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The Implementing Joint Custody Post Divorce In Indonesia: a Philosophical Viewpoint

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Abstract:

Child custody encompasses parental rights and responsibilities for raising and nurturing their children. In Indonesia, child custody often triggers disputes, especially in divorce cases. This research seeks to present a fresh perspective by examining the deconstruction of joint custody within the context of child guardianship. This study, focusing on legal aspects, employs a comparative approach to deconstruction concepts, drawing from Jacques Derrida's radical deconstruction and Thaha Abdurrahman's ethical deconstruction. The analysis aims to unearth possibilities and offer recommendations for implementing Joint Custody in Indonesia, particularly regarding post-divorce parental custody regulations. Both deconstruction concepts challenge the conventional maternal role in child custody, especially for children under 12. Embracing this deconstruction opens the door to considering joint custody as a new norm in Indonesia. Joint custody is no longer just a concept; empowering judges to consider it based on court proceedings is the fastest route to its adoption in the child's best interest.

Keywords: joint custody; post-divorce; child custody.

Introduction

Child custody refers to the rights and responsibilities of parents to care for and educate their children. In Indonesia, child custody often becomes a contentious issue during or after the divorce process. In Indonesia, the majority of research has been conducted to gain insights into child custody practices observed in various courts throughout the country. These studies encompass a wide range of scenarios, including cases where the mother is designated as the custodial parent,¹ situations

¹ Rokiah Binti Mustaring, "Analisis Putusan Hakim Terhadap Gugatan Hak Asuh Anak Di Pengadilan Agama Manado Perspektif Perlindungan Hak Anak," *I'tisham : Journal of Islamic Law and Economics* 2, no. 2 (November 12, 2023), <https://journal.iain->

where fathers assume custody due to perceived maternal irresponsibility,² and even disputes over custody rights that sometimes lead to shared custody arrangements.³ These diverse cases provide valuable insights into the implementation of sole custody or split custody, thereby highlighting inconsistencies in how the best interests of the child are upheld. Conversely, beyond the borders of Indonesia, research endeavors have grown increasingly intricate as they aim to ensure the well-being and optimal development of children. One noteworthy approach involves the investigation of joint custody arrangements through various studies and examinations.⁴

This research aims to introduce a new discourse in understanding child custody by focusing on the theme of deconstructing joint custody in the context of child guardianship in Indonesia. Joint custody, or shared parental responsibility, is a relatively new concept in the Indonesian family law system, which traditionally has been more familiar with the concept of sole custody following a divorce. In many countries, including Indonesia, social developments and changing paradigms about parental roles have led to demands for adopting this joint custody model,

manado.ac.id/index.php/itisham/article/view/2598; Risat Wardana and Adi Suliantoro, "Tinjauan Yuridis Hak Asuh Anak Yang Belum Dewasa Setelah Perceraian (Studi Putusan Perkara Nomor 1018/PDT.G/2021/PA.DMK)," *YUSTISI* 10, no. 3 (October 9, 2023): 178–86, <https://doi.org/10.32832/yustisi.v10i3.15211>; Devi Nur Sita Sari and Indra Yuliawan, "Tinjauan Yuridis Terhadap Hak Asuh Anak Akibat Perceraian (Studi Putusan Nomor 1034/Pdt.g/2022/Pa.Amb)," *Rampai Jurnal Hukum (RJH)* 2, no. 2 (September 29, 2023): 31–42, <https://doi.org/10.35473/rjh.v2i2.2587>.

² Aprinelita et al., "Analisis Hukum Terhadap Putusan Pengadilan Tentang Hak Asuh Anak Pasca Perceraian (Studi Kasus Di Pengadilan Agama Teluk Kuantan)," *KODIFIKASI* 5, no. 2 (July 30, 2023): 21–31; Sara Angelia Nababan, "Analisis Yuridis Pertimbangan Hukum Pengadilan Negeri Tentang Hak Asuh Anak Akibat Perceraian Putusan Nomor 28/PDT.G/2022/PN.PTK," *Jurnal Fatwa Hukum* 6, no. 3 (July 21, 2023), <https://jurnal.untan.ac.id/index.php/jfh/article/view/67856>.

³ Muh Muhajir Muhajir, Abd Halim Talli, and Kiljamilawati Kiljamilawati, "Tinjauan Yuridis Terhadap Hak Pemeliharaan Anak Akibat Perceraian di Pengadilan Agama Kelas I B Parepare Tahun 2021-2022," *Qadauna: Jurnal Ilmiah Mahasiswa Hukum Keluarga Islam* 4, no. 3 (August 31, 2023): 889–910, <https://doi.org/10.24252/qadauna.v4i3.37124>; Fitriani Noor, M. Fahmi Al-Amruzi, and Ahmadi Hasan, "Problematika Hak Asuh Anak Pasca Putusan Perceraian Di Pengadilan Agama (Studi Kasus Nomor 342/PDT.G/2020/PA.MTP Jo Putusan Banding Nomor 32/PDT.G/2020/PTA.BJM Jo Putusan Kasasi Nomor 392 K/AG/2021)," *Al Qalam: Jurnal Ilmiah Keagamaan Dan Kemasyarakatan* 17, no. 6 (November 4, 2023): 4085–4104, <https://doi.org/10.35931/aq.v17i6.2808>.

⁴ Daniel Fernández Kranz, Jennifer Roff, and Hugette Sun, "Can Economic Incentives for Joint Custody Harm Children of Divorced Parents? Evidence from State Variation in Child Support Laws," *Journal of Economic Behavior & Organization* 189 (September 1, 2021): 1–27, <https://doi.org/10.1016/j.jebo.2021.06.020>; Daniel Fernandez Kranz and Natalia Nollenberger, "The Impact of Equal Parenting Time Laws on Family Outcomes and Risky Behavior by Teenagers: Evidence from Spain," *Journal of Economic Behavior & Organization* 195 (March 1, 2022): 303–25, <https://doi.org/10.1016/j.jebo.2022.01.001>; Priyanka P. Nambiar et al., "Predictors of Behavioral and Emotional Issues in Children Involved in Custody Disputes: A Cross Sectional Study in Urban Bengaluru," *Asian Journal of Psychiatry* 67 (January 1, 2022): 102930, <https://doi.org/10.1016/j.ajp.2021.102930>; Inés Pellón, Ana Martínez-Pampliega, and Susana Cormenzana, "Post-Divorce Adjustment, Coparenting and Somatisation: Mediating Role of Anxiety and Depression in High-Conflict Divorces," *Journal of Affective Disorders Reports*, December 3, 2023, 100697, <https://doi.org/10.1016/j.jadr.2023.100697>.



based on the belief that the involvement of both parents in a child's life is crucial for the child's well-being.

Joint custody implementation in Indonesia faces unique challenges. In the socio-cultural and legal context of Indonesia, where patriarchal and traditional values are still strong, this concept raises various questions and concerns. One of these is how joint custody can function in a society that historically has different views on the roles of fathers and mothers in child-rearing. In addition, the existing legal provisions often do not fully support the implementation of joint custody, necessitating deconstruction and reconceptualization within the existing legal framework. Even within the judicial environment of the Supreme Court of Indonesia, the latest decision on joint custody was granted in 2020.⁵ This discourse is important as it concerns the rights and welfare of the child, which should always be the primary consideration in any custody decision. Similar studies have been conducted but have not yet touched upon the context of deconstruction, as they have focused on the formalistic basis of the law and the understanding of judges.⁶ Therefore, this research aims to explore how the concept of joint custody can be interpreted and implemented in Indonesia.

Method

This research is a literature study in law, using a comparative approach to the concepts of deconstruction in Jacques Derrida's radical deconstruction and Thaha Abdurrahman's ethical deconstruction.⁷ The analysis aims to identify opportunities and recommendations for the implementation of Joint Custody in Indonesia, especially towards the regulation of parental custody after divorce in Indonesia. The process of exploring the deconstruction of child custody rights in this study employs literature research with a deconstructive approach as a tool to unravel and understand the dynamics, assumptions, and legal foundations involved. Drawing inspiration from Jacques Derrida's radical deconstruction and Thaha Abdurrahman's ethical deconstruction, the analysis aims to identify opportunities and recommendations for the implementation of Joint Custody in Indonesia.

Result and Discussion

Child Custody in Indonesia

Indonesia, as a rule-of-law country, has legislative regulations governing child custody rights, such as the Marriage Law, the Compilation of Islamic Law, and the Child Protection Law. The Marriage Law in Indonesia establishes rules related to

⁵ "Direktori Putusan | Pencarian Joint Custody Kabul," accessed November 26, 2023, https://putusan3.mahkamahagung.go.id/search.html?q=%22joint%20custody%22&jd=KABUL&t_put=2020.

⁶ Meliani Meliani and Indra Budi Jaya, "Pelaksanaan Hak Asuh Bersama Terhadap Anak Di Bawah Umur: Analisis Norma Hukum," *Fastabiq: Jurnal Studi Islam* 3, no. 1 (July 21, 2022): 56–68, <https://doi.org/10.47281/fas.v3i1.87>; Rika Saraswati, Emanuel Boputra, and Yuni Kusniati, "Pemenuhan Hak Anak Di Indonesia Melalui Perencanaan Pengasuhan, Pengasuhan Tunggal Dan Pengasuhan Bersama," *Veritas et Justitia* 7, no. 1 (June 28, 2021): 188–210, <https://doi.org/10.25123/vej.v7i1.4066>.

⁷ Jonaedi Efendi and Johnny Ibrahim, *Metode Penelitian Hukum Normatif Dan Empiris*, 2nd ed. (Depok: Prenadamedia Group, 2016), 135 dan 140; Muhaimin, *Metode Penelitian Hukum* (Mataram: Mataram University Press, 2020), 49.



child custody after divorce. According to this law, both parents, whether mother or father, have the obligation to care for and educate their children, with a primary focus on the best interests of the child. In situations of custody conflict, the decision will be determined by the court. This law also emphasizes the father's financial responsibility towards his children. However, if the father is unable to fulfill this responsibility, the court may decide that the mother should also contribute to the financial needs of the child.⁸

On the other regulation, the Compilation of Islamic Law (KHI) governs family law for Muslim citizens of Indonesia, including child custody rights, defined in Articles 105 to 158. KHI underscores that the custody of children under the age of 12 years (who have not yet reached *mumayyiz*) is the right of the mother, while children over the age of 12 years (who have reached *mumayyiz*) have the freedom to choose one of their parents as their guardian, following Article 156(a) of the KHI.⁹ Meanwhile, the Child Protection Law provides a broader legal framework to protect the interests and welfare of children, especially in the context of custody rights. This law affirms the child's right to be raised by their parents, unless there are valid reasons and/or legal regulations indicating that separation from the parents is in the best interest of the child as a top priority.¹⁰

Radical and Ethical Deconstruction

Deconstruction, a critical analysis method introduced by French philosopher Jacques Derrida in 1967, aims to uncover and challenge the hidden assumptions within philosophical, literary, and cultural texts. This method not only highlights inconsistencies and instabilities within texts but also explores and expands meanings that are marginalized or concealed. Not confined to fixed rules or principles, deconstruction is more of a dynamic and evolving movement, which does not aim to destroy texts, but rather to open perspectives on diversity and difference, and to critique concepts considered fundamental such as logic, truth, essence, and identity.¹¹

Jacques Derrida, the originator of the concept of deconstruction, focused on revealing and disrupting the hidden logical, ethical, and political assumptions within philosophical, literary, and cultural texts. His method has had a wide-ranging influence, impacting areas such as critical theory, literature, feminism, postcolonialism, and cultural studies. Derrida emphasized the nature of language as never neutral or transparent, but always ambiguous, contradictory, and unstable. By critiquing concepts such as logic, truth, essence, and identity, Derrida

⁸ "UU No. 1 Tahun 1974 Tentang Perkawinan" (1974).

⁹ "Instruksi Presiden Nomor 1 Tahun 1991 Tentang Kompilasi Hukum Islam" (1991), <https://putusan3.mahkamahagung.go.id/peraturan/detail/11e9da0c8167c5c0b9c2313930343435.html>.

¹⁰ "UU No. 35 Tahun 2014 Tentang Perubahan Atas Undang-Undang Nomor 23 Tahun 2002 Tentang Perlindungan Anak" (2014).

¹¹ "Dekonstruksi," in *Kamus Besar Bahasa Indonesia (KBBI) Online*, accessed November 23, 2023, <https://kbbi.web.id/dekonstruksi>; "Definition of Deconstruction," in *Meriam-Webster Dictionary*, accessed November 23, 2023, <https://www.merriam-webster.com/dictionary/deconstruction>; "Deconstruction," *Britannica*, September 29, 2023, <https://www.britannica.com/topic/deconstruction>; "Deconstruction," in *Cambridge Dictionary*, November 22, 2023, <https://dictionary.cambridge.org/dictionary/english/deconstruction>.



challenged forms he considered oppressive and limiting to meaning, highlighting how texts often contain hidden spaces that allow for the emergence of alternative interpretations that challenge more dominant views.¹² Jacques Derrida's deconstructive reasoning is fundamentally based on at least four key concepts¹³: *Differance*¹⁴, *Trace*¹⁵, *Supplement*¹⁶ and *Aporia*¹⁷.

In the deconstructive approach developed by Derrida, deconstruction is not interpreted as a static doctrine or theory, but more as a dynamic movement that continuously evolves. More than just a tool for dismantling or denying texts, deconstruction is considered a method for opening and excavating meanings that are overlooked or hidden within texts. This approach emphasizes respect for diversity and difference and critiques concepts that are often considered central and authoritative. It challenges fixed interpretations and invites a multiplicity of perspectives, recognizing the complexity and fluidity inherent in language and meaning. This perspective offers a critical lens through which to analyze texts, institutions, and cultural norms, revealing the underlying assumptions and power structures that shape our understanding and experience of the world.¹⁸

Thaha Abdurrahman, unlike Derrida, combines ethics with the principles of *usul al-fiqh* in his approach to deconstruction, forming a new synthesis in the theory of *maqasid*. He directs the focus of Islamic legal reasoning from causal factors to goals, emphasizing *maslahah* or ethics as the basis for legal rationalization. Abdurrahman then develops a new approach to understanding *Maqasid Al-Shatibi*,

¹² "Deconstruction Summary," Britannica, accessed November 25, 2023, <https://www.britannica.com/summary/deconstruction>; Pragati Kalive, "Jacque Derrida's Deconstruction Theory - Explained," Sociology Group: Welcome to Social Sciences Blog, July 22, 2021, <https://www.sociologygroup.com/deconstruction-theory/>.

¹³ Mangihut Siregar, "Kritik Terhadap Teori Dekonstruksi Derrida," *Journal of Urban Sociology* 2, no. 1 (2019), <https://journal.uwks.ac.id/index.php/sosiologi/article/view/611/578>; Marcelus Ungkang, "Dekonstruksi Jaques Derrida Sebagai Strategi Pembacaan Teks Sastra," *Jurnal Pendidikan Humaniora* 1, no. 1 (2013), <http://journal.um.ac.id/index.php/jph/article/view/3919>; Nancy J. Holland, "Deconstruction," *Internet Encyclopedia of Philosophy* (blog), accessed November 25, 2023, <https://iep.utm.edu/deconstruction/>; Simon Lumsden, review of *Review of Derrida on Deconstruction*, by Barry Stocker, January 2, 2007, <https://ndpr.nd.edu/reviews/derrida-on-deconstruction/>.

¹⁴ *Differance*, this term, a deliberate misspelling of "différence," plays on the dual meaning in French of "to differ" and "to defer." Derrida uses it to illustrate that elements in texts (or concepts) derive their meaning not from their inherent qualities but from their relationships and differences with other elements. Furthermore, meaning is always deferred, constantly evolving, and never fully present.

¹⁵ *Trace*, in Derrida's philosophy, the "trace" is the mark of the absence of a presence, an always-already absent present. It's the indication that a word or concept points to something other than itself, something that is not present. This notion disrupts the traditional idea of a word or sign referring to a directly corresponding reality.

¹⁶ *Supplement*, this concept refers to something that both adds to and substitutes for something else. In Derrida's view, supplements enhance what seems complete in itself, suggesting that nothing is ever truly complete or self-sufficient. This challenges the idea of original purity, suggesting that what is often considered as secondary or an addition is actually fundamental.

¹⁷ *Aporia*, are moments of undecidability, where a text contradicts itself or leads to an impasse. For Derrida, these are not problems to be solved but essential aspects that reveal the complexity and instability of texts, concepts, and meanings.

¹⁸ Holland, "Deconstruction | Internet Encyclopedia of Philosophy"; Lumsden, "Review of *Derrida on Deconstruction*."



emphasizing the importance of ethics and morality in the knowledge system. His approach opens up new perspectives in the study of *Maqasid*, critiques traditional and fundamentalist approaches, and responds to contemporary challenges by enhancing the understanding of Islamic law from an ethical standpoint.¹⁹ Abdurrahman's deconstruction is centered on the term *al-maqasid* (المقاصد), breaking it down into three crucial dimensions²⁰: *nadzariyat al-maqasudat* (نظرية المقصودات)²¹, *nadzariyat al-qusud* (نظرية القصود)²², and *nadzariyat al-maqasid* (نظرية المقاصد)²³.

These three dimensions subsequently give rise to two modes of deconstructive reasoning, namely *tafkiiik al-maqasid* (تفكيك المقاصد) and *tarkib al-maqasid* (تركيب المقاصد). On the one hand, *Tafkiiik al-maqasid* is a mode of reasoning related to the process of deconstruction, involving the dismantling of meanings contained within Islamic legal texts. Through this process, a deep analysis is conducted on various aspects and impacts of words and concepts in Islamic jurisprudence, with the aim of exploring various interpretations and hidden or implied meanings. On the other hand, *tarkib al-maqasid* focuses on the process of reconstruction or reformation of meaning in Islamic legal texts following the deconstruction process. This approach results in a new synthesis that encompasses various layers of meaning, including ethical and moral aspects, to create a more holistic understanding of Islamic legal texts.²⁴

Derrida and Thaha Abdurrahman's approaches offer different yet complementary perspectives. Derrida, with his focus on language and text, challenges structuralism and dominant assumptions in philosophy, literature, and culture, portraying language as inherently ambiguous and contradictory, while critiquing authoritative concepts. His approach, known for valuing diversity of thought, leads to an understanding of meaning as always evolving and non-final. Conversely, Thaha Abdurrahman integrates ethics and morality into *usul al-fiqh*, creating a new approach to understanding Islamic law that is more oriented towards *Maqasid Al-Shatibi*, critiquing traditional and fundamentalist approaches in the field of *Maqasid*. Although considered complex, his approach opens up new insights into understanding *Maqasid* in the modern context, known as ethical

¹⁹ Abid Rohmanu and Khusniati Rofiah, "Tāhā 'Abd al-Raḥmān's Philosophical Contribution to Theorize Ethical Maqāṣid," *Al-Ahkam* 33, no. 2 (October 31, 2023): 185–206, <https://doi.org/10.21580/ahkam.2023.33.2.17527>; Said Bouchnafa, "Deconstruction of the Term 'Al-Maqasid' According to Taha Abd al-Rahman," *ASJP: Algerian Scientific Journal Platform* 5, no. 2 (2021): 425/436; Umar Bensaga, "A Reading of the Features of the Renewal in the Study of the Purposes of the Moroccan Philosopher Taha Abdel Rahman," *Afaq Fikriyah* 5, no. 10 (2019).

²⁰ Bouchnafa, "Deconstruction of the Term 'Al-Maqasid' According to Taha Abd al-Rahman."

²¹ This dimension focuses on the semantic content of Islamic legal texts. It delves into the meanings within the text, not only on a literal level but also in broader semantic and contextual aspects. This approach aims to understand legal texts by considering linguistic and cultural contexts, integrating ethics and morality.

²² This dimension emphasizes the importance of intention and sincerity in complying with the Sharia, indicating that intention is a crucial factor in determining the validity and moral quality of actions in accordance with Islamic law.

²³ This dimension explores the purposes, objectives, and ethical values or wisdom underlying Islamic law, emphasizing a deeper and holistic understanding of the Sharia. It advocates an approach that considers the goals, impacts, and ethical consequences of the application of the law.

²⁴ Bouchnafa, "Deconstruction of the Term 'Al-Maqasid' According to Taha Abd al-Rahman."



deconstruction, offering an alternative to Western deconstruction concepts that are perceived as ethically flawed.²⁵

Joint Custody, Sole Custody dan Split Custody in Indonesia

Joint custody, also known as shared custody, does not necessarily mean a split of parenting time or the child's residence between divorced parents. The concept involves the role of the court in supporting shared parenting by both parents, with custody practices based on a divided definition that includes elements of control and physical custody that can be separated. Children are ensured the benefit of a family environment similar to the one they had before their parents' divorce. In this case, the court is not bound to immediately alter the child's pre-existing living stability with both parents.²⁶

Meanwhile, in Indonesia, with its majority Muslim population, prioritizes the practice of sole custody or split custody, especially after divorce. Although the Marriage Law establishes that both parents have a duty to care for their children until they reach adulthood or marry, in practice, both the Compilation of Islamic Law and the Child Protection Law indicate that in cases of separation and custody conflicts, children are typically awarded to the parent deemed more suitable or given primary priority by the court for their care.

The concept that has been implemented in Indonesia is a manifestation of the application of Islamic law's study on the concept of *hadlanah* (حضانة). In Islam, the concept of *hadlanah* is obligatory, as children who do not receive proper care and nurturing will undoubtedly face difficulties in their lives. Therefore, the obligation to care for children not only encompasses providing basic needs or sustenance but also protecting them from various dangers and calamities.²⁷ The Prophet Muhammad (PBUH), who emphasized the importance of the responsibility of "hadlanah," is depicted in the following narration:

لَا تَدْعُوا عَلَىٰ أَنْفُسِكُمْ، وَلَا تَدْعُوا عَلَىٰ أَوْلَادِكُمْ، وَلَا تَدْعُوا عَلَىٰ أَمْوَالِكُمْ، لَا تُؤَافِقُوا مِنَ اللَّهِ سَاعَةً يُسْأَلُ فِيهَا عَطَاءٌ، فَيَسْتَجِيبُ لَكُمْ.

*Do not curse your past, your children, your servants, or your wealth. Do not curse anything in excess, for perhaps your cursing coincides with the time when Allah is granting your request.*²⁸

²⁵ Jean-Luc Nancy, *The Inoperative Community*, Theory and History of Literature, v. 76 (Minneapolis, MN: University of Minnesota Press, 1991); Jacques Derrida and John D. Caputo, *Deconstruction in a Nutshell: A Conversation with Jacques Derrida*, Perspectives in Continental Philosophy (New York: Fordham University Press, 1997); Muhammad HK, "Membaca Pemikiran Taha Abdurrahman Tentang Etika Politik Islam," *Politea: Jurnal Politik Islam* 3 (August 27, 2020): 273–86, <https://doi.org/10.20414/politea.v3i2.2339>; Zacky Khairul Umam, "Taha Abdurrahman & Islam sebagai Modernitas Alternatif Selain Barat," *tirto.id*, 2020, <https://tirto.id/taha-abdurrahman-islam-sebagai-modernitas-alternatif-selain-barat-ft11>.

²⁶ John G. Taussig Jr. and John T. Carpenter IV, "Joint Custody," *North Dakota Law Review* 56, no. 2 (1979): 223–38.

²⁷ Wahbah Az-Zuhayli, *Al-Fiqh Al-Islami Wa Adillatuhu* (Damaskus: Dar al-Fikr, 2019), 7696; Wahbah al-Zuhayli, *Fiqh Islam wa adillatuhu*, trans. Abdul Hayyie Al-Kattani, vol. 10 (Kuala Lumpur: Darul Fikir, 2010), 60.

²⁸ The context of the hadith is a response from Prophet Muhammad (PBUH) to the supplication of the companion Aus bin Ubadah Al-Anshari, who had prayed for the death of his daughter. Read



The majority view in the matter of *hadlanah* or child custody tends to prioritize women as the custodial parent over children. This consensus among Islamic jurists is an application of a hadith related to a complaint from a woman who wanted custody of her child after her divorce. Prophet Muhammad (PBUH), upon receiving her complaint, subsequently conveyed his guidance on this matter:

((أنت أحق به ما لم تتكحي))

((من فرّق بين والدتها وولدها، فرق الله بينها وبين أحبته يوم القيامة))

"You have a greater right to raise the child as long as you do not remarry."

"Whoever separates a mother from her child, Allah will separate them from their beloved ones on the Day of Judgment."²⁹

Based on these norms, Indonesian society still generally adheres to the understanding in accordance with the principles of Islamic law, with a priority for custody rights granted to the mother of the child.

The Application of Derrida's Deconstruction

The practice of sole custody or split custody, which has been implemented in Indonesia, when understood through Derrida's concept of deconstruction, generates a new understanding of the application of child custody rights. The application of Derrida's concepts such as *differance*, *trace*, *supplement*, and *aporia* to child custody practices in Indonesia offers profound and diverse perspectives. For example, *Differance*, demonstrates how the meaning and implementation of child custody laws are constantly changing and never final. Although the Marriage Law and Islamic Law Compilation theoretically impose obligations on both parents, in practice, mothers are often granted custody rights more frequently. This highlights the difference between legal texts and how they are interpreted or implemented, which often shifts and remains unstable.

Meanwhile, the concept of *trace* highlights the influence of history and culture in court decisions regarding child custody. Traces of traditional views on gender roles still strongly affect contemporary legal practices. In this context, maternal custody is often considered a '*supplement*', complementing or replacing the father's diminished role post-divorce. As for *aporia*, it arises in the uncertainty surrounding child custody arrangements after divorce. Despite legal guidelines and hadiths, court decisions often involve navigating through the complexities and uniqueness of each case, emphasizing the inherent uncertainty in determining what is best for the child's interests.

Article 105 to 158 of KHI mentioned above can be one of the concepts that need to be deconstructed. When deconstructed using Derrida's thinking, several following conceptions will be found:

further...Wahbah Az-Zuhayli, *Al-Fiqh Al-Islami Wa Adillatuhu* (Damaskus: Dar al-Fikr, 2019), 7694; Wahbah al-Zuhayli, *Fiqh Islam wa adillatuhu*, trans. oleh Abdul Hayyie Al-Kattani, vol. 10 (Kuala Lumpur: Darul Fikir, 2010), 60.

²⁹ Az-Zuhayli, *Al-Fiqh Al-Islami Wa Adillatuhu*, 7299; al-Zuhayli, *Fiqh Islam wa adillatuhu*, 10:62.



Table 1. Derrida's thinking

Derrida's Deconstruction	Child custody for children under the age of 12 is with the mother.
différance	Questioning conventional assumptions about gender roles in child-rearing
Trace	Questioning the presence and absence dynamics in child-rearing
Supplement	Questioning alternative possibilities that can occur in child-rearing.
Aporia	Questioning the suitability, willingness, and incapability of parental roles in child-rearing

Applying Derrida's concept of "différance" to the idea that children under the age of 12 should be cared for by their mothers opens up new insights into how we understand parenting. This concept delves into the differences and deferred meanings associated with child-rearing, challenging the conventional assumptions about gender roles. In this context, "différance" highlights that the social role of mothers in parenting can vary significantly depending on cultural, legal, and social contexts. It suggests that the concept of parenting is not something monolithic and fixed but rather something that evolves and differs across various societies.

Furthermore, the concept of "trace" leads us to understand that parenting by the mother is not isolated but connected and influenced by other elements that may not be directly mentioned. In the statement "children under the age of 12 should be cared for by their mothers," "trace" could signify the trace of the father's role or other caregiving figures that are 'absent' in the statement but still impact our understanding of the mother's role. This concept illustrates that the maternal caregiving role always interacts with other factors, both present and absent, in the context of parenting.

Finally, "supplement" and "aporia" provide additional insights. "Supplement" suggests that maternal caregiving may require supplementation or substitution from other sources, such as the father or another caregiver. This challenges the notion that maternal caregiving automatically suffices or is superior. On the other hand, "aporia" introduces ambiguity or contradiction in the idea of exclusive maternal caregiving, especially in situations where the mother is unavailable or incapable, or where the father is better suited for the role. This leads to difficult questions and dilemmas without easy answers, challenging simplistic views of parenting and gender roles. Through the lens of these Derridean concepts, the statement about maternal caregiving is revealed as a complex construction influenced by various social, cultural, and gender factors.

On one hand, in the context of the frequent changes and inconsistencies that occur in child custody practices, the concept of joint custody emerges as a flexible and adaptive solution. It takes into account diverse needs and situations, facilitating the involvement of both parents in the child's life even if they are separated. Joint custody offers a framework that can be adjusted according to family dynamics, ensuring that the child benefits from both parents' roles. This becomes important, especially considering the ever-changing custody practices, challenging traditional



and static approaches that often do not reflect the complex realities of modern family life.

On the other hand, joint custody also serves as a response to the historical and cultural influences that have long dominated the mother's role in custody. It acts as a more balanced and progressive approach, recognizing the importance of both the father and mother in parenting. Joint custody can be seen as a 'supplement' to fill any gaps that may exist in the father's role post-divorce, allowing both parents to actively contribute to child-rearing. Furthermore, considering the often-occurring uncertainty in post-divorce custody decisions, joint custody offers a more dynamic and flexible framework, enabling custody arrangements to adapt to the unique needs of the child and parents, helping to address uncertainty, and provide the best solutions for the child's interests.

The Application of Abdurrahman's Deconstruction

A deconstructive understanding of the practices of sole custody or split custody in Indonesia can also be obtained using Abdurrahman's deconstruction analysis. Through the ethical concept of deconstruction, within the framework of *nadzariyat al-maqsudat* (نظرية المقصودات) there is a critical examination of the content of legal regulations, which at least consists of the Marriage Law, Islamic Law Compilation, and Child Protection Law. After conducting this critical examination, with *nadzariyat al-qusud* (نظرية القصد), the importance of intention and sincerity in the implementation of Sharia, including in child custody cases, is emphasized. This refers to evaluating the extent to which child custody practices in Indonesia reflect intentions and sincerity in line with Islamic Sharia principles and how court decisions and legal practices actually reflect good intentions for the welfare of children.

In the process of *nadzariyat al-maqasid* (نظرية المقاصد), the analysis delves into the purposes, objectives, and ethical values that underlie Islamic law regarding child custody. This evaluation assesses how practices such as sole custody or split custody, as well as the prioritization of custody rights for mothers in Indonesia, align with the goals and ethical values of Islam. This assessment includes examining the consistency of these practices with the primary purpose of *hadlanah* law in Islam, which is to ensure the well-being and protection of children in accordance with the teachings and hadiths of the Prophet Muhammad (PBUH).

In the context of child custody in Indonesia, *nadzariyat al-maqsudat* (نظرية المقصودات) plays a crucial role in examining and understanding the content of existing regulations, including the Marriage Law, Islamic Law Compilation, and Child Protection Law. This process explores the extent to which these regulations truly reflect the best interests of the child. This analysis can highlight areas where practices such as sole custody or split custody may not fully support the best interests of the child, thus prompting consideration of a more inclusive and balanced custody model, such as joint custody. This is an important step to ensure that child custody policies align with the actual needs and circumstances faced by children after divorce.

Furthermore, *nadzariyat al-qusud* (نظرية القصد) introduces an evaluation of intentions and sincerity in applying Islamic Law in child custody cases. This process examines how current child custody practices in Indonesia may align with



or deviate from the intentions and sincerity recommended by Islamic Law. The focus is on the well-being and protection of the child, questioning whether the current child custody practices truly reflect these principles. This evaluation is highly important to ensure that child custody decisions align with Islamic ethical and moral values, which ultimately may lead to the adoption of a child-centered joint custody model. Finally, through the process of *nadzariyat al-maqasid* (نظرية المقاصد), a deep assessment is carried out on the objectives and ethical values underlying Islamic law concerning child custody. This includes evaluating how practices such as sole custody or prioritizing custody rights for mothers align with Islamic ethical principles.

The process of *tafkiik al-maqasid* (تفكيك المقاصد) then dissects existing practices to better understand how child custody is structured as protection and the best interests of the child. From there, *tarkib al-maqasid* (تركيب المقاصد) integrates these elements to form a broader and contextual understanding of child custody practices in Indonesia. This approach combines Islamic values with the needs of modern law, opening opportunities for a fairer and more balanced custody model, such as joint custody, which aligns with Islamic principles and prioritizes the well-being and protection of children.

Abdurrahman's concept of deconstruction is not significantly different from Derrida's radical deconstruction, but Derrida's concept of deconstruction provides a more detailed pattern of deconstruction. Abdurrahman's concept of deconstruction is more general in nature. If applied to read Articles 105 to 158 of the Compilation of Islamic Law (KHI), you may find the following concepts:

Tabel 2. Abdurrahman's Deconstruction

Abdurrahman's Deconstruction	Child custody for children under the age of 12 is with the mother
نظرية المقصودات	Questioning the original primary intent or purpose of specifying that children under the age of 12 should be under their mother's care
نظرية القصد	Questioning the motivation behind the implementation of the requirement that children under the age of 12 must be cared for by their mothers
نظرية المقاصد	Questioning how Sharia law views the protection of religion, life, intellect, lineage, and property concerning the concept that children under the age of 12 should be cared for by their mothers

The application of *nadzariyat al-maqasudat* (نظرية المقصودات), *nadzariyat al-qusud* (نظرية القصد), and *nadzariyat al-maqasid* (نظرية المقاصد) in post-divorce child custody situations requires an understanding of the underlying objectives, intentions, and purposes of the relevant legal regulations. *Nadzariyat al-maqasudat* (نظرية المقصودات) prompts us to grasp the underlying reasons or goals behind child custody regulations, with a primary focus on the child's well-being and best interests, taking into account factors such as emotional stability, psychological needs, and a supportive developmental environment. In contrast, *nadzariyat al-qusud* (نظرية القصد)



concentrates on the intentions that drive legal determinations, such as the rationale behind designating the mother as the primary caregiver for children under 12, considering the conditions and capabilities of both parents in providing a secure and nurturing environment for the child. These theoretical frameworks offer a more comprehensive understanding of post-divorce child custody arrangements, placing paramount importance on the child's welfare and the underlying intentions of the law.

On the other hand, *nadzariyat al-maqasid* (نظرية المقاصد) focuses on the overarching goals of Sharia, such as the protection of religion, life, intellect, lineage, and property. In the context of post-divorce child custody, this theory demands that custody decisions align with these objectives, particularly in safeguarding lineage and the physical and emotional well-being of the child. Applying these three theories in post-divorce child custody underscores the importance of prioritizing the welfare and needs of the child. This aligns with the principles and objectives of Sharia while recognizing the significance of considering individual circumstances and the overall family situation to create the most supportive environment for a child's development and well-being.

After grasping the concept of deconstruction, Abdurrahman's deconstructive thinking would then involve applying *tafkiik al-maqasid* (تفكيك المقاصد) and *tarkib al-maqasid* (تركيب المقاصد). *Tafkiik al-maqasid* (تفكيك المقاصد) entails dissecting and examining the diverse purposes of child custody, such as the child's well-being and safeguarding their rights, to assess whether legal practices effectively align with these goals within the framework of Sharia. Subsequently, *tarkib al-maqasid* (تركيب المقاصد) integrates these aims into a coherent structure, ensuring that custody arrangements promote the child's welfare, fairness between parents, and adherence to Sharia principles overall. This approach takes into account the specific circumstances of each case and underscores the importance of creating the most supportive environment for a child's growth, ensuring that custody decisions reflect a harmonious balance between various factors and objectives in accordance with Sharia principles.

Promoting Joint Custody as the New Norm in Indonesia

Both of the deconstruction concepts discussed above encourage a reassessment of the prevailing maternal role in child custody, particularly for children under the age of 12. By employing this deconstruction process, it opens the door to contemplating a fresh concept, advocating for joint custody as a new standard that could be implemented in Indonesia. Joint custody, does not necessarily entail an equal 50-50 division of parenting time or the child's residence between divorced parents. Instead, joint custody focuses on the court's role in endorsing shared parenting responsibilities for both parents. Custody arrangements under this concept are based on a split definition that encompasses elements of control and physical custody, which can be distinct. This concept ensures that children can maintain a family environment akin to what they had prior to their parents' divorce.

Joint custody is a court decision that grants child custody rights to both parents. There are two main variants of joint custody: first, physical custody sharing, which involves jointly arranging the care and residence of the child, and



second, legal custody sharing. In the physical custody sharing model, the child lives with and is cared for by both parents according to a custody schedule agreed upon and sanctioned by the court. Meanwhile, in the legal custody sharing model, both parents have equal rights and responsibilities in making important decisions regarding the child, including matters related to education, medical care, and religion, and both have access to the child's educational and health records.³⁰

Moreover, from another perspective, in accordance with child protection laws, which are reinforced by the Supreme Court's Circular as the highest judicial authority, and the ratification of children's rights, children are granted the freedom to have access. This obligates the custodial parent not to limit non-custodial parties from meeting and expressing affection towards the child.³¹ Consequently, deconstructing the prevailing concepts of sole custody and split custody, with specific considerations, can be pursued to arrive at fresh decisions incorporating the notion of joint custody.

The concept of joint custody or shared custody should no longer be limited to mere discourse in Indonesia. The quickest step toward its implementation is to empower judges to consider joint custody as the best interest of the child based on the facts presented during court proceedings.³² Some considerations for determining the allocation of joint custody can be made through the division of weekly "plans" and "schedules" or detailed monthly arrangements as follows:³³

Table 3. Detailed monthly arrangements

• 2-2-3 Plan							
Weeks	Mon	Tue	Wed	Thu	Fri	Sat	Sun
I	Mother	Mother	Father	Father	Mother	Mother	Mother
II	Father	Father	Mother	Mother	Father	Father	Father
III	Mother	Mother	Father	Father	Mother	Mother	Mother
IV	Father	Father	Mother	Mother	Father	Father	Father

• 2-2-5-5 Plan							
Weeks	Mon	Tue	Wed	Thu	Fri	Sat	Sun
I	Mother	Mother	Father	Father	Mother	Mother	Mother
II	Mother	Mother	Father	Father	Father	Father	Father
III	Mother	Mother	Father	Father	Mother	Mother	Mother
IV	Mother	Mother	Father	Father	Father	Father	Father

³⁰ Gayle Rosenwald Smith and Sally Abrahms, *What Every Woman Should Know about Divorce and Custody: Judges, Lawyers, and Therapists Share Winning Strategies on How to Keep the Kids, the Cash, and Your Sanity*, Updated ed (New York: Penguin Group, 2007).

³¹ "Keputusan Presiden (KEPPRES) No. 36 Tahun 1990 Tentang Pengesahan Convention On The Rights Of The Child (Konvensi Tentang Hak-Hak Anak)" (1990), <https://peraturan.bpk.go.id/Home/Details/63923/keppres-no-36-tahun-1990>.

³² 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 (August 21, 2019): 61–76, <https://doi.org/10.31602/iqt.v5i1.2143>.

³³ Amir Muallim et al., *Perbandingan Hukum Islam Di Beberapa Negara (Isu Hukum Islam, Hukum Keluarga Dan Ekonomi Syariah)*, ed. Edo Segara Gustanto and Januariansyah Arfaizar (Yogyakarta: UII Press, 2023), 309–24.



- 3-4-4-3 Plan

Weeks	Mon	Tue	Wed	Thu	Fri	Sat	Sun
I	Mother	Mother	Mother	Father	Father	Father	Father
II	Mother	Mother	Mother	Mother	Father	Father	Father
III	Mother	Mother	Mother	Father	Father	Father	Father
IV	Mother	Mother	Mother	Mother	Father	Father	Father

Conclusion

Indonesia, with its majority Muslim population, tends to prioritize sole custody or shared custody practices after divorce, discussions about the deconstruction of thinking by Derrida and Abdurrahman have prompted a reevaluation of the dominant role of mothers in child custody. Through this deconstruction process, a new idea has emerged advocating for joint custody as a new standard that can be implemented in Indonesia. The concept of joint custody is no longer merely discourse in Indonesia, and the quickest step toward its implementation is to empower judges to consider joint custody as the best interest of the child based on the facts presented during court proceedings.

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