

Spotlighting the Neglect of Balinese Women's and Children's Rights in Custody Court Decisions

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Abstract

The Balinese society adheres to a patrilineal kinship system in which men are considered the successors of the lineage. This system often serves as the rationale for awarding child custody to fathers in divorce cases, frequently disregarding the rights of the mother and the best interests of the child. This study examines the implications of the patrilineal kinship system on divorce proceedings, the criteria used by judges in child custody decisions among the Balinese, and the potential for reconstructing child custody arrangements to prioritize the child's best interests. It is a legal research that examines the normative issues regarding child custody in a patrilineal society with a gender perspective. This paper suggests that decisions regarding child custody should refer to the child's best interests principle and gender responsiveness. In the event of a divorce, a wife is typically returned to her parents by her husband's extended family, a process known as "mulih deha", which effectively reverts her to the status of a girl, implying she has no children and does not retain any marital property. Societal culture holds that a child is considered secure in the father's household, even if the paternal grandparents provide care. This entrenched belief system discourages Balinese women from pursuing child custody. A co-parenting model, allowing both parents to remain actively involved, can help reconstruct child custody arrangements to serve the child's best interests better.

1. INTRODUCTION

The kinship structure within a family plays a crucial role in determining lineage according to regional cultural practices. The kinship system influences marital arrangements and inheritance distribution, ensuring adherence to Balinese customary law. The Balinese Hindu family system is a patrilineal family system that adheres to the male lineage.¹ The patriarchal culture is so strongly attached to a society that adheres to a patrilineal family system, which places the highest position in male

¹ Ni Kadek Ratna Dewi, I Made Suwitra, and Diah Gayatri Sudibya, "Hak Waris Laki-Laki Perkawinan Nyeburin dalam Hukum Adat Bali di Desa Adat Sawan Kabupaten Gianyar," *Jurnal Interpretasi Hukum* 2, no. 1 (2021): 147.

dominance.² In various Indonesian regions, including Bali, patriarchal values often transcend mere adherence to patrilineal lineage, permeating cultural norms that influence daily familial and communal dynamics.³ This is evident among the Balinese, who uphold patrilineal traditions characterised by distinct roles and authority within marital relationships.⁴

A fundamental component of feminist theory and political activism has been the idea of patriarchy.⁵ The center of the most pervasive and long-lasting type of social, political, economic, and religious structure on the planet is the dominating man, who serves as the head of the family and a father figure both literally and symbolically. The concept of patriarchy emerged as a form of belief or ideology that men have a higher position than women.⁶ Systems of social, political, and economic institutions and connections that are organized around gender inequity are referred to as patriarchal. Patriarchal institutions essentially prevent or limit women's full involvement and favor men and male precepts.⁷ The process of forming a patriarchal social system begins with the house as a place where the initial socialization of patriarchal construction is carried out.⁸

This has implications not only for the dominance of men in the family but also for child custody after divorce. A woman who decides to divorce is said to be *mulih deha*⁹ which means returning to be a girl. In principle, a woman whose status is *mulih deha* means relinquishing her rights and obligations in her husband's family and being bound by the rights and obligations of her family of origin. However, in a patrilineal society, when a

² Kamalia Novi, "The Masculinity of Madurese Male Bodies in Patriarchal Culture," *Russian Journal of Agricultural and Socio-Economic Sciences* 100, no. 4 (2020): 108.

³ Dewi, Suwitra, and Sudibya, *loc.cit.*

⁴ I Komang Agus Darmayoga, "Perempuan dan Budaya Patriarki dalam Tradisi, Keagamaan di Bali (Studi Kasus Posisi Superordinat dan Subordinat Laki-Laki dan Perempuan)," *DANAPATI: Jurnal Komunikasi* 1, no. 2 (2021): 140.

⁵ Prakash Khundrakpam and Jayanta Krishna Sarmah, "Patriarchy and Patriarchal Customs in the Meitei Society of Manipur," *Women's Studies International Forum*, 96 (2023): 102674.

⁶ D. J. Cremer. *Patriarchy, Religion, and Society*. In: Marques, J. (eds) *Exploring Gender at Work* (London: Palgrave Macmillan, Cham, 2021), 26.

⁷ Giovanna Galizzi, Karen McBride, and Benedetta Siboni, "Patriarchy Persists: Experiences of Barriers to Women's Career Progression in Italian Accounting Academia," *Critical Perspectives on Accounting* 99 (2024): 4.

⁸ Indra Kusumawardhana, "Analisis Legal-Sosial Terhadap Kondisi Kesetaraan dan Keadilan Gender dalam Mendukung Pembangunan Berkelanjutan Indonesia," *Jurnal Populis* 3, no. 6 (2018): 754.

⁹ *Mulih deha*, also generally called as *mulih bajang*, is a Balinese term, meaning a situation in which a woman, following separation from her partner through divorce or widowhood, returns to reside with her family of origin. See Y. P. Dewi. *Gendering Adat Law: Women's Rights Activists in Balinese Customary Affairs*. In: Goh, J.N., Bong, S.A., Kananatu, T. (eds) *Gender and Sexuality Justice in Asia* (Singapore: Springer, 2020), 35.

woman is divorced, she is interpreted as a girl; therefore, she is not allowed to bring anything from her husband's family, both properties obtained during marriage and children. The practice of a woman returning to her family of origin following divorce is complex and influenced by several factors. Economic considerations often play a significant role, as divorced women whose parents have limited financial means they may face challenges supporting themselves and their children if they are accepted back into their parental homes. When recognized as "*mulih daha*", the women's legal status is considered single, entitling them to parental support. Moreover, this status impacts inheritance rights, ensuring the daughter accepted as "*mulih daha*" retains entitlements despite the patrilineal kinship system prevalent in Balinese customary law communities.¹⁰

The patrilineal system is used as an excuse for the child to be in the care of the father and the family from the father's side, even though the child is still under the age of 12 years.¹¹ Children in families that adhere to a patrilineal kinship system are considered as the successors of the lineage; therefore, they should be in the care of their father. The custody of a child by their father's family is viewed as safeguarding the child's entitlement to establish a clear identity, lineage, and associated rights and responsibilities. Nonetheless, during childhood, children typically require the nurturing care and affection of their mothers. While the well-being of the child does not inherently depend on the father's family, the child's designation as the heir to the paternal lineage, and thereby perceived lack of ties to the maternal family, often results in their placement within the father's family's care.

In a case before the Amlapura District Court, where the plaintiff is the wife and the defendant is the husband, the Court granted custody rights to the husband.¹² The judge's *ratio decidendi* was that the marriage was conducted based on Balinese custom and Hinduism, so the defendant acted as *purusa*¹³ who was obliged to continue his lineage and serve his ancestors

¹⁰ Ni Ketut Sari Adnyani and I Gusti Ayu Purnamawati, "Pengaruhutamaan Gender Krama Istri (Warga Perempuan) dalam Hukum Adat Bali," *Pandecta Research Law Journal* 15, no. 1 (2020): 34.

¹¹ As a fairly universal guideline, the wishes of children under the age of 12 are not given significant weight in custody or access proceedings, although children's voices may be heard. The Committee on the Rights of the Child stresses that children's voices are not heard simply as a means of fulfilling a "tokenistic approach", but are considered in depth, taken seriously and given due weight. See: Emmie Henderson-Dekort, Veronica Smits, and Hedwig Van Bakel, "The meaningful participation and complex capacities of children in family law: Based on transdisciplinary perspectives and articles of the United Nations Convention on the rights of the child," *The International Journal of Children's Rights* 29, no. 1 (2021): 91.

¹² Amlapura District Court Decision No. 97/Pdt.G/2023/PNamp, p. 13.

¹³ The concept of *purusa* is related to the patrilineal kinship system which is determined based on the father's or male line. In Balinese customary law, *purusa* has a

and replace the obligation of *ngayah*¹⁴ in *banjar*¹⁵ of the defendant's parents, while the plaintiff as *pradana*¹⁶ in the marriage could not provide legal status to the children she gave birth to, but the children she gave birth to followed the *purusa* lineage. The judge's decision refers to the customary law in customary villages in Singaraja Regency, which adheres to a patrilinear system. Balinese customary law underlines that the status of *purusa* generally places the child's position within the husband's family.¹⁷ Likewise, children join their father's (husband's) family and have no direct relationship with their mother's family.¹⁸ The obligations of children or grandchildren are also transferred to their father's family, as well as their rights and obligations (from there). Such a relationship was not found with his mother's family.

The strong patriarchal culture in Balinese people influences the thinking of Balinese women so that they do not dare to fight for their rights, especially if the family of origin does not support it. Policy mechanisms that constrain women's rights and mobility and men's access to the full benefits of pragmatism are born out of patriarchy.¹⁹ In Balinese society, there is a term known as *mepamit*.²⁰ This situation often signifies that women are

broader meaning because it includes both men and women who are given the status of men (Women who are given the status of *purusa* occur in *nyentana* marriages (where a woman proposes to a man). See: Nengah Arnawa. *Linguistic devices in traditional forms of Balinese humour*. In Davis, J. M. (eds) *Humour in Asian Cultures*, New York, Routledge, 2022), 62-63.

¹⁴ *Ngayah* is a Balinese term referring to a community activity performed collectively and voluntarily by members of the community, without any expectation of payment or reward. See I. Gst Pt Bagus Suka Arjawa, and Zulkifli Zulkifli, "The Social Integration of Hindu and Muslim Communities: The Practice of "Menyama-Braya" in Contemporary Bali," *Studia Islamika* 28, no.1 (2021): 161.

¹⁵ *Banjar* referred to *Banjar Adat* or *Banjar Suka Duka* or other terms which is a customary organization under a Customary Village. See Article 1 (9) of Regional Regulation of the Bali Province No. 4 of 2019 concerning Customary Villages in Bali.

¹⁶ *Pradana* is a Balinese term and Hindu teachings which are interpreted as a devoted female and/or male descendant, who after marriage no longer carries out and continues her responsibilities as a descendant of the *kapurusa*, because she has married out and continues her responsibilities in the house of her husband/wife who has the position of *purusa*. See Anak Agung Istri Agung, "Makna Purusa dan Pradana dalam Putusan Hakim Mengenai Sengketa Waris Adat Bali" (Doctoral Dissertation, Universitas Brawijaya, 2016), 1.

¹⁷ Ni Made Sumerti Asih and Made Emy Andayani Citra, "The Position of Daughters in Balinese Customary Inheritance System from Gender Equality Perspective," *International Journal of Law Reconstruction* 5, no. 2 (2021): 187.

¹⁸ *Ibid.*

¹⁹ Adhi Dwipayana and Nyoman Astawan, "The Domination of Patriarchism in Inheritance Customary Systems," *RETORIKA: Jurnal Bahasa, Sastra, Dan Pengajarannya* 14, no. 1 (2021): 2.

²⁰ "*Mepamit*" is a Balinese term that signifies saying goodbye to the woman's family of origin. It also serves as an acknowledgment of the bride's ancestors, marking her transition into the groom's family as she becomes their responsibility. *Mepamit* ceremony typically takes place before, or occasionally after, the marriage ceremony. See Luh Sukma

considered to transition from the responsibility and domain of their natal family to becoming wholly integrated into their husband's and his family's sphere.²¹ A married woman's activities typically become solely the concern of her husband, reflecting adherence to Hindu teachings that form the basis of Balinese customary law.²² Hindu religious doctrines exalt women, contrasting sharply with findings from Elfrida Gultom's research (2017), which highlight the incongruity between Bali's customs and legal frameworks—characterized by gender disparities—and Hinduism's reverence for women in its sacred tenets. This contrast is evident in the behaviors of men and women across social contexts, as well as in matters of marriage and inheritance.²³ According to the Moral Sentiment theory, if religion grants certain rights to women, then adhering to and implementing these values and practices can serve to protect and uphold women's socio-economic rights.²⁴

The Preamble of the Universal Declaration of Human Rights (UDHR) states, “Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom.”²⁵ In international law, there is the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which has been ratified by the Republic of Indonesia through Law No. 7 of 1984 on July 24, 1984 (Law 7/1984). The convention is a statement of the commitment of countries worldwide to emphasize equality and justice between women and men (equality and equity).²⁶

Advocates for women's equality both domestically and internationally have found great use for CEDAW, and the Committee created under the treaty to oversee its implementation has been instrumental in promoting the treaty's implementation.²⁷ In the Preamble of CEDAW, it is stated, “Nothing

Ningsih and I Wayan Suwendra, “Upacara Pawiwahan Dalam Agama Hindu,” *Jurnal Widya Sastra Pendidikan Agama Hindu* 3, no. 2 (2020): 47.

²¹ *Ibid.*

²² Putu Dyatmikawati, “Inheritance Rights of Women Based on Customary Law in Bali,” *International Journal of Business, Economics and Law* 11, no. 4 (2016): 14.

²³ Elfrida R. Gultom, “Development of Women Position in the Patrilineal Inheritance of Indonesian Society,” *Jurnal Dinamika Hukum* 17, no. 2 (2017): 198.

²⁴ I Nyoman Yoga Segara, “Positive Religious Coping, Cultural Anthropology of Women Rights and Well-Being of Hindu Women in Bali Indonesia,” *Journal of Ethnic and Cultural Studies* 8, no. 3 (2021): 266.

²⁵ See The Preamble of the Universal Declaration of Human Rights (UDHR).

²⁶ Mohd Nazish, “United Nations and Women’s Rights: A Historical Analysis of CEDAW,” *Sprin Journal of Arts, Humanities and Social Sciences* 3, no. 1 (2024): 42.

²⁷ Andrew C. Byrnes and Marsha Freeman, “The Impact of the CEDAW Convention: Paths to Equality,” *UNSW Law Research Paper 2012-7* (2012): 1.

that the Charter of the United Nations reaffirms faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women.”²⁸ A mother has the right to take care of her child, even though according to Balinese Customary Law, child care should be in the father's family.²⁹ Customary laws are frequently passed down orally from generation to generation rather than being recorded in written documents.³⁰ It poses a significant challenge when there exists divergent thinking from longstanding generational norms and regulations.

One of the biggest childhood traumas is parental divorce, which has a lasting effect on people's mental health, family dynamics, and educational opportunities. However, certain traits of culturally varied families and communities, as well as culturally sensitive interventions, mitigate or worsen this influence.³¹ The separation of a child from his mother will certainly have an impact on the child's mental health, especially if the father's family forbids the child to meet his mother. Parenting must also be based on the principle of the child's best interests as mandated in the Convention on the Rights of the Child (CRC).³² Children are recognized as human rights bearers under the CRC, and they are entitled to all the fundamental freedoms and human rights specified in the convention as well as in relevant international human rights protocols and jurisprudence.³³

Several studies have discussed post-divorce custody. Putra and Alfaris (2021) demonstrated how marital law actually functions, particularly in regards to court rulings pertaining to child custody disputes.³⁴ Sridiani, Lukman, and Ratnadewi (2021) examined the dynamics of child custody under the *nyentana* system, where men join the women's family. In cases of divorce, custody typically resides with the mother, contingent upon her fulfilling maternal responsibilities; however, under specific circumstances,

²⁸ See Preamble of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

²⁹ A. A. Mas Adi Trinaya Dewi, “Implementation of Judges' Decisions on Children After Marriage Division in the Purusa System,” *Proceedings of The International Conference on Multi-Disciplines Approaches for The Sustainable Development* (2023): 338.

³⁰ I Gusti Agung Mas Rwa Jayantiari et al, “Forming Legal Culture in Customary Forest Management: Local Wisdom Approach of Customary Law Communities,” *Udayana Journal of Law and Culture* 8, no. 1 (2024): 74.

³¹ Tuba Demir-Dagdas et al, “Parental Divorce and Children from Diverse Backgrounds: Multidisciplinary Perspectives on Mental Health, Parent–Child Relationships, and Educational Experiences,” *Journal of Divorce & Remarriage* 59, no. 6 (2018): 469.

³² Convention on the Rights of the Child (CRC), Art. 3 (1).

³³ Ton Liefwaard, “Access to Justice for Children: Towards a Specific Research and Implementation Agenda,” *The International Journal of Children's Rights* 27, no. 2 (2019): 196.

³⁴ M. Taufan Perdana Putra and M. Alfaris, “Reality of Indonesian Marriage Law Concerning Post-Divorce Child Custody,” *RADIANT Journal of Applied, Social, and Education Studies* 2, no. 2 (2021): 152.

custody may be transferred to the father.³⁵ According to research by Ramadan and Muslimin (2022) on decisions made by Indonesian Religious Courts regarding child custody, judges who base their findings on textual analysis typically determine that the mother has the right to custody, as stated in Article 105 of the Compilation of Islamic Law.³⁶

This paper explores the ramifications of the patrilineal kinship system in divorce proceedings, examines the factors influencing judges' decisions regarding child custody among Balinese society, and proposes reforms aimed at prioritizing the child's best interests in custody arrangements. The research aims to offer a fresh perspective on child custody that safeguards the rights of women as mothers while promoting the optimal well-being of the child.

This paper is a normative juridical research examining the neglect of women's and children's rights in court decisions about custody rights in Balinese peoples. The legal materials used include primary legal materials and secondary legal materials, namely international legal instruments, statutory regulations, Supreme Court Decision, and decisions of district courts in Bali which settling custody rights, and the Decision of the Main Assembly of *Pakraman* Village.³⁷ The secondary legal materials used are literature, scientific journals, and published research reports. Legal materials were collected through a literature study. The analysis in this research was carried out qualitatively by analyzing various court decisions regarding custody rights for Balinese people and the considerations of the panel of judges. This research recommends a child custody model for Balinese society based on the best interests of the child without sacrificing women's rights as mothers.

³⁵ Ni Wayan Sridiani Diani, Dwi Ratna Kamala Sari Lukman, and Ni Nyoman Ertnita Ratnadewi, "Nyentana Marriage Divorce Reviewed from Balinese Customary Law and its Consequences for Children," *Legal Brief* 11, no. 1 (2021): 148.

³⁶ Suci Ramadhan and J. M. Muslimin, "Indonesian Religious Court Decisions on Child Custody Cases: Between Positivism and Progressive Legal Thought," *JURIS (Jurnal Ilmiah Syariah)* 21, no. 1 (2022): 89.

³⁷ *Pakraman* Village is a Balinese term which means a unity of customary law community in Bali Province that has a unity of tradition and manners of social interaction of Hindu community from generation to generation in the bond of *kahyangan tiga* or *kahyangan desa* which has a certain territory and its own wealth and has the right to manage its own household. This term appears in Regional Regulation of the Bali Province No. 3 of 2001 concerning *Pakraman* Village. The term *Pakraman* Village has been replaced by *desa adat* according to Regional Regulation of the Bali Province No. 4 of 2019 concerning Customary Villages in Bali.

2. RESULT AND ANALYSIS

2.1 Implications of the Patrilineal Kinship System in Divorce

Hazairin (1962) outlines three primary principles of kinship lines. Firstly, patrilineal systems form extensive family units like clans, where individuals trace lineage exclusively through their father, determining membership in either the father's or mother's clan based on parental marriage type, as seen in alternating patrilineal systems. Secondly, matrilineal systems also establish large family units, such as clans or tribes, with lineage traced solely through the mother, determining membership accordingly. Thirdly, bilateral or parental systems can form large family units like tribes or groups, where individuals trace descent through either the mother or father.³⁸

In cultures following patrilineal traditions, lineage is traced through the father, emphasizing the significance of male offspring in patriarchal societies where sons are often expected to continue the family line.³⁹ Conversely, daughters are perceived as transitioning to new families upon marriage, diminishing their role as inheritors within their natal family.⁴⁰ Balinese cultural norms reflect this hierarchy by prioritizing sons as primary successors responsible for ancestral lineage continuity, believed to safeguard ancestors from spiritual unrest.⁴¹ In contrast, daughters assume a secondary position, expected to uphold duties and obligations within their marital family after marriage.⁴² Balinese people with a patrilineal family system, causing only male descendants to be considered able to take care of and carry on family responsibilities.⁴³ The male prerogative of guardianship and custody of children—which granted the father exclusive control over the child's personal matters, including property, habitation, travel, education, and marriage—persisted until the 19th century.⁴⁴

The strong impact of the patriarchal system has resulted in an acute stigmatization of women which cannot be simply cleaned up even when they

³⁸ Hazairin. *Hukum Kekeluargaan Nasional* (Jakarta: Tinta Mas, 1962), 20.

³⁹ Natalie Bau and Raquel Fernández, "Culture and the Family," *Handbook of the Economics of the Family* 1, no. 1 (2023): 6.

⁴⁰ Yermia Stephani Ambarita et al, "The Balinese Inheritance Customary Law During Modernity and Gender Equality Era (A Case Study)," *International Journal of Social Science And Human Research* 6, no. 1 (2023): 674.

⁴¹ *Ibid.*

⁴² Ni Nyoman Rahmawati, "Budaya Bali dan Kedudukan Perempuan Setelah Menikah (Perspektif Hukum Waris Hindu)," *Satya Dharma: Jurnal Ilmu Hukum* 4, no. 1 (2021): 3-4.

⁴³ I Putu Andre Warsita, I Made Suwitra, and I Ketut Sukadana, "Hak Wanita Tunggal Terhadap Warisan dalam Hukum Adat Bali," *Jurnal Analogi Hukum* 2, no. 1 (2020): 83.

⁴⁴ R. Raday, "Gender Equality and Women's Rights in The Context of Child Custody and Child Maintenance," *UN Women Discussion Paper Series* 30 (2019): 1.

live in the post-modern era.⁴⁵ Efforts to escape from the shadow of masculinity have been going on for a long time, and there is still a stigma due to masculine domination that seems to make men and women contradict each other.⁴⁶ With a patriarchal system, men will always be reluctant to be positioned lower than women.⁴⁷ Patricia Smith, in her article entitled “Feminist Jurisprudence,” as quoted by Dennis Patterson (2010), mentioned that all women endure patriarchy, which is the systemic subordination of women to men. The perspective of all women is that of individuals who, in spite of everything else that may be different about them, are subjected to subordination because of their gender. In spite of the fact that certain interpersonal interactions may differ from this standard, systematic social organization adheres to it universally.⁴⁸

The patriarchal culture has implications and is seen in the domestic life of the Balinese people.⁴⁹ In traditional Balinese society, women have a demanding workload.⁵⁰ Besides having to work in the domestic sector, such as taking care of children, washing clothes, cleaning the house, and so on, women also work to earn a living.⁵¹ In fact, in many families of Balinese peoples, household expenses are borne by the wife. Women who have married will live in the husband's family home; therefore, a wife must also serve her husband's family and relatives. Men occupy leadership roles where engaging in domestic tasks is viewed unfavorably, and wives who request assistance from their husbands with household chores risk undermining their husbands' authority.⁵² These household dynamics contribute to marital conflicts that can lead to divorce, although not all Balinese women are willing to consider separation despite experiencing domestic abuse.

Bali, one of Indonesia's 38 provinces, comprises 8 regencies and 1 city serving as its provincial capital. According to data from the Directorate General of Population and Civil Registration, Jembrana Regency in Bali Province records the highest proportion of divorced individuals, totalling

⁴⁵ I Nyoman Yoga Segara, “Balinese Hindu Women,” *1st Annual International Conference on Social Sciences and Humanities (AICOSH 2019)*, (2019): 172.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ Dennis Patterson. *A Companion to Philosophy of Law and Legal Theory: Second Edition* (UK: Blackwell Publishing, 2010), 294.

⁴⁹ I Made Yuda Suryawan, Ni Luh Tut Tri Ratnawati, and Jonathan Jacob Paul Latupeirissa, “The Conflict Analysis of Balinese Women on Equality in Work, Family and Social Life,” *Journal of Humanities, Social Science, Public Administration and Management (Husocpument)* 1, no. 1 (2021): 26-31.

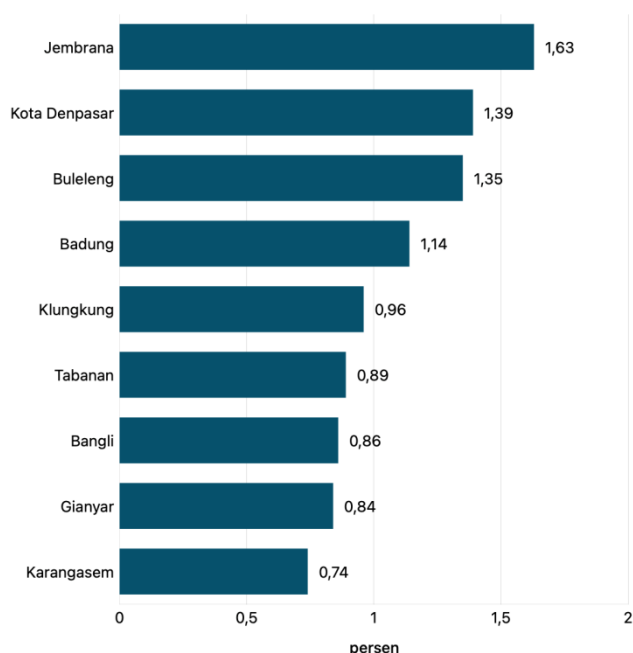
⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² Parveen Azam Ali, Julie McGarry, and Aneela Maqsood, “Spousal Role Expectations and Marital Conflict: Perspectives of Men and Women,” *Journal of interpersonal violence* 37, no. 9-10 (2022): NP7083.

5,315 people or 1.63% of its population of 325,651 as of 2021. This rate surpasses that of other 7 regencies/city, with Denpasar City following at 1.39%, Buleleng Regency at 1.35%, Badung Regency at 1.14%, and Klungkung Regency at 0.96%. Tabanan Regency reported a divorce rate of 0.89%, Bangli Regency at 0.86%, Gianyar Regency at 0.84%, and Karangasem Regency at 0.74%. Overall, Bali's population is expected to reach 4.28 million by the end of 2021, with 42.98% unmarried, 51.62% married, and 1.12% divorced.⁵³ More details can be seen in Graphic 1:

Graphic 1. Proportion of People with Divorced Status in Regencies/Cities of Bali Province (2021)⁵⁴



Whereas Karangasem Regency reported the lowest percentage of divorce cases, as can be seen in Graphic 1, the Amplapura District Court, which has jurisdiction over legal cases in Karangasem Regency, has processed 87 divorce cases between January and April 2023. The primary factors contributing to these divorces include economic difficulties, infidelity, and domestic violence.⁵⁵

Women who choose to divorce will assume the status of "*mulih deha*", which signifies their return to their natal family with the expectation that

⁵³ Viva Budy Kusnandar, "Penduduk Cerai Hidup di Jembrana Tertinggi Se-Bali pada 2021," <https://Databooks.katadata.co.id/datapublish/2022/06/16/Penduduk-cerai-hidup-di-jembrana-tertinggi-se-bali-pada-2021>

⁵⁴ *Ibid.*

⁵⁵ I Wayan Selamat Juniassa, "Kasus Perceraian di Karangasem Meningkat hingga 50 Persen," <https://www.detik.com/bali/berita/d-6723660/kasus-perceraian-di-karangasem-meningkat-hingga-50-persen>

they will be accepted back by their parents or siblings.⁵⁶ The status of being a "*mulih deha*" woman results from divorce, although not all divorces lead to this status. Several conditions must be met for a woman to have the rights and responsibilities to return to her natal family: a formal return process, acceptance by her family, an official handover at her residence witnessed by customary village authorities, a religious ceremony to honor her family, and the *uang kepeng*⁵⁷ termination ritual to signify the dissolution of the marriage.⁵⁸ Adhering to these stipulations diminishes the agency of women.

A woman opting to separate from her husband may not necessarily find acceptance from her family of origin. Instances arise where her family may refuse to welcome her back, often due to her marriage to a man of lower social status or concerns that her return under the status of "*mulih deha*" may lead to inheritance claims, as this status entails specific rights and responsibilities. Empirical evidence indicates that there are no established regulations governing marriages to foreigners in customary villages.⁵⁹ Consequently, divorced women often encounter challenges in gaining acceptance within these communities.⁶⁰ Consequently, divorced women who are not embraced by their natal families lack status both within their ex-husband's family and their own. Such a status is crucial as it dictates the place of burial upon their death, a significant consideration in Hindu teachings that emphasize reverence for ancestors. The complexity deepens if such a woman also contends for child custody without familial support.

2.2 The Basis for the Judge's Consideration in Deciding Child Custody Rights in Balinese People

To mitigate the impact of divorce on children, addressing parenting concerns becomes crucial in fostering their holistic development and future well-being. Children often endure significant adversities, encompassing physical, psychological, and economic challenges, alongside potential mistreatment, animosity toward parents, and disrupted upbringing. Despite

⁵⁶ Anak Agung Dwijanata and Ni Made Griadhi, "Kedudukan Hukum Anak Perempuan yang Ninggal Kedaton Pasca Perceraian dalam Perspektif Hukum Adat Bali," *Kertha Desa* 8, no. 3 (2019): 11.

⁵⁷ "*Uang Kepeng*" is a Balinese or Indonesian term meaning coin money. *Kepeng* money represents an intercultural heritage between Bali and China, integral to Balinese culture. Today, it also plays a significant role in Hindu rituals. *Kepeng* money remains essential in Bali as long as the people continue to uphold Hinduism as a fundamental belief in the existence of God (*Ida Sang Hyang Widhi Wasa*). See: Anak Agung Gede Raka et al, "Chinese Ancient Coin-Uang kepeng: A Strengthened of Bali and China Relationship," *Journal of Environmental Management and Tourism* 11, no. 2 (2020): 272.

⁵⁸ Putu Ayu Devi Kardila, I Nyoman Putu Budiarta, and I Wayan Rideng, "Kedudukan Perempuan Mulih Daha dalam Keluarga dan Akibat Hukum Terhadap Anak di Desa Adat Mengwitani," *Jurnal Konstruksi Hukum* 2, no. 3 (2021): 608.

⁵⁹ Adnyani and Purnamawati, *op.cit.*, 28.

⁶⁰ *Ibid.*

these hardships, divorce may offer a respite from hostile environments, paving the way for a fresh start with improved prospects.⁶¹ Thus, prioritizing effective parenting is essential to safeguarding children from the detrimental consequences of divorce.

A court decision on divorce can also decide on child custody. Balinese customary law is often used as a reference by judges when deciding on custody in Bali. In Bali, fathers typically receive priority in child custody decisions following divorce, grounded in the child's affiliation with the paternal family and limited connection to the maternal lineage. This practice is evident in various court rulings, such as Gianyar District Court No: 114/Pdt.G/2011/PN.Gir, which deliberated on divorce cases. The judges deliberated that the marriage between the plaintiff and defendant adhered to Balinese customary law, where the defendant held the *Purusa* (male) status.⁶² Consequently, children born from this union are recognized under the kinship of the defendant as *Purusa*. Thus, the judicial panel concluded that custody of the plaintiff's child should be entrusted to the defendant based on these customary principles.⁶³

In the Decision of Denpasar District Court No. 36/PDT.G/2016/PN.Nga, the plaintiff (wife) and defendant (husband) were subjects of a divorce case. The judge's reasoning emphasized that the marriage was conducted according to Balinese customs and Hinduism, whereby the defendant assumed the role of *purusa* responsible for lineage continuity, ancestral service, and fulfilling customary obligations within the defendant's parental family.⁶⁴ In contrast, the plaintiff, as *pradana* in the marriage, lacked legal standing regarding the children she bore, who were instead recognized under the *purusa* lineage.⁶⁵ Custodial authority over the children was awarded to the defendant. The judge's ruling, by referring to the applicable customary law of the Singaraja customary village community, upholds a patrilineal framework in which children are integrated into the husband's family.⁶⁶ The Denpasar District Court should refer to the customary law of Singaraja because the legal and cultural context of the parties involved is rooted in that specific locality. In this case, the decision to apply Singaraja's customary law likely stems from two key factors: the

⁶¹ Ubong E. Eyo, "Divorce: Causes and Effects on Children," *Asian Journal of Humanities and Social Studies* 6, no. 5 (2018): 176.

⁶² See Decision of Gianyar District Court No. 114/Pdt.G/2011/PN.Gir, Gianyar, p. 11.

⁶³ *Ibid.*, p. 13.

⁶⁴ See Decision of Denpasar District Court No. 36/PDT.G/2016/PN.Nga, p. 12.

⁶⁵ Lisa Aprilia Gusreyna and Siti Kotijah, "Peraturan Pemeliharaan Anak dalam Hukum Adat Bali Akibat Perceraian Putusan No.36/Pdt.G/2016/Pn.Ng," *Risalah Hukum* 18, no. 1 (2022): 60.

⁶⁶ *Ibid.*

groom's origin from Singaraja and the fact that the wedding ceremony was held there. Customary law in Singaraja is a reference for judges in deciding cases even though the trial was held at the Denpasar District Court because the groom came from Singaraja district and the wedding ceremony was previously held in Singaraja. Consequently, children are affiliated with and assume obligations towards their father's family, with corresponding rights and responsibilities derived from that lineage, while their relationship with their mother's family lacks direct legal recognition.⁶⁷

In another case before the Denpasar District Court (Decision No.37/Pdt.G/2019/PN Denpasar), custody is granted to the father, albeit with a more flexible arrangement. The three children are placed under joint custody until they reach maturity and can make independent decisions, currently residing with the father (defendant) as their guardian, yet allowing the plaintiff opportunities to demonstrate affection towards the children.⁶⁸

Decision of Singaraja District Court No. 175/Pdt.G/2017/PN Sgr determines that the right to care for the child named the plaintiff and defendant's child, male, remains in the defendant's care as *purusa* while still providing the plaintiff with the opportunity to meet with his child at any time to give affection.⁶⁹ Based on this explanation, it can be inferred that the judge's criteria for determining child custody and support rights post-divorce hinge on the husband's capability as the child's father to provide for their care and financial support.⁷⁰ Men are deemed capable caregivers due to their perceived ability to ensure the children's livelihoods.

Decision of Amlapura District Court No. 78/Pdt.G/2021/PN Amlapura specifies that the father is granted custody of the first and second children, while allowing the mother the right to visit and invite the children at any time to express her maternal affection. The judge's rationale is grounded in the family law of Bali, where Balinese society follows a patrilineal system (*Vaderrechtelijk*).⁷¹ This system is evident in the wife's integration into her husband's family, resulting in the children being affiliated with the father's family without direct ties to the mother's family. The children's obligations and rights are likewise associated with their father's family, contrasting with their relationship to the mother's family, where such connections are not recognized.⁷²

⁶⁷ *Ibid.*

⁶⁸ See Decision of Denpasar District Court No. 37/Pdt.G/2019/PN Denpasar, 13-14.

⁶⁹ See Decision of Singaraja District Court No. 175/Pdt.G/2017/PN Sgr, 12.

⁷⁰ Ni Kadek Sintia Antari and I Wayan Agus Vijayantera, "Pertimbangan Hukum dalam Menetapkan Hak Asuh dan Pembebanan Nafkah Anak Pasca Perceraian," *Jurnal Hukum Mahasiswa* 1, no. 2 (2021): 347.

⁷¹ See Decision of Amlapura District Court No. 78/Pdt.G/2021/PN Amlapura, p. 11.

⁷² *Ibid.* p. 14.

The decisions of various district courts above indicate that the favours to award custody of the child to the father. The basis for the panel of judges' consideration was the kinship system in Bali which draws lineages based on the father's family. The father and the father's family have a responsibility to the child and conversely the child is the successor to his father's generation and not the successor to his mother's generation. The child will continue his religious, traditional and inherited obligations in his father's family. However, a mother still has the right to give love to her child, even if she is not caring for the child.

Children are viewed as continuations of parental rights and obligations concerning kinship (succession).⁷³ The patrilineal system in Bali is exemplified by the wife's assimilation into her husband's family, where children are aligned with the father's lineage and do not inherit from the mother's side.⁷⁴ This arrangement ensures continuity in the child's future status and life, as inheriting from the mother's lineage would create uncertainty.⁷⁵ Granting custody to the mother post-divorce could potentially lead to ambiguity regarding the child's status, responsibilities, and rights.⁷⁶ Thus, paternal custody ensures clarity in the child's legal and social standing, distinguishing between parental roles and responsibilities.⁷⁷

Based on legal practices, the effort to secure paternal custody of a child is typically more assertive if the child is male, whereas girls generally encounter more flexibility. The Balinese traditional community upholds a patrilineal family structure, employing the majorated inheritance system, which prioritizes descendants with *kapurusa*⁷⁸ status—highlighting the perceived importance of males in assuming family responsibilities aligned with Hindu beliefs and environmental conservation. Consequently, only male descendants traditionally hold inheritance rights, whereas those with

⁷³ Antonela Miho and Olivier Thévenon, "Treating all children equally. Why policies should adapt to evolving family living arrangements," *OECD Social, Employment and Migration Working Papers*, no. 240 (OECD Publishing, 2020), 30.

⁷⁴ Anastasia Septya Titisari et al, "Stories of women's marriage and fertility experiences: Qualitative research on urban and rural cases in Bali, Indonesia," *Gates Open Research* 7 (2023): 126.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ Verronica Verronica and Imelda Martinelli, "Akibat Hak Asuh Anak di Bawah Umur yang Diasuh Terpisah oleh Ayah atau Ibu Pasca Perceraian (Studi Kasus: Putusan Pengadilan Negeri Tabanan Nomor: 169/PDT. G/2017/PN. TAB)," *Jurnal Hukum Adigama* 5, no. 1 (2022): 144.

⁷⁸ *Kapurusa* has a similar meaning with *purusa*.

pradana status are viewed as less likely to fulfill familial duties and are thus deemed ineligible for inheritance within the family framework.⁷⁹

The predominance of judicial decisions regarding child custody among the Balinese customary community reflects their perspective on children as the heirs of the family. Granting custody to the father is perceived as serving the child's best interests by ensuring care within his paternal family, while the maternal family is not recognized as the child's family. The scenario where a mother loses custody can facilitate her remarriage, as Balinese society, influenced by patriarchal norms, often struggles to accept stepchildren. Stepchildren participating in rituals at their stepfather's family temple may be seen as venerating ancestors unrelated to them.

In instances where a mother retains custody of children from her previous marriage and subsequently remarries, complexities arise in Bali, particularly if the first husband belonged to the *Sudra*⁸⁰ caste and the children belong to the *Sudra* caste. Remarrying a man from a different caste is viewed critically in Balinese customary society, likened to consuming leftovers from a *Sudra*'s meal.⁸¹ This situation underscores the challenges posed by caste dynamics and the implications for children when their mother remarries outside her original caste affiliation after divorce.⁸² Based on conditions in society, in specific instances, women awarded custody may face requests from their prospective husband's family not to bring their child into the new marriage. This customary practice underscores the belief that custody rights should reside with the biological father's family, often overlooking the child's emotional needs. However, customary norms should evolve to remain relevant in contemporary society, recognizing that traditions are not immutable and should adapt to changing times.

In legal practice, there are instances where judges grant custody to mothers. This is exemplified in the decision of Denpasar District Court No.

⁷⁹ Ria Maheresty, Aprilianti, and Kasmawati, "Hak Anak Perempuan dalam Sistem Pewarisan pada Masyarakat Adat Bali (Studi di Banjar Tengah Sidorejo Kecamatan Sekampung Udik Kabupaten Lampung Timur)," *Pactum Law Journal* 1, no. 2 (2018): 138.

⁸⁰ *Sudra* is a Balinese term, meaning commoner. It is generally accepted that the term *sudra* comes from Sanskrit language. In India, for centuries *Sudra* have been part of caste system. These roles are dependent on the Balinese caste system, which follows the Indian system of four castes: *Brahmana*, *Satria*, *Wesia* and *Sudra*. Ideally, the *Brahmins* are in charge of religion, the *Satria* in charge of politics, the *Wesia* in charge of trade, and the *Sudra* are the workers in other areas. This caste status, called *wangsa*, is ascribed and inherited at birth. The three higher castes (*Brahmana*, *Satria* and *Wesia*) are said to make up the *Triwangsa*, or the *Menak* (aristocrats), whereas the commoners are the *Sudrawangsa*, or *Jaba* (the lower caste group or outsiders). As much as 90% of the population is made up of the *Sudras*, themselves subdivided into many clans and subclans, with many types of temples. See: June McDaniel, "Mysticism among the Pedandas of Bali," *Religions* 11, no. 11 (2020): 5.

⁸¹ Dewa Gede Edi Praditha and Made Hendra Wijaya, "Kedudukan Anak Tiri Beda Kasta Terhadap Pewarisan," *Jurnal Hukum Saraswati* 4, no. 1 (2022): 31.

⁸² *Ibid.*

114/Pdt.G/2016/PN.DPS, where custody rights were awarded to the plaintiff (wife) due to the child's young age resulting from the marriage between the plaintiff and the defendant (husband). The judge's decision referenced provisions in Law No. 1 of 1974 concerning Marriage, which stipulates that divorce entails legal consequences for children, ex-spouses, and shared assets. In particular, when parents divorce, they still have a duty to provide for and educate their children, with decisions being made only with the child's best interests in mind. The ruling of Denpasar District Court's was based on granting custody to the mother (*pradana*), supported by evidence of the father's negligence and domestic violence.⁸³ Based on practical conditions, the pursuit of child custody is invariably protracted, as women must substantiate allegations of domestic violence committed by their husbands. This process places significant strain on the involved parties, potentially escalating hostilities between the wife and her extended family against her ex-husband and his relatives, despite their divorce.

In reviewing several court decisions, it becomes evident that custody rulings in post-divorce Bali prioritize the child's best interests regarding their legal status within the kinship system. The evaluation of children's welfare often disregards the closeness and relational dynamics with both parents, emphasizing instead the judge's discretion in choosing a prevailing model for resolving custody disputes. Overemphasis on normative aspects risks neglecting the rights and welfare of children. Conversely, prioritizing the child's best interests necessitates thorough evidence gathering, including assessments of parental history, parent-child interactions, and other pertinent factors crucial to achieving optimal parenting outcomes. Amidst various models and approaches to custody determination, the concept of shared parenting, also known as joint custody, has emerged.⁸⁴ This approach aims to reconcile differences between existing models and patrons, promoting a parenting framework that not only prioritizes the child's welfare but also maximizes the involvement of both parents in their upbringing.⁸⁵

⁸³ Sang Ayu Putu Sukma Dewi, AA Sri Indrawati, and Suatra Putrawan, "Hak Asuh Anak dalam Suatu Perceraian (Study Kasus Putusan No. 114/PDt. G. 2016) di Pengadilan Negeri Denpasar," *Kertha Semaya: Journal Ilmu Hukum* 7, no. 7 (2019): 13.

⁸⁴ See for example M. Natsir Asnawi, "Penerapan Model Pengasuhan Bersama (Shared Parenting) dalam Penyelesaian Sengketa Hak Asuh Anak," *Al Iqtishadiyah Jurnal Ekonomi Syariah Dan Hukum Ekonomi Syariah* 5, no. 1 (2019): 61.

⁸⁵ *Ibid.*

2.3 Reconstruction of Child Custody That is Oriented to the Best Interests of the Child

Gender inequality is a structured system that places both men and women as victims, making it very important to work towards advancing gender equality.⁸⁶ Since the 1990s, gender has become a prominent priority in global education policy. Gender equity, a dynamic process, aims to ensure equal access, participation, control, and benefits in various spheres of life, spanning from familial to national levels.⁸⁷ Thus, efforts are required to enhance the quality and capacity of disadvantaged groups, encompassing both women and men, through affirmative action.⁸⁸ Gender transcends the traditional binary of male and female sexes, embodying a multifaceted social system that shapes the life experiences of individuals.⁸⁹

The customary legal framework governing child custody is susceptible to change. Customary law is inherently dynamic, evolving in response to temporal and spatial circumstances.⁹⁰ Legal developments consistently adapt to evolving societal changes.⁹¹ The evolution of customary law pertaining to child custody in Bali may evolve alongside increasing recognition of human rights and the best interests of children. A pivotal aspect of reforming customary legal systems involves updating teaching materials, which serve as references in court decisions.⁹² Despite customary law adopting a positivist approach to its study a century ago, empirical developments have been dynamic, yet substantive changes to teaching materials have been limited.⁹³ It can be argued that the influence of international and national legal instruments can stimulate the evolution of customary legal systems concerning custody.

The mere act of reporting under the CEDAW tends to have a positive influence on the state of women's rights in any given country. The prospects for advocating women's rights in determining child custody are bolstered by

⁸⁶ Alan Greig and Michael Flood. *Work With Men And Boys For Gender Equality: A Review Of Field Formation, The Evidence Base And Future Directions*. UN-Women Discussion Paper Series (New York: United Nations Entity for Gender Equality and the Empowerment of Women, 2020), 15.

⁸⁷ Karen Monkman. *Gender Equity in Global Education Policy* (Oxford: Oxford Research Encyclopedia of Education, 2021), 1.

⁸⁸ Greig and Flood, *loc.cit.*

⁸⁹ Lori Heise et al, "Gender Inequality and Restrictive Gender Norms: Framing the Challenges to Health," *The Lancet* 393 (2019): 2440.

⁹⁰ Rica Gusmarani, "Eksistensi Masyarakat Hukum Adat di Desa Saribu Asih, Kecamatan Hatonduhan, Kabupaten Simalungun," *Journal Law of Deli Sumatera* 1, no. 2 (2022): 11.

⁹¹ *Ibid.*, 12.

⁹² Sartika Intaning Pradhani and Almonika Cindy Fatika Sari, "Penerapan Pendekatan Positivistik Dalam Penelitian Hukum Adat," *Masalah-Masalah Hukum* 51, no. 3 (2022): 237.

⁹³ *Ibid.*

various legal protections for women, such as the CEDAW.⁹⁴ Concrete examples illustrate opportunities for mothers to secure custody in judicial precedents. Judges base their decisions on existing laws, and in instances where the law is incomplete or ambiguous, judges engage in *rechtsvinding*, the process of seeking and interpreting legal principles to guide their rulings.⁹⁵

In global legal developments, the CRC frequently serves as a cornerstone in determining child protection and custody decisions.⁹⁶ This principle actively combats the neglect of children's rights and perspectives, explicitly avoiding bias towards either parent based on gender. It aligns with the trend towards judicial discretion, empowering courts to prioritize the best interests of each child.⁹⁷ However, the broad scope of this principle necessitates clearer interpretation in judicial practice, particularly in terms of optimal parenting practices and general child development, as well as specific case contexts.⁹⁸ Consequently, this principle underscores the necessity for expert assessors with knowledge of child care and development, and demands considerations rooted in developmental theories of robust scientific credibility.⁹⁹

The decision of the Supreme Court of the Republic of Indonesia No. 126K/Pdt./2001 dated August 28, 2003 stated that "*If the father and mother divorce, the care of the minor is left to the closest person to the child, namely the mother*".¹⁰⁰ This jurisprudence strives a balance between the application of customary law and national law which is the basis for considering judges in their decisions regarding child custody in divorce.¹⁰¹ The Supreme Court ruling stated that "*In the event of a divorce, the child who is still under the age of care should be handed over to the closest person to the child, namely the mother*".¹⁰² In previous Supreme Court ruling, the Decision No.

⁹⁴ Rangita De Silva De Alwis and Melanne Verveer, "'Time Is A-Wasting': Making the Case for CEDAW Ratification by the United States," *Columbia Journal of Transnational Law* 60 (2021): 55.

⁹⁵ Laksana Arum Nugaheni, "Dinamika Hukum Waris Adat dalam Sistem Kekerabatan Patrilineal: Pewarisan Terhadap Anak Perempuan," *Jurnal Literasi Hukum* 5, no. 1 (2021): 136.

⁹⁶ Tina Gerdts-Andresen and Heidi Aarum Hansen, "How the child's views is weighted in care order proceedings," *Children and Youth Services Review* 129 (2021): 106179.

⁹⁷ Evelyn Merckx, "Article 12 CRC as a Tool to Empower Children after Parental Separation," *The International Journal of Human Rights* 26, no. 2 (2022): 239.

⁹⁸ Tommie Forslund et al, "Attachment Goes to Court: Child Protection and Custody Issues," *Attachment & Human Development* 24, no. 1 (2022): 5.

⁹⁹ *Ibid.*

¹⁰⁰ Translation is made by the Authors.

¹⁰¹ Ni Putu Yuliana Kemalasari, "Pertimbangan Hakim dalam Menentukan Hak Asuh Anak Akibat Perceraian Agama Hindu di Bali," *Jurnal Aktual Justice* 4, no. 2 (2019): 156.

¹⁰² See the Supreme Court Decision No.126 K/PDT/2001, p. 30.

102k/Sip/1973, it was stated that: "*Based on Jurisprudence regarding child guardianship, the benchmark is that the biological mother is prioritized, especially for young children, because the interests of the child are the criteria.*"¹⁰³

Customary leaders in Bali have provided opportunities for women to get custody. The decision of the Main Assembly of the *Pakraman* Village¹⁰⁴ of Bali Province No. 01/Kep/PSM-3/MDP Bali/X/2010 stipulates that "After a divorce, a child born can be cared for by his mother, without breaking the child's *pasidikaran*¹⁰⁵ relationship with the *purusa* family, and therefore the child gets life insurance from the *purusa*."¹⁰⁶ However, the position of the Decision of the Main Council of Customary Villages¹⁰⁷ is only as a guide that is not mandatory to be followed. The decision is still being debated given the deep roots of patrilineal culture. In the patrilineal kinship system, all children will follow and carry on their father's clan, and this position will not change even if their parents are divorced. In cases where the child is still a toddler and breastfeeding, the responsibility for caregiving and education typically rests with the mother. This practice aligns with customary norms that recognize the essential nurturing role mothers play in the early developmental stages of their underage children.¹⁰⁸

Developments with a more modern approach present the concept of shared parenting. Child custody law in Indonesia, from a normative and practical point of view, generally still applies a separate parenting model or parenting by one of the child's parents (split parenting, split custody). This is not only happening in Indonesia, but also in the legal system in various

¹⁰³ See the Supreme Court Decision No. 102k/Sip/1973, p. 6. Translation is made by the Authors.

¹⁰⁴ Based on Regional Regulation of the Bali Province No. 3 of 2001 concerning *Desa Pakraman* as the legal basis for the formation of customar villages at that time, the formation of the Main Assembly of *Pakraman* Village was chosen by representatives of the villages throughout Bali through the *Paruman Agung* (large meeting). The assembly has the authority to deliberate on various matters concerning customary and religious issues for the benefit of pakraman village; as a mediator in customary cases that cannot be resolved at the village level; assist in organizing religious ceremonies in the sub-district, in the district/city, and in the province.

¹⁰⁵ *Pasidikaran* is a Balinese term, meaning a form of cooperative action carried out to achieve a desired goal together. See I Wayan Sunampan Putra, "Rekonstruksi Sidikara Pada Masyarakat Bali Sebagai Praktek Ajaran Teologi Sosial," *Jnanasiddhanta: Jurnal Teologi Hindu* 3, no. 2 (2022): 187.

¹⁰⁶ The Assemblage of Results of the III *Pakraman* Village Assemy (MDP) Bali Grand Meeting in Bali on October 15th 2010.

¹⁰⁷ The decision of the Main Assembly of the *Pakraman* Village of Bali Province No. 01/Kep/PSM-3/MDP Bali/X/2010 does not have binding force if it is not regulated in *awig-awig* (customary village regulation).

¹⁰⁸ I. G. Surata et al, "Mewujudkan Budaya Taat Hukum di Masyarakat di Desa Gitgit Kecamatan Sukasada Kabupaten Buleleng-Bali," *Jnana Karya* 4, no. 1 (2023): 8.

countries.¹⁰⁹ The idea of the post-divorce family has undergone a dramatic change in the last 25 years in both political and legal discourses.¹¹⁰ The new co-parenting/biological family model, which has its roots in the status of biological parenthood, cross-household parenting, and the blurring of gender roles, has gradually replaced the model of the lone/reconstituted family, which had its roots in the institution of marriage/remarriage, the bounded household unit, and the clear gendering of parenthood. From the early 1980s, the co-parenting/biological family paradigm has progressively supplanted the model of the lone/reconstituted family.¹¹¹ The concept of post-divorce custodial arrangements has changed from exclusive custody (mostly held by mothers) to joint physical custody. Joint physical custody is becoming the primary legal custodial arrangement in certain countries.¹¹² Whether joint physical custody is allowed by law or not, it is thought to be in the child's best interests because children can still have relationships with both of their parents after a divorce.¹¹³

Reconstruction of child custody oriented to the best interests of the child can consider the shared parenting model. Judges have used this paradigm for joint custody decisions. Although there are conventional guidelines for what should be considered in this regard, the best interests of the child are an ill-defined notion whose definition varies depending on the

¹⁰⁹ Currently, in Spain, mothers obtain the majority of sole custody arrangements, obtaining child custody 58% of the time, while men obtain sole custody 4% of the time and shared custody occurs in the other 38% of cases. Spain is divided into seventeen autonomous communities, four of which have adopted their own civil legislation on custody. The rulings of the Spanish Supreme Court have a significant influence on the decisions of the second instance courts and their tendency is in favor of joint physical custody. This may explain why second instance court rulings are increasingly favorable to joint physical custody. See: Jose Felix Muñoz Soro and Carlos Serrano-Cinca, "A Model for Predicting Court Decisions on Child Custody," *PLoS one* 16, no. 10 (2021): 18.

¹¹⁰ Kim Bastaitis and Inge Pasteels, "Is Joint Physical Custody in the Best Interests of the Child? Parent-Child Relationships and Custodial Arrangements," *Journal of Social and Personal Relationships* 36, no. 11-12 (2019): 3752.

¹¹¹ Bren Neale and Carol Smart. "In Whose Best Interests? Theorising Family Life Following Parental Separation or Divorce," in *Undercurrents of Divorce* (Oxfordshire: Routledge, 2019), 33.

¹¹² Our results reveal that shared physical custody is increasing in the United States overall, and this increase appears to reflect changing norms and policies that favor shared custody over sole custody. See Daniel R. Meyer, Marcia J. Carlson, and Md Moshfi Ul Alam, "Increases in Shared Custody after Divorce in the United States," *Demographic Research* 46 (2022): 1137. In Canada, the first major revisions to the child custody provisions of the Canadian Divorce Act since its inception in 1985 have been implemented. The legislative objective of these changes is to enhance opportunities for children to maintain relationships with both parents, provided that all other factors are equal and the parenting arrangement aligns with the best interests of the children. See Nicholas Bala, "Shared Parenting in Canada: Not Presumed, but Increasingly Accepted," *Canadian Family Law Quarterly* 41, no. 2 (2022): 155.

¹¹³ *Ibid.*

instance or situation in which it is applied.¹¹⁴ The decision of the Denpasar District Court No. 706/Pdt.G/2022/PN Dps on September 14, 2022 stated that the two children born from the marriage of the plaintiff and the defendant were in the joint care of the plaintiff and defendant. Thus, these children can be together in the care of their mother and father together and subsequently carried out based on an agreement. The joint parenting decision will indeed face potential conflicts, especially if the emotional conflict in the relationship between the ex-husband and ex-wife has not been resolved.¹¹⁵ The deliberate exploitation of abuse claims by one parent to distance their children from the other is a topic of discussion in another recent parental alienation controversy.¹¹⁶ In the context of criminal law reform, decisions regarding child custody should be accompanied by the imposition of criminal penalties on any party that obstructs the other party's access to the child.¹¹⁷

The application of the law should protect the rights and obligations of each legal subject; therefore, in the event that a certain law is applied, the law should only have an effective impact, improve, fix, and punish problematic parties without colliding and disturbing the rights and obligations of other legal subjects that previously had no problems. In relation to the protection of the rights and obligations of legal subjects, the co-parenting model in court decisions must also be framed with strict restrictions so as not to cause new problems in the future. For example, the definition of co-parenting, ensuring both parents have a good track record in

¹¹⁴ Fuensanta Rabadán Sánchez-Lafuente, "The Best Interests of the Child and Gender Perspective," in *Gender Perspectives in Private Law* (Cham: Springer International Publishing, 2023), 85.

¹¹⁵ See Decision of Denpasar District Court No. 706/Pdt.G/2022/PN Dps, p. 13.

¹¹⁶ Jennifer Harman et al, "Gender and Child Custody Outcomes Across 16 Years of Judicial Decisions Regarding Abuse and Parental Alienation," *Children and Youth Services Review* 155 (2023): 1.

¹¹⁷ Currently, the Constitutional Court is examining a case with application No. 140/PUU-XXI/2023 filed by five mothers, namely Aelyn Halim, Shelvia, Nur, Angelia Susanto, and Roshan Kaish Sadarangani. The five Petitioners are mothers who are fighting for child custody rights. The Petitioners are testing the phrase "Whoever" in Article 330 (1) of the 1946 Criminal Code (KUHP 1946). Article 330 (1) stipulates: "Anyone who intentionally withdraws a person who is not of age from the power that according to law is determined over him/herself, or from the supervision of a person authorized for that purpose, shall be subject to a maximum imprisonment of seven years". In the preliminary dissent, the Petitioner's authority said that all the Petitioners have something in common, namely that after divorcing their husbands, they have child custody rights. However, they currently do not have this right because their ex-husband took their children by force. According to the Applicants, the phrase "Whoever" in that provision should be applied to everyone, including the biological father or mother of the child, as a legal subject. There should be no application that gives absolute power and authority to the father or mother if a violation of the child's rights occurs so that they cannot be held accountable. See Utami Argawati, "Perjuangkan Hak Asuh Anak, Tsania Marwa Jadi Saksi di MK," <https://www.mkri.id/index.php?page=web.Berita&id=20126>

child care, submitting to the child regarding the decision to be with whom physically without any intervention from one of the parents, not hindering each other or even taking the child away without the consent of either party.

The evolution of Balinese customary law concerning child custody can be envisioned as progressing through several strategic stages. First, *Enhancing Academic Research and Collaboration*. The evolution of Balinese customary law pertaining to child custody can be envisioned through a phased approach aimed at integrating academic research with traditional governance structures. Initially, there is a critical need to enhance academic research by fostering collaboration between scholars and Balinese traditional leaders. This partnership aims to develop comprehensive guidelines for child care that resonate with local customs and values. These guidelines would then be incorporated into *awig-awig*.¹¹⁸ By enriching the scholarly discourse with traditional knowledge and cultural insights, this collaborative effort seeks to establish a robust foundation for addressing child custody issues within the framework of Balinese customary law.

Second, *Updating Customary Law Literature*. Another pivotal stage in the evolution of Balinese customary law involves updating existing literature to reflect contemporary understandings of child welfare and custody rights. Despite the prevailing patrilineal kinship system that traditionally favors paternal lineage, there is a growing recognition of the importance of prioritizing the best interests of the child. This involves revisiting and integrating concepts within customary law that accommodate maternal custody arrangements, particularly in cases where it aligns with the child's well-being. By adapting customary law texts to include provisions that safeguard children's rights and promote their holistic development, Balinese legal frameworks can better align with modern standards of child care and protection.

Third, *Increasing Expert Involvement and Advocacy*. A crucial aspect of advancing Balinese customary law on child custody is increasing the involvement of experts who specialize in child welfare and family law. These experts play a pivotal role in advocating for the rights of children and women within the legal system. Their involvement extends to providing informed recommendations and expert testimony in custody cases, thereby ensuring that judicial decisions are grounded in empirical evidence and contemporary best practices. This approach aligns with the principle emphasized by the

¹¹⁸ *Awig-Awig* is a Balinese term meaning rule made by a Customary Village and/or *Banjar* which applies to *Krama*, *Krama Tamiu*, and *Tamiu*). See I Gede Yusa and Ni Ketut Supasti Dharmawan, "The Balinese Traditional Law Instrument: A Realism Between the Balance of Cosmic and Human Rights Context," *PADJADJARAN Jurnal Ilmu Hukum (Journal of Law)* 5, no. 3 (2019): 449 and Ramdhan Mochamad and Nur Hidayah, "The Existence of Balinese Customary Law in National Law," *Proceedings of the International Conference on Community Legal Education* 4 (2020): 1–9.

Committee on the Rights of the Child, which states that "the best interests of the child must be a primary consideration in all actions concerning children, including judicial and administrative decisions."¹¹⁹ By enhancing expert advocacy, Balinese courts can better navigate the complexities of child custody disputes and make decisions that prioritize the well-being and developmental needs of the child. This proactive engagement not only strengthens the legitimacy of legal outcomes but also fosters a more inclusive and child-centered approach within Balinese society.

In summary, the evolution of Balinese customary law regarding child custody involves a multifaceted approach that integrates academic research, updates to legal literature, and increased expert involvement. These efforts are aimed at harmonizing traditional practices with contemporary understandings of child welfare, ultimately ensuring that the best interests of children are comprehensively addressed within the cultural and legal frameworks of Bali.

3. CONCLUSION

The patrilineal kinship system profoundly influences divorce proceedings among the Balinese population. Within this framework, the child is regarded as the successor to the father's family, which underpins the common practice of awarding child custody to the father. Consequently, women who choose to divorce must be prepared to live apart from their children. Judicial decisions on childcare are heavily influenced by Balinese customary law, wherein the best interests of the child are interpreted as securing a clear legal status within the father's family. This interpretation prioritizes legal clarity over the child's emotional need for maternal care. However, the co-parenting model presents a potential solution, enabling children to maintain relationships with both parents without undue restrictions or pressures. This model requires a robust legal framework to prevent future complications. The evolution of Balinese customary law regarding child custody can proceed in stages: First, academic research should be enhanced by collaborating with Balinese customary leaders to develop comprehensive childcare guidelines and incorporating them into *awig-awig* (customary village regulations). Second, customary law literature should be updated by integrating concepts prioritizing the child's best interests and considering maternal custody, despite the patrilineal kinship system, into Balinese customary law texts. Third, expert involvement in

¹¹⁹ The Committee on the Rights of Child, General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art. 3, para. 1), available on https://www2.ohchr.org/english/bodies/crc/docs/gc/crc_c_gc_14_eng.pdf

child custody should be increased to advocate for the rights of children and women and provide informed recommendations to judges in custody cases. These steps aim to align traditional practices with contemporary understandings of child welfare, ensuring that the best interests of the child principles are comprehensively addressed.

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