

Responsiveness Family Law Reform in Indonesia and Tunisia (Study of Post-Divorce Child Custody)

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Abstract

This study aims to explain the development of understanding of child custody after divorce, describe an overview of the provisions of child custody after divorce in Indonesia and Tunisia, explain the importance of applying the best interest of the child in post-divorce child custody decisions, and finally assess the responsiveness of child custody provisions after divorce in Indonesia and Tunisia. This research is qualitative research, with a normative juridical approach. The main sources of data for this research are Law Number 1 of 1974 concerning Marriage jo. Law Number 16 of 2019, Compilation of Islamic Law and Code of Personal Status (CPS). Family law reform in Tunisia is more progressive in ensuring the law is responsive to social change and children's needs. On the other hand, Indonesia still faces challenges in integrating traditional values with modern legal principles. Both countries have the potential to learn from each other, especially in creating a more equitable and child-oriented legal system after divorce. Both countries offer flexibility in addressing social contexts, relationships between children and parents, and emotional needs. However, implementation varies between the two countries. Islamic law in Indonesia strongly influences child protection, while Tunisia's CPS reforms in the year focused on gender equality.

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1. INTRODUCTION

Family law plays a very important role in regulating the dynamics of household life and individual rights within it. (Hidayat & Isyaaq Maulidan, 2021) One of the crucial issues that often arises is determining child custody after divorce. Amir Syarifudin said that child custody or *gift* is an urgent problem and must be resolved, so the person who does it must have the ability and adequacy. This is due to the fact that if young children are not properly cared for and educated, it will have a bad impact on them, and can even lead to death. (Amir Syarifudin, 2014) Therefore, it is very important to ensure that children are well educated, looked after and cared for. In this case, child care and maintenance cover many things, such as financial matters, education, and all the child's daily needs.

According to Islamic rules, the husband is responsible for household finances, although the wife can help the husband in this matter. This problem not only concerns formal legal arrangements but also the social and psychological impact on children and the family as a whole. Therefore, family law needs to be responsive, able to adapt to the needs of society, and ensure that the best interests of children are the main priority.

In Indonesia, the family law system is still heavily influenced by Islamic law through the Compilation of Islamic Law (KHI) and other statutory regulations. Child custody is often awarded based on traditional norms that do not take into account the child's individual needs or the broader social context. Meanwhile, Tunisia, as a country that is also based on Islamic law, has carried out significant family law reforms through *Code of Personal Status* (CPS) since 1956. Tunisia is known to be progressive in regulating family issues, including child custody, taking into account the principles of gender justice and the interests of children.

A comparison of the responsiveness of family law reforms in Indonesia and Tunisia offers valuable insights into approaches that can be implemented to align the law with the needs of modern society. This study aims to analyze the extent to which family law in both countries is able to respond to social changes, prioritize the interests of children, and reflect the indicators of legal responsiveness theory developed by Nonet and Selznick. In the laws of Algeria, Egypt, Iraq, Jordan, Malaysia, Yemen, Somalia, and Morocco, the mother has greater custody rights than the father. In Tunisia, on the other hand, fathers and mothers both have custody of the child. (Ahmad, 2022)

Previous research that is relevant to this research among them that is: *First*, Hala Ahmed Nour El-Din in his article entitled "Indeterminacy of the Best Interest of the Child and Shari'a Rules in Custody Adjudications: Egypt Case". (Ahmed & El-Din, n.d.-a) *Second*, Holy Ramadhan and JM. Muslimin in the article "Indonesian Religious Court Decisions on Child Custody Cases: Between Positivism and Progressive Legal Thought". (Ramadhan & Muslimin, 2022) *Third*, Sudirman L in the article "Child Custody After Divorce: Enhance A Shared-Parenting in Indonesian Marriage Legal System" (Sudirman, 2023) The novelty of this research compared to the three previous studies is that this research focuses on examining the responsiveness of child custody laws after divorce in two countries, namely Indonesia and Tunisia. Furthermore, this research aims to explain development of understanding of child custody rights after divorce, explained *overview* post-divorce child custody provisions in Indonesia and Tunisia, explain the importance of implementation *best interest of the child* in post-divorce child custody decisions, finally measuring the responsiveness of post-divorce child custody provisions in Indonesia and Tunisia.

2. RESEARCH METHOD

This type of research is qualitative research. This research emphasizes the search for meaning, understanding, concepts, characteristics, symptoms, symbols, descriptions of a phenomenon, natural and holistic in nature, prioritizing quality which is ultimately presented in narrative form. This study uses a normative juridical approach, namely the researcher examines library materials, both primary and secondary, to then explore further regulations relevant to this research. Furthermore, this research focuses on using the Legal Responsiveness theory by Nonet and Selznick to measure the responsiveness of child protection laws regarding post-divorce custody rights in Indonesia and Tunisia.

The primary data source for this research is Law Number 1 of 1974 concerning Marriage jo. Law Number 16 of 2019, Compilation of Islamic Law and *Code of Personal Status*. Secondary sources for this research are the Al-Qur'an, Hadith, books and works of Islamic scholars and thinkers who study *gift* and justice for children as well as journals or study relevant to the topic discussed in this research. The data material for this research was collected using documentation techniques.

3. RESEARCH RESULTS AND DISCUSSION

A. Development of Understanding of Child Custody Rights Post Divorce

Hadhanah is another term for custody. Minor children are raised by their parents after a divorce. *Hadhanah* is to place something near the ribs or lap, as a mother does when breastfeed her child. According to the term, *gift* is to take care of and organize everything related to the welfare of children who cannot take care of themselves. (Afendi, n.d.) According to the Compilation of Islamic Law, *gift* is an activity to care for and educate young children until they stand on their own. Fiqh experts define *gift* as taking care of a small child, whether a boy or a girl who has not reached maturity, by giving the best for him and avoiding things that could harm him.

According to the Shafi'i school of thought, caregivers must fulfill seven requirements: Islam, common sense, trustworthy, independent, capable of caring, still tied to their husband or unmarried, and finally taking care of themselves. Most scholars agree that a *hadhanah* is a person who is sensible, mature, trustworthy, has good behavior and has the ability to educate. In terms of religious matters, Imam Syafi'i stated that nothing is permitted other than the Islamic religion; on the other hand, other schools of thought do not stipulate religious issues as a requirement. However, according to Imam Hanafi, custody is no longer necessary in cases of apostasy.

There are some groups or individuals who are entitled to *hadhanah*. The group of women consists of mothers, grandmothers and upwards, mothers from fathers upwards, paternal sisters, paternal sisters, paternal sisters, paternal sisters, and paternal sisters. The male group consists of fathers, grandfathers and upwards, paternal and maternal brothers, paternal uncles, and sons of paternal and maternal uncles. (Afendi, n.d.)

According to Imam Syafi'i, *hadhanah* is given to the mother of a child who has not been *mumyiz* before he is six or seven years old. After that, the child is given the right to choose who will take care of him. If the mother chooses, the father must provide child support as long as the mother is not married yet. (Fiqri, 2023) Then the child's mother or grandmother receives the right of *hadhanah*. According to Imam Malik, the age limit for boys is when they reach puberty even in illogical or sick conditions, and for girls it is until marriage. If he reaches marriageable age and his mother is in the period of *iddah*, he has greater rights over his daughter until she marries again. If not, the child is entrusted to the father; if there is none, it is entrusted to his guardian or combined with his guardian.

Hanbali Imams have two opinions on this matter. According to the first opinion, the mother has greater rights over the son until he is 7 years old, after which he has the option of living with one of the parents. According to the second opinion, the girl remains with her mother until she is 7 years old. There is no right to choose. Second, according to Imam Hanafi's opinion, mothers have more rights over their children until the children are adults and can fulfill their own daily needs, then fathers.

According to Imam Hanafi, the mother has more rights over her child until the child grows up and can stand on his own to meet his daily needs, then the father has the right over the daughter. For a daughter, the mother has a greater right to take care of her until she grows up and has no other choice. The age limit of *hadhanah* ends for boys who do not need care and are able to meet their own needs. In addition, for girls, menstruation comes on the first day of menstruation. In other words, the *hadhanah* of a 7-year-old boy and a 9-year-old girl. The right is transferred from the mother, father's mother, half-brother and half-father, and then the daughter from the half-brother to the aunt.

Law Number 1 of 1974 concerning Marriage and the Compilation of Islamic Law, Article 45 paragraph (1) which emphasizes that both parents share the responsibility to

care for and educate their children as well as possible. According to paragraph (2), the obligations of both parents remain until the child marries or is able to stand alone. This obligation remains even after the marriage between the parents ends. (Department of Religion of the Republic of Indonesia, 2001)

Article 41 letter (a) of Law Number 1 of 1974 also confirms the right to custody of children for both parents after divorce, which stipulates that either the father or mother remains obliged to care for and educate them. his children solely based on the interests of the child, and if there is a dispute regarding control of the child, the court will make a decision. However, according to letter (b), the father is responsible for maintenance and education costs; if the father is unable to do so, the mother can be responsible. Article 47 stipulates that children are under parental authority if they are not yet 18 years old or unmarried during the period of parental authority. The child's property owned by the parents may not be transferred or pawned by the parents if there is no interest in the child's wishes, according to Article 48.

According to KHI Articles 105-106, the mother is the first person who has the right to care for the child. This is not seen from an educational perspective regarding morality, affection, growth, or how to care for children. The bottom line is the interests of the child. People who have custody are obliged to care for and look after their children by providing education, morality and a positive attitude. According to Fiqh scholars, mothers are more valued than fathers because they have the instinct to care for and educate children and their patience. Apart from that, from the basis above, the order of people who have more rights to custody is also determined. The scholars prioritize women over men.

B. Overview of Child Custody Rights in Indonesia and Tunisia

1. Child Custody Rights in Indonesia

Historically, the archipelago region that makes up the modern country of Indonesia has religious, social, legal, and political diversity. Then, during the colonial period, the Dutch colonial government gathered customary norms and local traditions and turned them into laws that could be enforced judicially, called *adat*recht in Dutch or customary law in Indonesian. (Dupret et al., 2023) With Islamization of the Indonesian archipelago, in the 13th to 15th century, Islamic norms and legal traditions (religion or *syarak*) were introduced.

After the local rulers embraced Islam, they began to obey, more or less, the teachings of Islam, including the rules governing family relationships. The doctrine of *Shāfi'ī* (jurisprudence) is generally followed. Various normative sources are applied in various combinations: religion/*syarak* (Islamic normativity and tradition/jurisprudence), religion (local customs, norms and traditions), *karinah* (a mixture of religion and *dirgama*), *toyagama* (corporal punishment), and *cilagama* (commercial transactions). After Indonesia became independent, in 1945, the new government decided to maintain the Dutch colonial legacy, while continuing to use legal books and the judicial system.

Nevertheless, a new constitution was drafted and some personal status laws were replaced. Regarding the constitution, the constitution confirms Pancasila (five basic principles of Indonesia): Belief in One Almighty God, just and civilized humanity, Indonesian unity, democracy guided by deliberation, and social justice) but does not include sharia as a source of legislation for Muslim issues. Thus, Indonesia is neither an Islamic state nor a secular state, but a “religious state” in which six religions (Islam, Catholicism, Protestantism, Buddhism, Hinduism, Confucianism) are officially recognized as state religions, and sharia is only one source of legislation.

Based on Law of the Republic of Indonesia Number 1 of 1974 concerning Marriage, Article 45 paragraph (1) states that both parents have an obligation to care for and educate their children as well as possible, and paragraph (2) states that this obligation remains valid even if the marriage between the parents is terminated. Article 41 letter (a) of Law Number 1 of 1974 states that if the marriage between the parents is dissolved. Furthermore, Article 49(2) of Law no. 1 of 1974 states that "even though parents are deprived of their authority, they are still obliged to provide maintenance costs to the child".

Thus, it can be concluded that if the child is under the care of the father or mother, then the father is responsible for the costs of the child's maintenance and education. The amount of the fee is determined based on the child's needs and adjusted to the parents' economic situation. Parents who have a strong income must pay for the child, but parents who have a less income must pay for the child.

Child maintenance or *hadhanah*, is defined in Compilation of Islamic Law Article 1 letter g as the activity of nurturing, maintaining, and educating children until they grow up or are able to stand on their own. In Articles 98 to 112, KHI uses the term "child custody" to explain the authority of parents over children, with Articles 107 to 112 discussing guardianship. Articles 98 and 105 of KHI regulate *hadhanah*.

Child Custody Rights Based on Law of the Republic of Indonesia Number 23 of 2002 concerning Child Protection as amended by Law of the Republic of Indonesia Number 35 of 2014 concerning Child Protection that it is very important to protect children, and this must be done continuously even if the mother or father dispute, one of them has a belief outside of Islam, or comes from another country. When parents decide what they should do, they must consider the welfare of the child, both in this world and in the afterlife. According to Article 14 of Law no. 35 of 2014 concerning Child Protection "Every child has the right to be raised by his own parents, unless there are valid reasons and/or legal regulations indicating that separation is in the best interests of the child and is a final consideration." In explanation Law no. 35 of 2014 concerning Child Protection emphasizes that, "The separation referred to in this provision does not eliminate the child's relationship with his parents."

Based on the provisions above, there is no reason to prohibit the other parent from meeting the child, even though the law has designated one parent as the holder of "child custody".

Basically, both parents have an obligation to look after their children, but because of divorce, mothers have the right to look after their minor children. Article 45 paragraph (1) of the Marriage Law states that "Both parents are obliged to care for and educate their children as best as possible".

Articles 105 and 156 of the Islamic Law Book explain the order in which children are entitled to care if a divorce occurs. Article 156 KHI states that the custody rights of children who are terminated due to divorce are as follows.

Children who have not reached the age of majority are entitled to the *hadhanah* of their mother, except if the mother dies, then her position is replaced by: women in a straight line upwards from the mother; father; the women in a straight line upwards from the father; sister of the child in question; women related by blood according to the side line from the father. The children who have *mumyyiz* have the right to request *hadhanah* from their father or mother.

If the holder of *hadhanah* cannot guarantee the physical and spiritual safety of the child, even though the cost of *hadhanah* and maintenance have been sufficient, the Religious Court can transfer the right of *hadhanah* to another relative who has the right of *hadhanah* also at the request of the relative concerned. The father is

responsible for all the costs of hadhanah and child maintenance, at least until the child is an adult and able to take care of himself (21 years old).

According to the explanation of article 156 KHI, the order of the right to perform hadhanah for a child who has not been mumyyiz is as follows: if the child's mother dies, the custody of the child is transferred to the family that has been explained above, but if the child has been mumayyiz, the child can choose to receive gifts from his father or mother. However, his biological father is responsible for the cost of the dowry.

Article 156 (c) KHI clearly states that the person who has the right to provide care must be able to guarantee the physical and spiritual safety of the child. If the custodial parent is unable to do so, another family with equal rights can take over the gift of the child.

According to research conducted by Suci Ramadhan and Jm. Muslimin in Indonesian Religious Court Decisions on Child Custody Cases: Between Positivism and Progressive Legal Thought, explains that in deciding child custody cases, religious courts in Indonesia use a different legal reasoning approach. Study of several Religious Court Decisions in Indonesia as follows: a) Sukoharjo Religious Court Decision, Number 0145/Pdt.G/2015/PA.Ska; b) Decision of the Semarang High Religious Court, 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) Decision of the Makassar High Religious Court, Number 79/Pdt.G/2015/PTA.Mks; f) Supreme Court Decision, Number 237K/Ag/2016. (Ramadhan & Muslimin, 2022) Certain judges use a juridical approach, while other judges use a progressive and sociological approach. There are differences in these legal considerations that lead to different interpretations of fairness in child custody cases.

Based on article 105 of the Compilation of Islamic Law, judges tend to decide that child custody is the mother's right. On the other hand, judges who use contextual considerations tend to decide that child custody is the father's right. Legal reasoning positivistic underlies the consideration of the text, which uses the logical coherence of the text as the main approach to solving the problem. To produce justice values based on the interests of the child and the conditions of the parents, contextual considerations are based on sociological reasoning, including approaches against *legem with qiyâs* (analogy) and *istihsân* (teleological interpretation).

2. Child Custody in Tunisia

Tunisia has long held a special position among family law regimes in Muslim jurisdictions. Legal reforms introduced in the initial codification of personal status law in the 1950s have brought changes from Islamic legal doctrine in many areas of family law. While early legislative measures initially focused on questions of marriage and divorce, child custody has also undergone extensive reform, especially in the 1960s when the best interests of the child were elevated to the primary consideration in awarding custody after divorce.

Since then, judicial practice has echoed the focus on the best interests of the child and not only applied the concept consistently, but also developed it further. However, at the same time, Tunisian statutory law also remains faithful to Islamic legal traditions where, in certain aspects of custody and guardianship, it upholds the division of parenting functions based on gender and defines the right to custody in guardianship boundaries. In 1993, the decision to grant most guardianship powers to

whoever acts as the child's guardian was considered an important step in the country's child care regime and was progress for mothers' rights. (Achour, 2017)

Tunisia has a unique position in terms of personal status laws compared to other Muslim Jurisdictions. Reforms in personal status law in the 1950s have demonstrated a departure from Islamic legal doctrine. This became clear in the 1960s when the term '*Best Interest*' (BI) was announced as a primary consideration in guardianship cases especially after dissolution of marriage. This transformation occurred earlier than the ratification of the UNCRC convention. The decision-making process in cases related to child custody reflects several developments in *Best Interest*. (Ahmed & El-Din, n.d.-b) Meanwhile, Tunisian law continues to adopt aspects of Islamic law regarding custody and guardianship which requires a division between the two sexes in the function of caring for children.

Regardless of the justification for child custody law reforms, it is clear that some of these reforms depart from conventional Islamic precepts and place emphasis on the well-being of children after parental separation. In 1966, the Tunisian legislature carried out significant reforms in which the term (*Thanks for the advice*) the interests of the child were for the first time introduced as a determining factor in the attribution of child custody.

That same year, the rule ending maternal parental rights at a certain age was abolished. These reforms increased mothers' rights to care for their children and strengthened the nuclear family. However, the reason for this change is because deciding custody based solely on age can lead to risky circumstances, such as separating the child from his familiar environment and requiring him to live in a new one, which has the potential to disturb his moral and affective balance.

In 1981, the Tunisian legislature modified child custody laws, allowing a child to live with the mother if she remarried as long as it was in the child's best interests. Additionally, in 1993, lawmakers decided that if the father is incapable of being a guardian - which in Islamic Law is considered a right of the father - then the mother should be granted guardianship rights (*wilaya*) and this was done to encourage the child's education and management of his financial affairs.

Another significant reform in the child protection law in 1992, was that it allowed parents to appeal against interim measures taken during divorce proceedings. In 2006, lawmakers again raised the topic of child care: Article 66 bis grants visitation rights to grandparents if one of the parents dies, if this is in the interests of the child. In this way, the regime recognizes the importance of the extended family. Lawmakers also observed that lengthy legal proceedings in divorce proceedings can have a negative impact on children's education and basic needs. As a result, judges are responsible for taking prompt decisions to protect children's personal interests in the name of public order.

Bearing in mind that the protective role of the family system is generally focused on protecting the family unit on the one hand, and to protect each family member against other family members on the other hand. As long as the divorce case is still in process, this immediate decision will remain temporary. The judge may review the family by making amendments on his own initiative or at the request of the couple, and the immediate decision is always subject to consideration of the best interests of the child, which must always take precedence over all other considerations. For example, if it is proven to the judge at any point during the dispute that the father intentionally claimed less income than he actually had, he would be entitled to a greater alimony payment than was imposed in the first judgment.

This glance at the reform of child custody rules in Tunisia points towards having legal decisions that can act in the interests of the child, for example the assignment of guardianship to the guardian mother if the father shows negligence towards the child's property. The second direction is to have more flexible legislation that is far from the rigid legal school of thought (Hanafi madzhab) in terms of terminating the age of child custody. This does not deny the fact that the decision-making process for all matters relating to children must remain an area that needs to be reviewed.

C. Best Interest of the Child for Responsive Law

Principle *best interest* are global guidelines adopted by many countries through various legal systems. Its implementation allows for more consistent and objective decision-making worldwide, while promoting the protection of children's rights as a top priority. Historically, the best interests of the child underpin an understanding of the development of this term in western societies and how they understand it. An in-depth search for the roots of the term *Best Interest* guides researchers interested in the field of child custody to understand how the term has historically developed and provides a framework within which the main point of my dissertation can be understood, namely that the uncertainty of legal terms will result in rigidity and inflexibility decision-making process in determining child custody.

The best interests of the child are a concept that has historical origins in Western and Islamic jurisprudence. Today, this concept not only includes international treaties and agreements, but also dominates the decision-making process in family courts regarding child custody conflicts post-divorce. one of the arguments of the term *Best Interest* created to support multiple genders. However, there has been a shift from gendered and moral assumptions about what is best for children in terms of child welfare to a focus on children's needs and rights. (Moloney, 2008)

Jean Zermatten defines it as “the best interests of the child, as a legal tool that allows achieving the well-being of the child at the physical, psychological and social levels, and it is the obligation of public and private institutions and structures to verify that these criteria are then taken into account when making decisions regarding children and that this ensures that the long-term best interests of the child are the unit of measurement, and that there must be competition between interests.

According to Hala Ahmed Nour El-Din, consideration of the interests of children after divorce must be a priority in reforming child custody law. This is to avoid subjective legal opinions that may have a negative long-term impact on the child's life. Consequently, custody decisions must be evidence-based, and a child-centered paradigm must be established, with psychological and social professionals participating in the decision-making process to provide insight into the complexities of the child's best interests. (Ahmed & El-Din, n.d.-a)

Principle *best interest of the child* It is very important to ensure that decisions regarding post-divorce child custody do not only accommodate the interests of the parents, but truly pay attention to the child's welfare. By applying this principle, the legal system can create fairer decisions, protect children's rights, and support children's growth and development in a healthy and stable environment.

D. Measuring the Responsiveness of Post-Divorce Child Custody in Indonesia and Tunisia

Legal Responsiveness Theory is an approach developed by Philippe Nonet and Philip Selznick in their book, *Law and Society in Transition: Toward Responsive Law* (1978). This theory provides a framework for understanding the evolution of law in the

context of social, political, and economic change. Nonet and Selznick distinguish three types of law: Repressive Law, Autonomous Law, and Responsive Law. (Hamzani, n.d.) In this context, responsive law is considered the most advanced stage, where law becomes a dynamic tool to meet community needs and realize justice.

Nonet and Selznick developed the theory of legal responsiveness by viewing law as a phenomenon influenced by social dynamics. In their view, law functions not only as a tool of social control but also as a means of supporting sustainable social change. This theory is a criticism of formalistic and rigid legal approaches, such as those found in repressive or autonomous legal systems.

Legal Responsiveness Theory has a number of prominent indicators, which reflect the role of law as a dynamic and justice-oriented tool social, namely: 1) Balance between stability and change; 2) Openness to participation public; 3) Prioritizing substantive values; 4) Flexibility; 5) Empathy towards public interests; 6) accountability and supervision; 7) Response to social needs.

First, balance between Stability and Change. In the context of child custody, the law must provide the stability necessary to protect the child's best interests, but also be flexible to adapt to changes in the family situation, such as changes in the parents' economic capabilities or health conditions. Being responsive to these changes is critical to ensuring children's welfare remains a priority.

Second, openness to Public Participation. Responsive law opens up space for the participation of parents, children and other related parties in the legal process. For example, in a hearing to determine custody, the child's voice or the child psychologist's assessment can be important considerations. This participation ensures that legal decisions better reflect the social realities and needs of the parties involved.

Third, Prioritizing Substantive Values. In determining child custody, the values of justice, welfare and humanity take precedence over compliance with formal procedures alone. The focus is on the child's emotional and physical needs, ensuring they receive the best care, despite rigid legal norms.

Fourth, Flexibility. Flexible laws allow for child custody arrangements that can be updated as needed. For example, if one of the parents who initially had custody is no longer able to provide a suitable environment, the law must be able to accommodate changes in custody in the best interests of the child.

Fifth, Empathy towards the Public Interest. Child custody touches the public interest because children are an important part of society's future. Therefore, laws must reflect empathy for the best interests of children by paying attention to aspects of their education, health and emotional needs.

Sixth, Accountability and Oversight. Supervision of the implementation of custody rights is an important indicator of responsive law. With an accountability mechanism in place, the implementation of custody rights can be monitored regularly to ensure that the child is well cared for and decisions are not abused.

Seventh, Response to Social Needs. Responsive laws must also take into account changes in social needs, such as the increase in single-parent families or separating couples. Policies should include support services such as family counseling and equal access for both parents to be involved in the child's care.

1. Equal Responsiveness of Post-Divorce Child Custody Laws in Indonesia and Tunisia

a. Focus on Children's Interests

Indonesia: The principle of the best interests of the child (*best interests of the child*) is the basis for determining custody rights, as regulated in Article 41 of Law Number 1 of 1974 concerning Marriage (and renewed in Law Number 16 of

2019). In its implementation, the judge considers the child's age, emotional needs and parents' financial capabilities.

Tunisia: *Code of Personal Status* (CPS) Tunisia also stipulates that custody rights must be based on the interests of the child. Legal reforms in Tunisia expand the scope for mothers or fathers to obtain custody rights based on the welfare of the child.

b. Legal Flexibility

Indonesia and Tunisia both provide flexibility for courts in considering social context, parent-child relationships, and children's emotional needs. However, the implementation of this flexibility differs between the two countries.

2. Differences in Responsiveness of Post-Divorce Child Custody Laws in Indonesia and Tunisia

a. Cultural and Religious Context

Indonesia: Family law in Indonesia is still heavily influenced by Islamic law (Compilation of Islamic Law/KHI) for Muslim citizens. Child custody tends to be given to the mother, especially for young children (under 12 years). This is in accordance with the principal *gift* in Islamic jurisprudence, although the father remains financially responsible.

Tunisia: Tunisia has had a more secular legal approach since the CPS reform in 1956. Custody is not automatically given to the mother or father, but to the party deemed better able to meet the child's needs, with an emphasis on gender equality.

b. Community Participation and Advocacy

Indonesia: Public participation in family law reform remains limited. The legislative process tends to be influenced by religious and customary interpretations, which limits more progressive approaches. Advocacy from civil society groups still faces obstacles in pushing for more responsive legal changes.

Tunisia: Tunisia has a better track record in engaging women and children advocacy groups. CPS reform is the result of pressure from progressive groups pushing for gender equality, reflecting the law's responsiveness to social dynamics.

4. CONCLUSION

Family law reform in Tunisia is more progressive in ensuring the law is responsive to social changes and children's needs. On the other hand, Indonesia still faces challenges in integrating traditional values with modern legal principles. Both countries have the potential to learn from each other, especially in creating a legal system that is fairer and oriented towards the interests of children after divorce. Both countries offer flexibility in addressing social context, relationships between children and parents, and emotional needs. However, implementation varies between the two countries. Islamic law in Indonesia greatly influenced child protection, while CPS reforms in Tunisia in 1956 focused on gender equality.

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