Law. *Journal of Malaysian and Comparative Law*, *7*(1), 29–64. http://ejournal.um.edu.my/index.php/JMCL/article/view/15219

Islami, I., & Sahara, A. (2019). Legalitas Penguasaan Hak Asuh Anak di bawah Umur kepada Bapak Pasca Perceraian. *Jurnal Al-Qadau: Peradilan Dan Hukum Keluarga Islam*, *6*(2), 181–194. https://doi.org/10.24252/al-qadau.v6i2.10715

Ivana, R., & Cahyaningsih, D. T. (2020). Dasar pertimbangan hakim terhadap putusan perceraian dengan pemberian hak asuh anak kepada bapak. *Jurnal Privat Law*, *8*(2), 295–302. https://doi.org/10.20961/privat.v8i2.48423

Khisni, A. (2011). *Metode Ijtihad dan Istimbat (Ijtihad Hakim Peradilan Agama)* (Sumain (Ed.)). UNISSULA Press.

Kompilasi Hukum Islam, (1991).

Leawoods, H. (2000). Gustav Radbruch: An Extraordinary Legal Philosopher. *Washington University Journal of Law & Policy*, *2*(1), 24.

Makassar Religious High Court Decision, Number 79/Pdt.G/2015/PTA.Mks.

Mansari, M., Jauhari, I., Yahya, A., & Hidayana, M. I. (2018). Hak Asuh Anak Pasca Terjadinya Perceraian Orangtua dalam Putusan Hakim Mahkamah Syar'iyyah Banda Aceh. *Jurnal Gender Equality: International Journal of Child and Gender Studies*, *4*(2), 103–124. https://doi.org/10.22373/equality.v4i2.4539

Maswandi, M. (2017). Hak Asuh Anak Yang Belum Dewasa Setelah Perceraian. *JPPUMA: Jurnal Ilmu Pemerintahan Dan Sosial Politik Universitas Medan Area*, *5*(1), 21. https://doi.org/10.31289/jppuma.v5i1.1143

Muhammad, R. (2014). Eksistensi Hakim dalam Pemikiran Yuridis dan Keadilan. *Jurnal Hukum IUS QUIA UISTUM*, *21*(3), 426–443. https://doi.org/10.20885/iustum.vol21.iss3.art5

Muslimin, J. M. (2005). *Islamic Law and Social Change: A Comparative Study of the Institutionalization and Codification of Islamic Family Law in the Nation-States Egypt and Indonesia (1950-1995)*. Universität Hamburg.

Musthofa, A. H. (2019). Ijtihad Hakim dalam Penerapan Konsep Contra Legem Pada Penetapan Perkara di Pengadilan Agama: Kajian Perspektif Metodologi Hukum Islam. *Jurnal Legitima*, *1*(2), 1–17. https://doi.org/10.33367/legitima.v1

i2.917

Muwahid. (2017). Metode Penemuan Hukum (Rechtsvinding) Oleh Hakim Dalam Upaya Mewujudkan Hukum Yang Responsif. *Al-Hukama: The Indonesian Journal of Islamic Family Law*, *7*(1), 225–248. https://doi.org/10.15642/al-hukama.2017.7.1.224-248

Nalbandian, E. G. (2008). Positivism Continued : Kelsen' s Pure Theory of Law. *Mizan Law Review*, *2*(2), 346–372.

Pangkajene Religious Court Decision, Number 12/Pdt.G/2015/PA.Pkj.

Personal Interview with Mukti Arto, Supreme Court Justice of the Chamber of Religion, Supreme Court of the Republic of Indonesia, 15 October 2020. (2020).

Pound, R. (2017). *The Spirit of the Common Law: with a new introduction by neil hamilton and mathias alfred jaren*. Routledge.

Priban, J. (2018). Roger Cotterrell: Sociological Jurisprudence: Juristic Thought and Social Inquiry by Roger Cotterrell. *Journal of Law and Society*, *45*(2), 330–337. https://doi.org/10.1111/jols.12097

Putra, M. D. (2014). Kontribusi Aliran Sociological Jurisprudence Terhadap Pembangunan Sistem Hukum Indonesia. *Jurnal Likhitaprajna*, *16*(2), 45–59. https://likhitapradnya.wisnuwardhana.ac.id/index.php/likhitapradnya/article/view/38

Radbruch, G. (2006). Five minutes of legal philosophy (1945). *Oxford Journal of Legal Studies*, *26*(1), 13–15. https://doi.org/10.1093/ojls/gqi042

Ramadhan, S. (2021). *Konstruksi Paradigma Hakim dalam Memutus Perkara Perkawinan Islam Berbasis Hukum Progresif* (F. M. Akbar (Ed.); edisi I). A-Empat.

Rawls, J. (1971). *A Theory of Justice* (Rev. ed.). Harvard University Press.

Sanjaya, U. H. (2015). Keadilan hukum pada pertimbangan hakim dalam memutus hak asuh anak. *Yuridika*, *30*(2). https://doi.org/10.20473/ydk.v30i2.4653

Semarang Religious High Court Decision, Number 249/Pdt.G/2015/PTA.Smg.

Sholahudin, U. (2016). Hukum dan Keadilan Masyarakat (Analisis Sosiologi Hukum terhadap Kasus Hukum Masyarakat Miskin "Asyani" di Kabupaten Situbondo). *Jurnal Dimensi*, *9*(1), 31–44.

Sukerti, N. N., Ariani, I. G. A. A., & Krisnawati, I. G. A. A. A. (2015). Penegakan Hukum terhadap Hak Asuh Anak Akibat Perceraian dalam Praktik Peradilan di Bali. *Udaya Master Law Journal*, *4*(1), 90–100. https://doi.org/10.24843/JMHU.2015.v04.i01.p07

Sukoharjo Religious Court Decision, Number 0145/Pdt.G/2015/PA.Ska.

Supreme Court Decision, Number 237 K/Ag/2016.

Supreme Court Decision, Number 406 K/Ag/2016.

Thomas, E. W. (2005). *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles*. Cambridge University Press.

Undang-Undang Nomor 23 Tahun 2002 tentang Perlindungan ANak.

Undang-Undang Nomor 48 Tahun 2009 tentang Kekuasaan Kehakiman.

Visegrady, A. (2015). Judge-Made Law and the Effective Legal System. *Fiat Iustitia*, *1*, 213–223.

Weruin, U. U. (2017). Logika, Penalaran, dan Argumentasi Hukum. *Jurnal Konstitusi*, *14*(2), 374–395. https://doi.org/10.31078/jk1427

Yunanto, Y. (2019). Menerjemahkan Keadilan dalam Putusan Hakim. *Jurnal Hukum Progresif*, *7*(2), 192–205. https://doi.org/10.14710/hp.7.2.192-205

Yunarti, S. (2017). Diskresi Hakim Dalam Menetapkan Hukum Di Pengadilan Agama Kelas Ib Batusangkar. *JURIS (Jurnal Ilmiah Syariah)*, *16*(1), 77–88.