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RESEARCH ARTICLE

The Impact of The Shifting Meaning of Parental Authority in The Family Law System in Indonesia

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Abstract

Family laws that govern parental authority in post-independence Indonesia's legal system are still plural in nature, i.e., the three provisions governing Family Law are regulated under customary law, Islamic law, and Burgerlijk Wetboek (Book of Civil Law) and Law Number 1 of 1974 concerning Marriage. Although these provisions collectively regulate the identical stands of parental authority, their concepts and provisions are distinguishable.

The results of the study show that the plurality nature of parental authority regulations in the legal system in Indonesia has already been unified through the enactment of Law Number 1 of 1974 concerning Marriage. The concept of parental authority currently in effect has changed compared to the concept of parental authority before the enactment of Law Number 1 of 1974 concerning Marriage. The current concept of parental authority is not associated with the presence or absence of a legitimate marriage. Therefore, parental power does not cease due to the dissolution of the marriage of the child's parents subjected to the parent's authority. Article 47 paragraph (1) of Law Number 1 of 1974 concerning Marriage also provides an age limit of under 18 years old to be subjected to parental authority. This has the effect of changing the legal age limit in the current Indonesian private law system.

Keyword: *Parental Authority, Legal System, Marriage Law, legal Age limit*

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INTRODUCTION

Because of its limitation to perform legal action, civil law regulates minors under parental authority. *Burgerlijk Wetboek,* as a source from the Western civil law, books of Islamic *fiqh* as a source from the Islamic law, and adat (customary) law stipulate that minors are under the parent's

control (Wirjono Prodjodikoro, 1959). Moreover, it is accepted as a necessity that several actions taken by minors are the responsibility of their parents.

After the independence, rules regarding the relationship between parents and children were basically still based on the provisions that were in effect during the colonial period (Wirjono Prodjodikoro, 1959). This means that arrangements regarding the relationship between parents and children still refer to three sources of law, which are *Burgerlijk Wetboek*, Islamic Law and Customary Law. It was only with the passing of Law No. 1 of 1974 concerning Marriage that arrangements regarding the relationship between parents and children obtained a new source of law apart from the three sources of law that had been in effect previously (Mahkamah Agung, 1999).

Even though it has been regulated in the marriage law, arrangements regarding the relationship between parents and children are rearranged in the Compilation of Islamic Law, which is specifically for Muslims. Arrangements regarding the relationship between parents and children are again found in Law No. 23 of 2002 concerning Child Protection as amended by Law No. 35 of 2014. In practice, several provisions in the Civil Code (*Burgerlijk Wetboek*), Islamic law, and customary law are also still used to regulate the relationship between parents and children. So, several legal sources are used together in adjudicating cases related to the relationship between parents and children.

Even though it regulates the same matter regarding the relationship between parents and children, each of the regulations mentioned above has different rules or some rules that are not regulated in other regulations, such as the norms related to the power of parents towards the children. In the Civil Code, parental authority gives parents authority and obligation to educate, nurture, and represent on behalf of children. Parents also have *vruchtgenot* or the right to collect the interest from the child's assets and the obligation to maintain and protect these assets (Subekti, 1959). This arrangement cannot be found in regulations other than the Civil Code.

Conceptually, the Civil Code and the Marriage Law have different arrangements for parental authority. This will be seen by taking into account the following provisions of Article 299 of the Civil Code and Article 47 paragraph (1) of the Marriage Law:

> **Article 299 Civil Code**:
>
> "*Gedurende het huwelijk der ouders blijft het kind tot aan zijn meerderjarigheid onder hun magt, voor zoover zij daarvan niet zijn ontheven of ontzet"* (*De Wetboeken, Wetten En Verordeningen, Benevens de Grondwet van de Republiek Indonesie*, 1989).

As long as the father and mother are married, each child, until he becomes an adult, remains under their (parent) authority as long as they are not freed or removed from this authority.

Article 47 Marriage Law:

"Anak yang belum mencapai umur 18 (delapan belas) tahun atau belum pernah melangsungkan perkawinan ada di bawah kekuasaan orang tuanya selama mereka tidak dicabut dari kekuasaannya."

Children who have not reached the age of 18 (eighteen) years or have never been married are under the authority of their parents as long as their authority is not revoked.

The Supreme Court stated in the Formulation of the General Civil Chamber in SEMA No. 7 of 2012 that with the existence of Article 47 of the Marriage Law, the occurrence of a divorce does not result in the end of parental authority. Divorce also does not result in the emergence of guardianship (*Kompilasi Rumusan Hasil Rapat Pleno Kamar*, 2020). This proves that changes in provisions regarding parental authority institutions have caused changes in the family law system in Indonesia. Moreover, these changes are not limited to the status of parents who cannot be appointed as guardians but also affect other matters influenced by parental authority.

There are several studies related to parental authority, such as a study conducted by Firman Wahyudi that explained the court decision on parents as guardians for the child is decided due to the precautionary principle and necessity in business practice. Business institutions such as banks require a guarantee from the court that the parent who claims to act on behalf of the children is legally entitled to do so (Firman Wahyudi, 2019). The study provides another fact that courts often stipulate that the parent as the guardian of their children rather than declaring parents as the holder of parental authority. Another study came from Lutfia Hasan, who compared rules of parental authority between the civil code and the marriage law. It concluded that parental authority comes with parental obligations towards the child.(Hasan, 2018) Unfortunately, the study did not discuss the legal effects caused by rules of parental authority in Marriage Law, which differ from the civil code. Nathalie Jesica Sjumanti, in her research, stated that according to Marriage Law, post-divorce child guardianship can occur if the child's parents are unable to carry out their obligations. The study also indirectly points out that according to The Marriage Law, parents cannot be appointed as the holder of guardianship of their child.(Sjumati, 2018) It is a contrary point by the civil code, which allows parents to be appointed as the holder of guardianship of their child (*vide* article 229 Civil Code).

Those studies have not discussed the implication of conceptual changes of parental authority in the marriage law. This paper tends to enrich the study of parental authority in Indonesia by examining problems that have not been explored in previous studies, that is, the implication of parental authority legal change in the marriage law, which has different rules from the parental authority concept in the civil code. These changes in norms have broad legal effect and influence

the family law system in Indonesia, especially in terms of ensuring the maintenance and fulfillment of children's necessities. Therefore, to describe the extent of this influence, this paper will answer two problems. First, how is the parental authority law that applies in Indonesia? Second, what are the legal consequences of changes to the norms of parental authority in the Marriage Law?

In answering those questions, an analysis of statutory regulations (statute approach) will be carried out, then comparing these regulations with the Civil Code (comparative approach), as well as analyzing the application of these norms in a number of court decisions (case approach). Primary legal material in this study is the Civil Code (*burgerlijk wetboek*), Law No. 1 of 1974 of Marriage Law, Law No. 35 of 2014 concerning Amendments to Law No. 23 of 2002 of Child Protection Law, Compilation of Islamic Law and other related laws.

RESEARCH METHODS

The method used in this paper is the library method, by finding relevant legal sources and literature. This research applies statute approach, and conceptual approach to analyze legal sources and literature. The prime legal literature on this paper are several acts related to family law such civil code (*burgerlijk wetboek*), The Marriage Law No 1 Year 1974, The Government Regulation No 9 Year 1975 of The Implementation of Marriage Law, The Child Protection Law No. 23 Year 2002, as changed by Law No. 35 Year 2014, and many others. Based on those regulations, the paper describes changes of parental authority and teh result of those changes in legal practise.

FINDINGS AND DISCUSSION

Law of Parent Authority in Indonesia

The ratification of Law No. 1 of 1974 concerning Marriage and Government Regulation No. 9 of 1975 concerning the Implementation of the Marriage Law did not necessarily result in the norms regarding parental power being effective. This is as explained by the Supreme Court in the Instruction Letter M.A./Pemb./0807/75 concerning the Supreme Court's Instructions Regarding the Implementation of Law No. 1 of 1974 in Points III and IV, which principally states that the provisions regarding assets in marriage, the position of children, rights and obligations between parents and children, as well as guardianship in the marriage law cannot be effectively enforced, and therefore the old legal provisions are still being applied (Mahkamah Agung, 1999). According to the supreme court instruction, the provisions regarding parental authority that apply are still referring to the norms in the Civil Code, Islamic law and customary law Subekti. Until now, there has been no other instruction letter that expressly revokes or changes the contents of the Instruction Letter M.A./Pemb./0807/75. Although the revocation or amendment has not been explicitly stated,

there are decisions and other Supreme Court Guidance that indicate the guidance in Instruction Letter M.A/Pemb./0807/75 is no longer adhered to.

First, Supreme Court Decision No. 477 K/Sip/1976 on 2nd November 1976 decided the age limit of the child to be held under guardianship is 18 years old.(*Putusan Mahkamah Agung No 477 K/Sip/1976 Tanggal 2 November 1976*, n.d.) The decision stated: *By the enactment of Law No. 1 Year 1974 (Marriage Law) based on article 50 of the law, the age limit of the child to be held under guardianship is 18 years old, not 21 years old.*

According to the Civil Code, one of the categories for someone being categorized as minors is when he is not yet 21 years old (Subekti, 1959), as it is stated in article 330 of the Civil Code. It means that decision No. 477 K/Sip/1976 did not apply the criteria of maturity in the civil code but applied the provision of guardianship in Marriage Law, which, according to the Supreme Court Letter No M.A./Pemb./0807/75 should not be applied effectively.

Second, the formulation of the general civil chamber in SEMA (Supreme Court Letter of Guidance) 7 Year 2012 at point XII stated that a divorce does not result in the end of parental authority (*Kompilasi Rumusan Hasil Rapat Pleno Kamar*, 2020). According to the civil code, a divorce causes the end of parental authority and the beginning of guardianship (Subekti, 1959). Even though it did not revoke Supreme Court Letter No M.A./Pemb./0807/75, considering the formulation in SEMA 7 Year 2017, it can be understood that implicitly, the Supreme Court has considered the provisions regarding parental authority in the marriage law to have been applied effectively.

However, the provisions of parental authority in the marriage law are relatively short compared to provisions of parental authority in the civil code. The marriage law also did not regulate another aspect that was founded in Islamic Law, such as *hadhanah* and adoption of the child in Customary Law. Therefore, article 66 of The Marriage exists to accommodate those aspects.

Article 66 of The Marriage Law regulates that by the enactment of The Marriage Law, the old regulations in The Civil Code (Burgerlijk Wetboek), The Ordinance of Indonesian Christian Marriage (*Huwelijks Ordonantie Christen Indonesiers S.1933 No. 74),* The Mix Marriage Law (*Regeling op de gemengde Huwelijken S. 1898 No. 158*) and other regulations are not applicable as long as the marriage law is already regulated the related actions. Hence, *in contrast,* provisions in those old regulations substantially have been applicable as long as it is not yet regulated in The Marriage Law, including the provisions in the civil code, Islamic law, and customary law.

Apart from getting its legitimation based on Article 66 of The Marriage Law, the implementation of that previous regulation is also based on another factor. First, the previous

regulations are still applied by the community in their daily life. Provisions in the civil code, Islamic Law, and Customary law, in fact, are practiced. Moreover, there is The Compilation of Islamic Law that became one of written Islamic Law. The Civil Code, in fact, has also been applied to settle disputes among society before the court. Those norms and previous regulations are constantly applied until they become "the legal consciousness" of the society itself. Second, those previous regulations are needed by the society. Primarily for the sake of achieving the universal legal objects that are justice, certainty, and greatest good (benefit)(Kusuma Aji & Adicahya, 2021). The need to implement these regulations cannot be separated from the existence of concise norms in the marriage law. Meanwhile, society needs more detailed regulations to provide legal certainty.

However, the applicability of those regulations should be in accordance with the philosophy and fundamental norms of The Marriage Law. Provisions in The Marriage Law, especially provisions of parental authority, should be the principal norms, while norms in previous regulations, such as The Civil Code, The Compilation of Islamic Law, and Customary Law, are applied as technical regulations of the marriage law (Satrio. J., 1991). Those previous regulations, The Civil Code-originally, are enacted and developed on different civil systems compared to The Marriage Law. The foundation of the regulations originally is not The Marriage Law, but by considering the necessity of this previous regulation, it is acceptable to apply those regulations as long as it is in accordance with the principles of The Marriage Law.

Aside from the marriage law, other provisions related to parental authority are also found in The Child Protection Law No. 23 Year 2002, as changed by Law No. 35 Year 2014. It regulates child custody as part of parental authority (*vide* article 1 point 11 The Child Protection Law). Unfortunately, when compared to the previous regulation, such as The Civil Code, provisions regulated in The Child Protection Law are considered as concise norms. It makes the previous regulations needed to fill the blank area that is not yet regulated in current regulations. However, again, the implementation of the previous regulations should be in accordance with the principles used by the current regulations, such as The Marriage Law and the Child Protection Law.

According to the above explanation, the current effective applied law of parental authority is based on Marriage Law No. 1 Year 1974, as changed by Law No. 16 Year 2019, and The Child Protection Law No. 23 Year 2002, as changed by Law No. 35 Year 2014. Previous regulations, such as The Civil Code, are used to fill the blank area for the sake of providing legal certainty. As well as Islamic Law and Customary Law are used as it is necessary and as it is acknowledged as the legal consciousness by society. The implementation of that previous regulation should be in accordance with The Marriage Law and The Child Protection Law.

Legal Implication of Parental Authority Norm Change

Primarily changes of parental authority in Indonesia civil law found in the comparation of provisions in The Civil Code and The Marriage Law. Especially a comparation of article 299 of The Civil Code and article 47 verse (1) of The Marriage Law as stated below:

Article 299 of The Civil Code:

"*Gedurende het huwelijk der ouders blijft het kind tot aan zijn meerderjarigheid onder hun magt, voor zoover zij daarvan niet zijn ontheven of ontzet"* (*De Wetboeken, Wetten En Verordeningen, Benevens de Grondwet van de Republiek Indonesie*, 1989).

Throughout the marriage of father and mother, each child, until he becomes an adult, remains under parent authority, but they are not revoked or removed from the authority.

Article 47, verse (1) of The Marriage Law:

Children who have not reached the age of 18 (eighteen) years old or have never been married are under the authority of their parents as long as they are not removed from their authority.

By comparing those two articles, it can be described every element on each article:

The Article	***The Element of Article***
Article 299 of The Civil Code	Throughout the marriage of father and mother (*Gedurende het huwelijk der ouders*); each child, until he becomes an adult, remains under parent authority (*blijft het kind tot aan zijn meerderjarigheid onder hun magt)*; but they are not revoked or removed from the authority (*voor zoover zij daarvan niet zijn ontheven of ontzet*).
Article 47 verse (1) of The Marriage Law	Children who have not reached the age of 18 (eighteen) years old or have never been married; are under the authority of their parents; as long as they are not removed from their authority.

Considering every element of that article, we can see differences between the parental authority (*ouderlijk maacht*) in The Civil Code and the parental authority in The Marriage Law, which are:

The Emerge of Parental Authority

Parental Authority (*ouderlijke maacht*) in The Civil Code is a legal consequence of the birth of a child in a marriage or child legalization. Therefore, only a legitimate child could be held under

parental authority (*ouderlijke maacht*), while the illegitimate child is held under guardianship (*Voogdij*).(H.F.A. Vollmar, 2018) An illegitimate child could be legitimate as long as he is neither an illegitimate child of adultery (*overspell*) nor an incestuous child (Hayu Perwitasari, 2009). Then, paternal authority based on the civil code exists only as long as both parents are married to each other. It is stated, "Throughout the marriage of father and mother (*Gedurende het huwelijk der ouders*)" in article 299 of The Civil Code.

On the contrary, article 47 verse (1) The Marriage Law does not require parental marriage for emerging the parental authority. The article only stated that a child is under his parent's authority. Therefore, as long as someone is categorized as a parent of a child, can emerge parental authority between the parent and the child (Satria, n.d.). While in the civil code, a child who is born out of wedlock is under his parent's guardianship and not in his parent's authority. His parent is legally acting as guardian and not as a parent. On the other hand, The Marriage Law does not acknowledge guardianship by the parent. It is always parental authority if the holder is the parent of the child. According to The Marriage Law, The Parent should never be a holder of guardianship.

The marriage law also does not require the existence of marriage between a father and a mother to make both of them parents of a child. Article 43 verse (1) The Marriage After being revised by Constitutional Court Decision Number 46/PUU-VIII/2010-stated:

Children born out of wedlock have civil relations with their mother and their mother's families as well as with men as their father that can be proven based on science and technology and/or other legal evidence to have blood relations, including civil relations with their father's family.

Grammatically, the above provision opens up a possibility for a child born without marriage to be not only biologically related but also have civil relations with the father and the mother. Although, the father and the mother are never bonded by marriage.

There are critics and rejection of the decision. One of those is the decision that is accused of being a form of legalization for adultery (Farahi & Ramadhita, 2017). Moreover, the Indonesia Council of Ulama (MUI), as a response to the decision, constituted Fatwa No. 11 Year 2012 regarding The Position of Child of Adultery and its treatment. Through this fatwa, MUI explains the child of adultery's legal position according to Islamic Law and the father's obligation to protect the child.

Another study of the decision concluded that the civil relations between the father and the child of adultery are the same as a legitimate child's civil relations towards its legitimate parent. This is due to the context of the decision that emerged as a response to the case of the birth of a child in an unregistered marriage, which was carried out in accordance with sharia provisions.

Therefore, the norms in the decision only apply under the same conditions (Hamzani, 2016). Meanwhile, illegitimate children who are born from a relationship without a marriage bond have no lineage relationship, so they do not have rights to get *nafkah*, guardian rights, *hadhanah* rights, and inheritance rights from their father but only lineage rights from their mother (Arifin, 2017).

Another study stipulated that Article 43 verse (1) of the marriage law should be accepted as human rights enforcement, especially for the child's rights. Every child is entitled to obtain services and responsibilities such as guardianship, custody, and supervision. Because a relationship between father and mother is something that is in a will, not in the control of the child (Shulton, 2017).

Apart from the debates, it can be concluded that the existence cause of parental authority is the birth of the child itself. The parental authority is not affected by the existence of marriage between the child's parents. At least the mother who gave birth to the child is legally the holder of parental authority by law and not the holder of guardianship. Meanwhile, for biological fathers, a separate discussion is needed to determine the civil relationship that arises for the illegitimate child.

Age Limits for Children Under Parental Authority

Article 47, verse (1) of The Marriage Law uses the phrase "Children who have not reached the age of 18 (eighteen) years old or have never been married", while article 299 of The Civil Code uses the phrase " each child until he becomes an adult" (*het kind tot aan zijn meerderjarigheid*) to describe the age limitation for a child to be held under parental authority. Instead of stating a specific age, article 299 of The Civil Code uses "adult" (*meerderjarigheid*), which is the opposite of immature/minors (*minderjarigen*).

Articles in The Marriage Law use "adult" (vide Article 46, article 49, and Article 51) without clearly defining the criteria for someone to be an adult. Moreover, there is no definition of a child in The Marriage Law. Although The Civil Code does not define adult, using *argumentum a contrario* toward article 330 of The Civil Code concluded that those are 21 (twenty-one) years old or are married. It means there is a different category between the marriage law and the civil code on criteria for someone to be put under parental authority. The civil code uses 21 years old and marriage status to be the limit of releasing parental authority from parents. While the marriage law uses 18 years old and marital status as the limit for the parents to hold parental authority.

One of the authorities possessed by parents who hold parental authority is the authority to represent children in carrying out legal actions. A factor that causes a child to be under parental authority is that the child has not yet reached the age to be free from parental authority. So, as long as the child is not yet 18 years old and not married, the parents have the authority to act on behalf of the child.

Setting the age of 18 as the limit for a child to be under parental authority also results in a change in the criteria for someone to be considered an adult. The concept of maturity is an important concept because it is one of the factors that determine a person's ability to act (*handelingsbekwaamheid*). However, not all adults will be considered competent to act because it is still possible for someone who is an adult to be placed under guardianship (*curatele*) if they meet certain conditions.

Based on the above explanation, it can be understood that a child is under his parent's parental authority only if he is not yet reaching the age of 18 years or has not yet been previously married. The change of the child's age limit to be under parental authority has affected the category of adult/legal maturity. Therefore, it will affect the requirements of acquiring the capacity to act (*handelingsbekwaamheid*) and indirectly will affect the area of authority in parental authority itself.

The Authority of The Parental Authority Holder

According to the civil code, parental authority affects the child's body/personality and towards child's property (Wirjono Prodjodikoro, 1959). Towards the child's body/personality, the holder of parental authority is obligated to educate and maintain the child (Subekti, 1959). Vollmar argues that the obligation to educate and to maintain a child does not depend on the existence of parental authority, but it is a result of the parental relationship between the parent and child. To take it into account, the parental relationship did not emerge with parental authority according to the civil code. Especially between an illegitimate child who is not legitimate yet and only being acknowledged by his parent. The acknowledgment emerges in the parental relationship, but it does not emerge in the parental authority for the parent towards the child. However, the parent is still obligated to maintain and educate the child (H.F.A. Vollmar, 2018).

In contrary to Vollmar's opinion, according to article 319j of the civil code, losing parental authority caused the loss of the right to maintain and educate the child. Again, the parent is still obligated to provide allowance to the board of guardianship for the child's maintenance and education. Therefore, it is more precise to state that parental relationship creates an obligation to provide allowance for children's care and education, but not emerging the right or authority to maintain and educate the children. As a parent, they also have the right to inherit with their child; it is just that for illegitimate children who have not been legalized, the child only gets a limited share of inheritance (H.F.A. Vollmar, 2018).

The holder of parental authority also has the right of purba wasesa. It is a right to punish the child with measurable punishment. The holder also has the right to determine the domicile and the school for the child. They also have the authority to carry out a legal act on behalf of the child and

the right to take care (beheer) of the child's property (Satrio, 2018). While they have to have the court's permission to sell or to trade the property (Wirjono Prodjodikoro, 1959). Essentially, the holder is responsible for preventing the property loss and ensuring it remains good.

Apart from being given the authority to manage the child's property, parents who hold the parental authority are also given *vruchtgenot* right. The *vruchtgenot* right, also known as the right to enjoy the fruit, gives the right to income derived from child property. It is distinct from the right to collect the result/the right to withdraw income (*vruchgebruik*), which is regulated in chapter x book II of the civil code (Soedewi Masjchoen Sofwan, 1981). The distinction is stipulated by the Decision of *Hoge Raad* Netherland on 20 March 197 that the characteristic of the *vruchtgenot* right is different from the characteristic of the *vruchtgebruik* right (Wirjono Prodjodikoro, 1959). One of the differences is the possibility of transferring the *vruchtgebruik* right as it is wished by the holder. On the contrary, the *vruchtgenot* right is not easily transferred by the wish of the holder because this right is a result of parental authority, which can only be obtained by the parents who hold the authority.

Table 2. Rights and Obligations of Parents Who Hold Parental Authority:

Legal Relation	***Legal Effect***	
Parents	Child body/Personality	Obligation to Support/Giving Allowance
	Child Property	Right to inherited
Parents as The Holder of Parental Authority	Child body/Personality	○ Right of Purba Wasesa ○ Authority to act on behalf of the child
	Child Property	○ Right to Manage ○ Right to enjoy the fruit (*vruchtgenot*)

Sources: Vollmar (1996), Subekti (1959), Wirjono (1959)

According to Islamic Law, the concept of parental authority is divided into two areas which are *hadhanah* and *wilayat al-mal* (Wirjono Prodjodikoro, 1959). Article 1 point g of Islamic Law Compilation defines hadhanah or maintaining as an act of nurturing, caring, educating, and maintaining children until they are adults or able to stand on their own. *Hadhanah* is also defined as

the maintenance or care of people who are unable to fulfill their daily needs because they are not mumayyiz; that is, they are still a child (Az-Zuhaili, 2011).

Wilayat al-mal is the maintenance of the child's wealth and all the child's interests related to that wealth. Wilayat al-mal in Islamic law is actually part of guardianship. It is an adult's arrangement of the affairs of a person who is "lacking" in personality and property. What is meant by lacking is the lack of *ahliyatul ada'* or a child who is not *mumayyiz* Az-Zuhaili, 2011). Therefore, apart from guardianship over *al-mal* (property), guardianship in Islamic jurisprudence also covers a person's body and personal being. Of course, this definition of guardianship is different from the definition of guardianship in the Islamic Law Compilation and the Civil Code.

In an Islamic marriage, the father and mother or husband and wife are responsible for their children. These responsibilities include caring for the child, such as feeding, clothing, and providing a place to live, which basically meets the child's needs. Apart from that, parents are also responsible for representing their children in legal actions. The latter responsibility is specifically assigned to the child's father. While the obligation to care is carried out by both the father and mother or husband and wife, the mother will be given priority in the role of caretaker of the child or holder of *hadhanah* (*hadin*).

Provisions regarding the legal consequences of the position as parents and children in the Marriage Law are regulated in Chapter X concerning Rights and Obligations Between Parents and Children. The provisions in this chapter provide an understanding that when someone is designated as a parent, legal consequences will arise in the form of an obligation to provide support, the emergence of parental authority, and the obligation of children to be filial to their parents.

The obligation of parents to provide support regardless of whether they have parental authority can be seen in Article 49 verse (2) of the Marriage Law, which states that even if parental authority is revoked, they are still obliged to provide maintenance costs to the child. This provision is likely similar to the Article 319j of the Civil Code. The obligation of children to be filial to their parents is reflected in Article 46 of the Marriage Law, which requires children to respect and obey the good wishes of their parents. Adult children are also obliged to care for their parents as best they can.

Based on Article 45, Article 47, and Article 48 of the Marriage Law, it can be understood that there are three areas of parental authority regulated by the marriage law. Firstly, Article 45 of the Marriage Law regulates the obligations for child maintenance by parents. Second, Article 47 of the Marriage Law regulates the child's personal position before the law and the authority of parents to represent the child. In the conception of the Civil Code and Islamic Law, these two fields are a form of parental power over the child's personality. Third, Article 48 of the Marriage Law regulates

the authority of parents to manage children's assets. In particular, parents are prohibited from transferring rights or duplicating fixed assets belonging to their children unless the child's interests require it.

The obligation of parents to take care of the child is emphasized by the regulation of authority to foster in the Child Protection Law. Article 1, number 11 of the Child Protection Law states:

> *"Authority to Foster is parental authority to foster, educate, nurture, guide, protect, and grow the child with the religion they adhere to and in accordance with their abilities, talents, and interests."*

The above provision emphasizes that there are several authorities within the parental authority of the marriage law. Considering the above explanation, this is the simple structure of the parent's legal position and its relation with parental authority:

Table 4. Legal Relation between Parent and Parental Authority

Position	***Legal Consequences***		
Parent	Providing support for the child		
	Child is obliged to be fillial/obidience		
	Parental Authority	Person	○ Authority to Foster ○ Authority to carry out legal act in behalf of the child
		Property	Authority to Manage

Source: The Marriage Law and The Child Protection Law

In reality, the implementation of authority to manage child property demanded the application of the prudential principle. It is based on article 48 of The Marriage Law, which restricted the authority in transferring the right of unmovable good-only when it is required by the interest of the child. Article 48 of The Marriage Law states that:

> *"Parents are not permitted to transfer rights or pawn unmovable property owned by their children who are not yet 18 (eighteen) years old or have never been married unless it is required by the interest of the child."*

Therefore, there are legal requests on guardianship by the parent before the court (Syamsu Alam et al., 2011) and also request the court permission for the guardianship to sell or transfer the child's property.

The legal request to constitute a parent as the holder of guardianship is actually an inaccurate request. As previously explained, according to the marriage law, the parent is only entitled to parental authority and not entitled to guardianship.(Masdukhin, n.d.) However, judicial practice accommodates the request for ensuring that the parent is in authority to manage the property and to ensure the capability to carry legal action on behalf of the child.(Zahri, n.d.) The request is exercised by the court only to enforce legal certainty. (Satria, n.d.)

There are two things that should be ensured in legal action carried out by the parent as the manager of the child's property. First, the acting parent is the holder of parental authority, so they have the authority to represent the child in taking legal action. The parental authority should not be revoked and should still be in the hands of the parent. If the parental authority is held by the father and the mother, then the action should be taken by both of them or by agreement. It is distinct from the civil code that only appoints the father as the executor of parental authority (vide article 300 of The Civil Code). The marriage law did not appoint the executor of parental authority between the father and the mother. Article 31 of The Marriage Law states that the rights and obligations between husband and wife are equal. Each spouse has the capacity to act on legal action, not only the husband that has the capacity to act. Therefore, when the legal act is carried out on behalf of the child, it should be represented by both the father and mother.

Second, the legal act upon child property is needed and required by the interest of the child. It is as stated in the phrase "unless when it is required by the interest of the child" in Article 48 of the marriage law. In legal practice, because the marriage law did not regulate the specific method to ensure the interest of the child, the concept of permission to sell of the civil code is adopted to the legal practice. According to the civil code, the management of unmovable property, securities (effecten), and collection letters should not be sold nor transferred before obtaining the permission of the court (Subekti, 1959). It is regulated by Article 309 of the civil code that appoints the provisions of procedure in transferring child property by the guardian at Article 393 and Article 394 of the civil code (Wirjono Prodjodikoro, 1959).

Based on the above explanation, it is not surprising that there are a number of decisions that constitute a parent as guardian of a child.* It must be acknowledged that most civil practices in Indonesia are built based on the concept of the Civil Code. This is the result of the Dutch Colonial Government's legal policy that wanted to separate all elements of Islamic Law Doctrine (Dimyati & Wardiono, 2014) and Customary Law by enforcing one civil law system for all groups (Wignjosoebroto, 2014). Hence, many parties are familiar with the system concept and legal

**See Decision No. 103/Pdt.P/2021/PN. Bpp on 19 April 2021, Decision No. 0096/Pdt.P/2016/PA.TA on 8 June 2016, Decision No. 371/Pdt.P/2022/PN.JKT.SEL on 31 May 2022 dan Decision No. 55/Pdt.P/2011/PN.Prob on 6 July 2011*

concept of the civil code. However, decisions that determine parents as guardians of a child must be understood as merely a form of practical necessity and not a determination that parents run a guardianship institution. Because determining someone as a guardian will have legal consequences in the form of rights and obligations that are different from parental authority (see Article 51 of the Marriage Law).

A similar explanation also needs to be applied to decisions of authority to foster. It is common that after a divorce, parents often have disputes regarding the authority to foster. In their lawsuit, one of the parents often asks that their child be placed under their authority to foster. It is as if establishing authority to foster over one parent will immediately eliminate the authority to foster the other parent.

Authority to foster is part of parental authority that gives rights and authorities to foster, educate, nurture, guide, protect, and grow the child. As part of parental authority, the authority to foster belongs to each parent and is executed together by both parents. Divorce is not revoking the parental authority; it is not revoking the authority to foster belonged to each parent. Moreover, both parents are suggested to foster the child together. The article 41 point a of The Marriage Law stated:

The consequences of breaking up a marriage due to divorce are:

a. *Both mother and father are still obliged to care for and educate their children, based solely on the child's interests; if there is a dispute regarding the control of children, the Court shall give its decision;*

The article shows that after the divorce, the father and the mother are obliged to care for and educate their child. The article did not appoint one of the parents to execute the authority to foster. However, in reality, the legal practice is inclined to constitute one of the parents to be the holder of authority to foster. It is as stated by the formulation of general chamber point d in Supreme Court Letter of Guidance (SEMA) 1 Year 2017 that it is the right of the biological mother to foster the minors after the divorce can be transferred to the biological/legitimate father as long as it effects positively for the minors (*Kompilasi Rumusan Hasil Rapat Pleno Kamar*, 2020). This formulation states that after a divorce, it is the mother's right to foster the minors, and the father does not have this right unless it has been granted through a court decision. In fact, Article 105 letter a of the KHI states that the authority to foster children who are not yet *mumayyiz* (a kind of minors in Islamic law) is the right of the mother.

The preference for granting custody rights to the mother is based on the idea that younger children are better cared for by their mothers. However, this perspective has evolved, and it is now recommended that the child be cared for by a parent who is more psychologically connected to the child. This has led to the concept of joint custody (Saraswati et al., 2021), as an alternative to sole

custody (*split custody*) (Asnawi, 2019). Joint custody is seen as a solution to reconcile the principles outlined in Article 41 of the Marriage Law and the concept of parental authority, which remains intact after divorce. Nonetheless, there may still be situations where it is better for one parent to have sole custody.

Because the power of custody is not erased by divorce, the actual demands requested in a child custody lawsuit are essentially the revocation of the power of custody or the revocation of hadhanah and the determination of one parent as the custodial power holder. This is reflected in the formulation of the religious chamber point 4 in Supreme Court Circular Letter No. 1 of 2017, which states that not being given access to meet with the child can be a reason to file a lawsuit for revocation of *hadhanah* or custody rights (*Kompilasi Rumusan Hasil Rapat Pleno Kamar*, 2020). This formulation reflects that a custody dispute is actually a demand for revocation of custody rights and not just the determination of one parent as the custody holder. However, court practice recognizes custody, disputes-especially those that occur after divorce-as disputes over and determination of rights, rather than custody revocation claims. Therefore, in cases where custody disputes arise, and both parents are not at risk of having their parental authority revoked, the underlying request is, in essence, the withdrawal of custody rights. Consequently, by designating one parent as the custodial parent, *ipso facto,* the other parent is considered to have had their custody rights withdrawn.

However, designating one parent as the custodial parent does not eliminate the parental authority of both parents. It merely means that one parent loses some custodial authority to care for the child. Other rights and obligations, such as the authority to represent the child in legal matters, remain intact for both parents. Therefore, the designation of custody to one parent does not grant that parent a complete monopoly over parental authority. Divorced parents are still required to fulfill their parental duties and exercise their parental authority together. A more in-depth discussion of the relationship and legal consequences of custody rights and parental authority may be advisable for a separate study.

The End of Parental Authority

The termination of parental authority *(ouderlijk gezag)* in the Civil Code (KUHPerdata) can occur for several reasons, including the dismissal or release of parents from that authority (as per Article 319a of KUHPerdata) (Subekti, 1959), the divorce of both parents (as per Article 229 of KUHPerdata), and the death of one or both parents (as per Article 345 of KUHPerdata). Meanwhile, in the Marriage Law (Undang-Undang Perkawinan), it is stipulated that parental authority can be revoked (as per Article 49 of the Marriage Law). There are no other provisions governing the loss

of parental authority except through a court decision to revoke it. Therefore, it can be understood that divorce or the death of one parent does not automatically eliminate parental authority. If all parents pass away, then the institution of parental authority disappears due to the absence of parents as the holders of that authority.

The fact that parental authority is not lost due to divorce or the death of one parent is reflected in the formulations of the general civil chamber's meeting contained in Supreme Court Circular Letter No. 7 of 2012, in Point XII, which states:

> *Regarding the consequences of divorce, based on Article 47 and Article 50 of the UUP, the existence of divorce does not make parental authority end. It does not give rise to Guardianship (compared with Article 299 of the KUHPerd); the Judge must appoint one of the two parents as the party who maintains and educates the child (Article 41 UUP).*

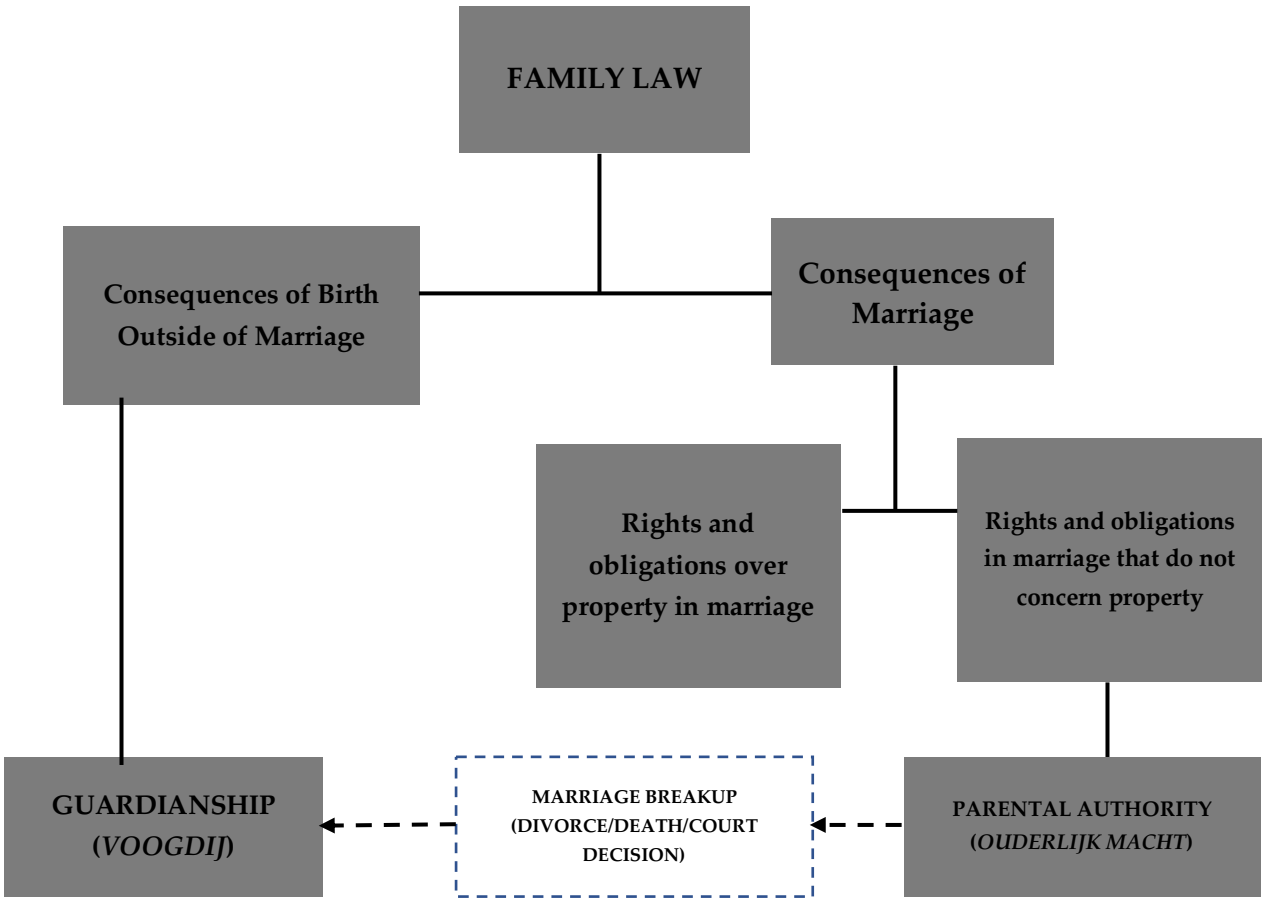
The results of the chamber meeting affirm a substantive transformation in the legal foundation for child custody within Indonesian family law. Traditionally, the institution of child custody was primarily guided by the Civil Code (KUHPerdata), as well as customary law and Islamic law. However, recent developments, as highlighted in the plenary chamber meeting, have redirected the reference point for child custody to the provisions set forth in the Marriage Law (Undang-Undang Perkawinan). This shift underscores the evolution of legal norms, reflecting a broader commitment to prioritizing the welfare and best interests of the child above rigid adherence to older legal frameworks. The principle established during this meeting is both clear and impactful: *"The dissolution of marriage does not terminate parental authority."* This principle extends beyond the context of divorce, explicitly applying to situations where a marriage ends due to the death of one parent. As long as one parent remains, parental authority persists, ensuring continuity in the care, upbringing, and education of the child.

This legal development signifies that the termination of the marital relationship whether by divorce or the death of one parent does not automatically extinguish the rights and obligations associated with parental authority. The surviving parent retains full parental authority and responsibility, except in cases where a court decision explicitly revokes such authority. This approach is consistent with contemporary legal and academic perspectives, which emphasize the enduring nature of parental obligations irrespective of changes in marital status. It ensures that children continue to receive essential support and guidance from their parents, thereby safeguarding their psychological and developmental needs. The chamber meeting's results also indicate that guardianship (voogdij) replaces parental authority only when both parents have passed away, not when a marriage simply ends.

In summary, the institution of parental authority in Indonesian law is now anchored in the principles of the Marriage Law, reflecting a progressive legal stance that places the child's interests at the forefront. The legal maxim, *"The dissolution of marriage does not terminate parental authority,"* serves as a foundational guideline for both judicial practice and academic discourse, strengthening the protection and continuity of parental roles after the end of marriage.

Based on the above explanation, it can be observed that there has been a shift in the family law system concerning the institution of parental authority. Specifically, there has been a change from the parental authority system under the Civil Code (KUHPerdata) to the parental authority system as stipulated in Law No. 1 of 1974 on Marriage. Below is a comparative chart of the legal institution of parental authority based on the two legal sources for reference:

Chart 1. The Position of Parental Power Institutions in the Family Law System According to the Civil Code.



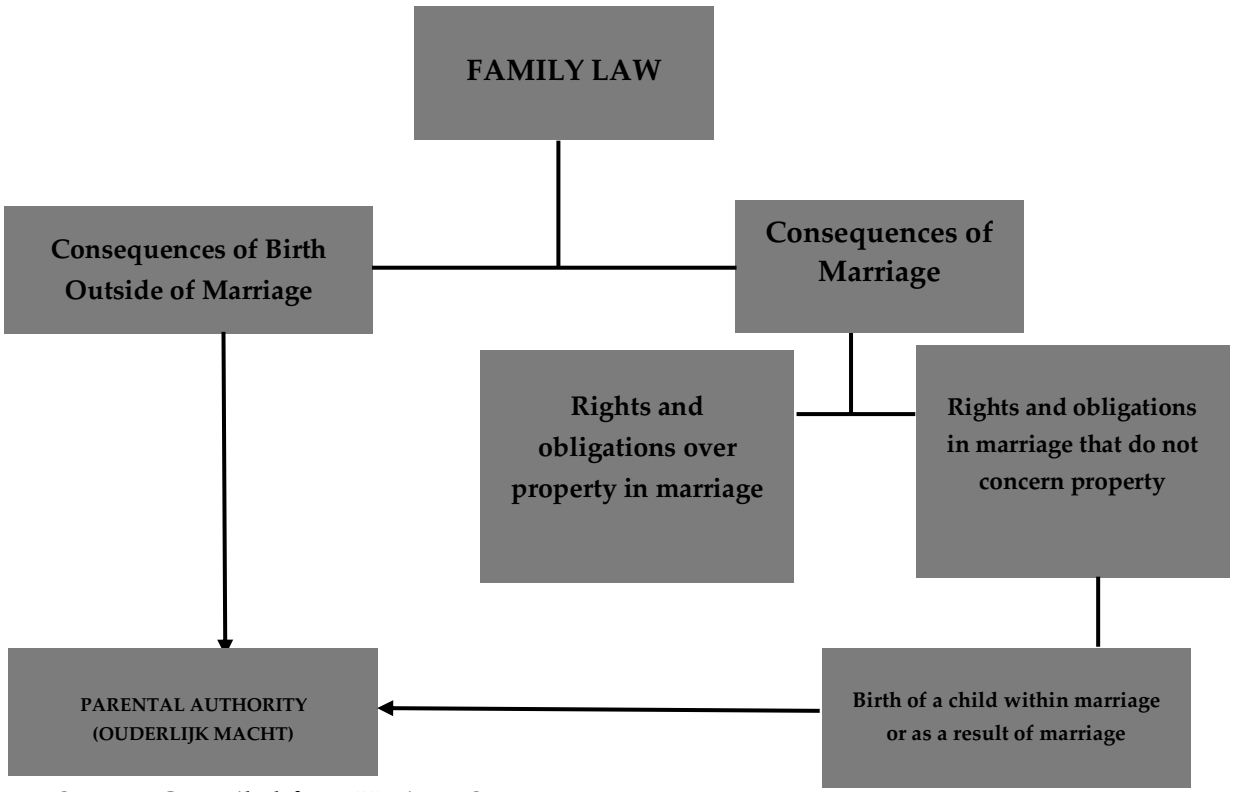
Source: Compiled from Various Sources

Based on the chart above, it is evident that the legal institution of parental authority is part of family law and is, therefore, only established when a valid marriage exists, resulting in the birth of a child within that marriage. If the marriage is terminated, either due to divorce, the death of one parent, or by court order, parental authority (ouderlijk macht) ceases to exist, and guardianship

(voogdij) takes its place. The birth of a child outside of marriage will lead to guardianship. If both parents acknowledge the child, subsequently marry, and confirm the child's status, then the legal institution of parental authority will be established for both parents over the legalized child.

This concept has changed with the introduction of marriage laws that no longer link the existence of parental authority solely to the act of marriage but instead connect it to the birth of a child. Consequently, whether a child is born within or outside of marriage, parental authority is established for the child's parents.

Chart 2. The Position of Parental Power Institutions in the Family Law System According to the Marriage Law.



Source: Compiled from Various Sources

Based on the chart above, the legal institution of parental authority according to marriage laws is a part of family law. It can be established either due to events like the birth of a child outside of marriage or as a result of a birth within a valid marriage. Consequently, the rights and obligations to exercise parental authority may or may not fall under the rights and obligations between spouses within the marriage. This depends on the reason for establishing parental authority, whether it arises as a result of birth within a valid marriage or as a consequence of the birth of a child outside of marriage.

CONCLUSION

Based on the above explanation, it can be concluded that the legal framework of parental authority in Indonesia derives from various legal sources adapted to the family law principles outlined in the Marriage Law. In principle, norms regarding parental authority in the Civil Code (KUHPerdata), Islamic Law, Customary Law, and other legal sources are still applicable but with adjustments based on the provisions of the Marriage Law. Therefore, the fundamental provisions regarding parental authority in old regulations are no longer valid and have evolved in meaning in accordance with the Marriage Law. However, implementing regulations from the old rules can still be used with adjustments.

The changes in the norms of parental authority as regulated in the Marriage Law have led to several significant changes in the institution of parental authority in Indonesia's family law system. **Firstly**, establishing parental authority is no longer based on marriage but on the birth of a child. This means that even children born out of wedlock are, in principle, under the authority of their parents, not under guardianship. **Secondly**, children under parental authority are those under 18 years of age and have not been married before reaching that age. This also changes the criteria for adulthood and legal capacity in civil law. **Thirdly**, the scope of parental authority in the Marriage Law is similar to old regulations, particularly the Civil Code (KUHPerdata). However, implementing parental authority in the Marriage Law is a joint effort by both parents, whether they are married or not. The Marriage Law does not designate one parent as the primary executor of parental authority, as the Civil Code (KUHPerdata) designates the father as the primary executor. **Fourthly**, parental authority does not end with divorce or the death of one parent. Parental authority only ends if it is revoked or if both parents have passed away. Divorce and the death of one parent do not result in guardianship, and parents cannot become guardians or exercise authority as guardians over their children.

Considering the conclusions above, it is evident that several aspects need to be studied specifically to establish the appropriate norms. This is because of the brevity of the regulations concerning the relationship between parents and children in post-independence Indonesian legislation. This condition requires legal researchers and practitioners to explore and make legal findings continually. To fill legal gaps and prevent disparities in practice, it would be appropriate for the government to issue regulations or guidelines, either by the government itself or the Supreme Court, regarding the implementation of parental authority, considering its importance as a legal institution in Indonesia's family law system. In contrast, a similar legal institution is guardianship, which currently has more detailed regulations in Government Regulation No. 29 of 2019 concerning the Requirements and Procedures for the Appointment of Guardians.

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