



# The Urgency of Legal Protection of Children's Rights Post-divorce in Caring for Mothers Who Undergoing Criminals in Correctional Institutions

Sulaiman Sulaiman<sup>(✉)</sup>

Universitas 17 Agustus 1945 Semarang, Semarang, Indonesia  
Sulaimansh99@yahoo.co.id

**Abstract.** This research aims to protect children's rights and must be upheld by everyone. The legal protection of children's rights in the care of their mothers is based on Pancasila and the 1945 Constitution of the Republic of Indonesia, as well as the basic principles of the Convention on the Rights of the Child and non-discrimination. The problem of this research is the protection of children's rights in the care of mothers serving a sentence in the Correctional Institution. The research method uses empirical juridical research, which is supported by primary and secondary data. The study results show that: (1) The protection of children's rights in the care of mothers who are undergoing crime has not been effective because there are still cases related to violations of children's rights that can threaten the growth and development of their future lives. (2) The regulation of the protection of children's rights in the care of mothers who are serving a crime in Pancasila and the 1945 Constitution of the Republic of Indonesia, as well as the issuance of several laws and regulations that regulate in detail the protection of children's rights in Indonesia, and (3) the urgency of the legal protection of children's rights in the care of mothers who are serving a sentence in prisons by the government has taken the right step by ratifying the Convention on the Rights of the Child by prioritizing progressive law, because in settlement of cases it does not only look at the aspect of legal certainty but pays more attention to the objectives of benefit and justice for the community, through prevention, relief, and alternative punishments.

**Keywords:** Protection of Children's Rights · Maternal Care · Correctional Institution

## 1 Introduction

Marriage is a community institution that legitimizes living together between an adult man and an adult woman in a household (family). The purpose of marriage for humans is not only to get offspring but also to get inner and outer happiness. The most important thing is to carry out religious orders and form a family. The complement of a family is

the birth of a child, and if the family has been blessed with a child, the family should pay attention to the interests of a child spiritually and physically.<sup>1</sup>

The termination of a marriage is based on a court decision with permanent legal force (*inkracht van gewijsde*). There will be legal consequences that follow, one of which is regarding the Custody of children born from the marriage. Relationships with parents and children arise rights and obligations. The rights and obligations of parents towards children are regulated in Law Number 1 of 1974 concerning Marriage and Law Number 23 of 2002 concerning Child Protection, and Article 1 paragraph (11). Child care is the responsibility of both parents in terms of education, economy, nurturing, protecting, and developing children according to their religion.<sup>2</sup>

Children's rights are part of human rights contained in the 1945 Constitution of the Republic of Indonesia (UD NRI 1945) and the Convention on the Rights of the Child. Article 28 B paragraph (2) of the 1945 Constitution of the Republic of Indonesia states that every child has the right to survival, growth, development, and protection from violence and discrimination. Article 9 paragraph (1) and the provisions of the Convention on the Rights of the Child affirm that children are the holders of fundamental rights and freedoms and parties who receive special protection.

Children's rights are part of human rights guaranteed and protected by international and national law, which are universally protected in the Universal Declaration of Human Rights (UDHR), International on Civil and Political Rights (CPR). Differentiate children's human rights treatment from adults in special international conventions. The 1993 Vienna Declaration was produced by the World Conference on Human Rights (HAM) on the First Call for Children Principle, which emphasizes the importance of national and international efforts to promote children's rights to Survival, Protection, and Participation.<sup>3</sup>

The state is very concerned about and protects children's rights, and everyone must uphold them. In its application related to law enforcement problems, it often encounters obstacles or obstacles, both caused by internal factors and external factors. From a legal perspective, the issue of children has received little attention from the government, law enforcement agencies and the community. How long does it take to give something to children.

A demand to be able to live financially and adequately prosper is caused by personal emotional factors and environmental influences that cannot be avoided. As in the case of the late Vanessa Angel (VA) in the case of drug abuse and must languish in a correctional institution. At that time, VA had a small child who was still being breastfed, so the baby who should have been in the care and protection of a mother was also deprived of her rights and separated from her mother, who was serving a crime.

The Correctional Institution (LAPAS) allows a prisoner to take a child under his care to a detention center or prison as stipulated in Article 28, paragraph 4 of Government Regulation Number 58 of 1999 concerning Conditions and Procedures for the Implementation of the Authority, Duties, and Responsibilities of Detainee Care. In this case,

<sup>1</sup> R WirjonoProjodikoro, 2002, *HukumPerkawinan di Indonesia*, cet 6, Bandung, p. 17.

<sup>2</sup> M. YahyaHarahap, 2005, *HukumPerkawinanNasional*, cet 1, CV. Rajawali, Medan, p. 3.

<sup>3</sup> Harkristuti Harkrisnowo, 2002, *Tantangan dan agenda Hak-hak Anak*, Newsletter Komisi Hukum Nasional, Edisi Februari, Jakarta, p. 34.

it is necessary to take concrete steps that should be taken in the law enforcement process to fulfill children's rights. Based on the background thought above, the author wants to discuss "The Urgency of Legal Protection of Children's Rights Post-Divorce in Caring for Mothers Who Are Undergoing Criminals in Correctional Institutions."

## 2 Research Method

This study uses empirical juridical, statute, and conceptual approaches. This study uses a conceptual approach and a comparative approach. The conceptual approach is carried out until an effort to reform, and a new approach is found to overcome the existing problems. While comparative (comparative approach) is a type of descriptive research that wants to find answers fundamentally about cause and effect by analyzing the factors that cause the occurrence or emergence of a specific phenomenon.<sup>4</sup>

## 3 Findings and Discussion

### 1. The Legal Protection of Children's Rights in The Care of Mothers Who Have Been Convicted Has Not Been Effective

The marriage law regulates the obligations of parents to children regarding several things, namely maintenance and education, that both parents are obliged to maintain and educate their children properly. If the marriage is terminated due to divorce, the mother and father are still obliged to maintain and educate their children solely for the child's sake. If there is a dispute between husband and wife regarding controlling their children, the court will decide who will handle the child.<sup>5</sup>

#### a. According to Law Number 1 of 1974

According to Law Number 1 of 1974 concerning Marriage, the consequences of a dissolution of marriage due to divorce are regulated in Article 41, which reads that the consequences of a dissolution of marriage due to divorce are:

- 1) Both mothers and fathers are still obliged to maintain and educate their children solely based on the interests of the child. If there is a dispute regarding the control of the children, the court will give its decision.
- 2) The father is responsible for all the maintenance and education costs needed for the child. If the father cannot fulfill these obligations, the court can determine that the mother is also responsible for the costs.
- 3) The court can oblige the ex-husband to provide living expenses and determine an obligation for the ex-wife.<sup>6</sup>

The provisions in the marriage law mentioned above align with the provisions in the compilation of Islamic law, which are based on the fact that the

---

<sup>4</sup> Nazir, 2005, *Metode Penelitian*, Ghalia Indonesia, Jakarta, p. 12.

<sup>5</sup> Bahder Johan Nasution & Sri Warijati, 2002, *Hukum Perdata Islam*, cet 1 CV. MandarMaju, Bandung, p. 35.

<sup>6</sup> Soetojo P, 2001, *Pluralisme dalam Perundang-undangan Perkawinan Indonesia*, cet 3, Airlangga University, Bandung, p. 121.

obligation to care for and educate children is a shared responsibility that mothers and fathers must carry out.<sup>7</sup> From these provisions, even though the marriage has been dissolved, both father and mother are still obliged to maintain and educate their children solely for the child's benefit. In carrying out guardianship, parents must not neglect their obligations and must behave well. If this is not the case, the guardianship power can be revoked, and you will still have to provide maintenance costs for the child.

b. According to the Compilation of Islamic Law

In the Compilation of Islamic Law (KHI), which is regulated in chapter XIV concerning child care from articles 98–106, and which regulates the issue of child care obligations in the event of a divorce, it is only contained in article 105, article 105 reads:

- a. It is the mother's right to take care of a child who is not yet *mumayyiz* or not 12 years old yet.
- b. The maintenance of a *mumayyiz* child is left to the child to choose between his father and mother as the holder of the right of care.
- c. The maintenance costs are borne by his father.

Matters that regulate the benefits for children are contained in article 231. In divorce, husband and wife are broken, but relations with children are not. All the integrity for children that arises in connection with their parents' marriage remains. The benefits of inheritance rights or from the marriage agreement, for example, if the marriage agreement determines something profit for the wife, then if the wife dies, the children are entitled to the benefits promised to their mother.

Child protection is a set of activities aimed at ensuring and protecting children and their rights so that children can live, grow, develop and participate optimally, respecting their dignity and protecting children. Against violence and discrimination, realizing dignity, nobility and prosperity Indonesian children. The Indonesian government has provided protection and fulfillment of children's rights, such as efforts to reduce child labor in Indonesia. From ancient times until now, the government has continued to innovate programs that can be used as a benchmark in alleviating child labor by improving the quality of education.

In responding to problems/issues regarding children, various policies have been issued by the government as a basis for realizing welfare, care, and protection for Indonesian children based on Pancasila and the 1945 Constitution of the Republic of Indonesia as described above. The Law of the Republic of Indonesia Number 4 of 1979 concerning Child Welfare. This law regulates the welfare of children, the child's age, and the child's rights, including the rights of children who do not have parents, children who cannot afford, children who experience behavior problems, and children with

<sup>7</sup> Soemiyati, 2005, *Hukum Perkawinan Islam dan UU Perkawinan*, cet 1, Liberty, Yogyakarta, p. 127.

disabilities. This law also regulates the responsibilities of parents towards child welfare and child welfare efforts.

Indonesia ratified the CRC through the presidential decree of the Republic of Indonesia Number 36/1990, on 25 August 1990, and according to the provisions in the CRC, thirty days later, the CRC came into force in Indonesia, starting on 5 October 1990. The consequences of adopting and ratifying the CRC were that Society, the Nation, and Indonesia are obliged to recognize and fulfill the rights of children formulated in the CRC. In the human rights discourse, "children" are the holders of rights, while "the State" is the party obliged to fulfill children's rights. Countries participating in ratification will take all legislative and administrative steps to implement CRC in Indonesia, marked by the issuance of Law 23 of 2002 dated 22 October 2002, which was subsequently amended by Law Number 35 of 2014 concerning Child Protection. An "Independent" Indonesian Child Protection Commission (KPAI) was formed to follow the policy.

## 2. Arrangements for the Legal Protection of Children's Rights in the Care of Mothers Who Are Undergoing Criminal Cases.

The State and government of the Republic of Indonesia have the duty and responsibility to respect and ensure the fundamental rights of all children, regardless of their ethnicity, religion, race, social class, sex, ethnic origin, or ethnicity. Ethnicity, culture and language and legal status of children. Status, date of birth, order and physical and/or mental condition. The state and government also have a responsibility to support the means and infrastructure to implement child protection. Arrangements regarding the obligations and responsibilities of the state and government are contained in Articles 21 and 22 of the Law on child protection.

The implementation of child protection is based on Pancasila and the 1945 Constitution of the Republic of Indonesia, and the basic principles of the Convention on the Rights of the Child include non-discrimination; the best interests of children, the right to life, existence and development and respect for the views of children. Child protection aims to ensure the realization of children's rights so that they live, grow, develop and participate optimally with dignity and dignity, and are protected against violence and discrimination. Discrimination to recognize Indonesian children with dignity, nobility and prosperity. In line with this goal, the essence of protecting Indonesian children is sustainability because they will take over the role and struggle to realize the ideals and objectives of the Indonesian nation. The state, government, community, family, and parents are obliged and responsible for implementing child protection.<sup>8</sup>

Obligations and responsibilities of the community for child protection are specified in Article 25. The obligations and responsibilities of the community for child protection are realized through activities and the role of the community in child protection. Implement child protection. The provisions of Section 72(2) of the Child Welfare Act state that individuals take on the role of the community, child welfare organisations,

---

<sup>8</sup> Hardjon, 2007, *Perlindungan Hukum Terhadap Anak*, Eresco, Jakarta, p. 23.

social organisations, NGOs, educational institutions educational institutions, religious organizations, commercial organizations and the mass media.

Article 26 of the Law on Child Protection regulates the obligations and responsibilities of families and parents. Parents are obliged and responsible for:

- a. Nurturing, nurturing, educating, and protecting children;
- b. Growing children according to the child's abilities, talents, and interests;
- c. Preventing child marriage;
- d. Providing character education and teaching character in children.

The implementation of the law on child protection means that the safety of children is carried out in the fields of religion, health, education, and social affairs. Meanwhile, Article 59, number 2 of the UUPA (Child Protection Law) states special protection for children.

The concept of protecting children in the care of mothers who are serving a sentence in Correctional Institutions should be carried out while still paying attention to the rights of children who their mothers bring to prison because of the case that plagued the mother, namely the child to continue to receive his mother's love and the right to an excellent social environment. A Correctional Institution is a place of guidance for a prisoner who has to serve his sentence because of a criminal act based on a court decision with permanent legal force. Correctional Institution functions to restore the social functioning of an inmate.

Problems related to technical matters, the situation and conditions of Correctional Institution in Indonesia do not guarantee or allow that Correctional Institution is an excellent social environment for children's growth and development. In paying attention to the pattern of parenting with a good environment, which pays attention to the best interests of children who participate in Correctional Institution with their mother or outside the prison with their extended family. Therefore, the rights of children brought to the Correctional Institution by their mothers must be fulfilled.

According to Notohamidjojo, the law is the whole written and unwritten rules which are usually coercive for human behavior in state society and between states oriented to two principles, namely justice and usability, for the sake of order and peace in society.<sup>9</sup>

The law must be able to integrate it so that conflicts of interest can be minimized as much as possible. So it is necessary to offer a way out of punishment through prevention and handling in law enforcement. Settlement of cases through restorative justice, commutation of sentences, or alternative punishments (rehabilitation as an alternative to imprisonment) can be implemented for drug addicts. In fact, drug addicts are victims who need to be rehabilitated, not imprisoned. Equality of perception between law enforcement officers in handling narcotics cases from the level of investigation to the courts is essential.

3. The urgency of the legal protection of children's rights in the care of mothers who are serving crimes in prisons

<sup>9</sup> Syamsul Arifin, 2012, *Pengantar Hukum Indonesia*, Medan Area University Press, Medan, p. 5–6.

Child protection is all efforts to create conditions so every child can carry out his rights and obligations for the development and growth of children naturally, physically, mentally, and socially. Child protection is the embodiment of justice in society; thus, child protection is sought in various fields of state and community life. Child protection activities have legal consequences concerning written and unwritten laws. The law is a guarantee for child protection activities.

According to Ahmad Kamil,<sup>10</sup> child protection is the responsibility of parents and families. Community, government, and state activities are carried out continuously to protect children's rights. Extra supervision of children, personally and as part of the community, needs to be done. This is intended to protect children's rights and can prevent the entry of negative external influences that interfere with children's growth and development.

As defined in Article 1 (2) of the Child Protection Act, the protection of children can be achieved with the support and responsibilities of different parties. The support needed to implement the protection of children's rights in Indonesia is governed by Article 20 of the Child Welfare Act, which states that the state, government, local authorities, communities, families family and parents or guardians are required and responsible for the implementation of child protection.

The government provides child protection through the criminal justice system, which is interpreted as "... The collective institution through which an accused offender passes until the accusation has been disposed of or the assessed punishment concluded..."<sup>11</sup> The integrated criminal justice system is not a system that works in one work unit or part that is unified, but rather a harmonious combination of sub-systems to achieve one goal.

The purpose of the integrated juvenile justice system should be more emphasized on efforts to resocialize, rehabilitate and reintegrate socially because in handling cases of children, the fulfillment and protection of children's rights is the main goal and must be based on the principle of the best interests of the child and not neglecting the welfare of the child.

Various cases in Indonesia relate to children's rights that have not been fulfilled following the law to the fullest, especially children from minority and isolated groups. In the child protection law, the implementation of child protection has not been appropriately matched. Legal protection is regulated in the form of regulations and their implementation, which is expected to guarantee the fulfillment of children's rights so that they can live, grow, develop, and participate optimally following human dignity. In addition, to get protection from all kinds of violence, injustice, neglect, discrimination, exploitation, and other hostile actions, realize a strong nation's children as the next generation.<sup>12</sup>

---

<sup>10</sup> Ahmad Kamil dan Fauzan, 2008, *Hukum Perlindungan dan Pengangkatan Anak di Indonesia*, PT. Raja Grafindo Persada, Jakarta, p. 12.

<sup>11</sup> Mappi FHUI, 2003, *Lembaga Pengawasan Sistem Peradilan Pidana Terpadu*, [www.pemantauperadilan.com](http://www.pemantauperadilan.com)).

<sup>12</sup> Maulana Hasan Wadang, 2000, *Advokasi dan Hukum Perlindungan Anak*, Gramedia Widiasarana, Jakarta, p. 76.

According to the author, the urgency of protecting children conflicts with legal cases. The concept of the legal protection of children's rights is a legal sub-system and the purpose of criminal law, which includes a basic understanding of the principles of criminal law such as the territorial principle, the active personal principle, the passive personality principle, the universality principle, the *fictie* principle, and others. Two legislative steps are taken to protect children involved in criminal acts: Law Number 3 of 1997 concerning Juvenile Court, amended by Law Number 11 of 2012 concerning the Juvenile Criminal Justice System, and Law Number 12 of 1995 concerning Corrections. The existence of the formulation of the provisions of the Law on Juvenile Justice in Indonesia becomes a reference that is more specific to the provisions of the criminal procedural law of children. The existence of the *Lex specialist derogatlexgeneralis* principle is a binding provision of the general principle.

## 4 Conclusion

The legal protection of children's rights in the care of mothers undergoing crime has not been effective because there are still cases related to violations of children's rights that can threaten the growth and development of their future lives. The child as the holder of rights and the state as the organizer of child protection must be able to handle the problems of fulfilling children's rights to the fullest. The state is responsible for providing legal protection so that children can grow and develop into a quality generation that has good universal values and instills morals and character education.

The regulation of the legal protection of children's rights in the care of mothers who are serving a crime has been regulated in Pancasila and the 1945 Constitution of the Republic of Indonesia, as well as with the issuance of several laws and regulations that regulate in detail the protection of children's rights in Indonesia. In reality, it has not been fully implemented as an effort to provide welfare and safety for children, marked by the existence of cases of children, either as perpetrators or victims.

The concept of the legal protection of children's rights in the care of mothers who are serving a sentence in prisons by the government has taken the right step by ratifying the Convention on the Rights of the Child by prioritizing progressive law because in settlement of cases it does not only look at the aspects of legal certainty but pays more attention to the objectives of benefit and justice for the community through prevention, leniency, and alternative punishments.

## References

- Ahmad Kamil dan Fauzan, 2008, *Hukum Perlindungan dan Pengangkatan Anak di Indonesia*, PT. Raja Grafindo Persada, Jakarta.
- Bahder Johan Nasution & Sri Warijati, 2002, *Hukum Perdata Islam*, cet 1 CV. MandarMaju, Bandung.
- Hardjon, 2007, *Perlindungan Hukum Terhadap Anak*, Eresco, Jakarta.
- Maulana Hasan Wadang, 2000, *Advokasi dan Hukum Perlindungan Anak*, Gramedia Widiasarana, Jakarta.
- M. Yahya Harahap, 2005, *Hukum Perkawinan Nasional*, cet 1, CV. Rajawali, Medan.



- Nazir, 2005, *Metode Penelitian*, Ghalia Indonesia, Jakarta, hlm. 12 Harkristuti Harkrisnowo, 2002, *Tantangan dan agenda Hak-hak Anak*, Newsletter Komisi Hukum Nasional, Edisi Februari, Jakarta.
- Peter Mahmud Marzuki, 2005, *Penelitian Hukum*, Prenada Media Group, Jakarta.
- R Wirjono Projodikoro, 2002, *Hukum Perkawinan di Indonesia*, cet 6, Bandung, hlm. 17. Sugiyono, 2006, *Metode Penelitian Kuantitatif, Kualitatif dan R & D*, Alfabeta, Bandung.
- Sudarsono, 2003, *Hukum Perkawinan Nasional*, cet 1, Rineka Cipta, Jakarta.
- Sulaiman, *Program Studi Hukum Program Doktor Fakultas Hukum Universitas 17 Agustus 1945 Semarang*.
- Soetojo P, 2001, *Pluralisme dalam Perundang-undangan Perkawinan Indonesia*, cet 3, Airlangga University, Bandung.
- Soemiyati, 2005, *Hukum Perkawinan Islam dan UU Perkawinan*, cet 1, Liberty, Yogyakarta.
- Syamsul Arifin, 2012, *Pengantar Hukum Indonesia*, Medan Area University Press, Medan.

## Laws and Regulations

- 1945 Constitution of the Republic of Indonesia.
- Law Number 1 of 1974 concerning Marriage.
- Law Number 23 of 2002 concerning Child Protection.
- Law Number 3 of 1997 concerning Juvenile Court as amended by Law Number 11 of 2012 concerning the Judicial System.
- Law Number 12 of 1995 concerning Corrections
- Law of the Republic of Indonesia Number 4 of 1979 concerning Child Welfare.
- Law of the Republic of Indonesia Number 39 of 1999 concerning Human Rights.
- Law of the Republic of Indonesia Number 11 of 2012 concerning the Juvenile Criminal Justice System.
- Law of the Republic of Indonesia Number 35 of 2014 concerning Child Protection.

## Internet

- Mappi FHUI, 2003, *Lembaga Pengawasan Sistem Peradilan Pidana Terpadu*, [www.pemantauperadilan.com](http://www.pemantauperadilan.com)).

**Open Access** This chapter is licensed under the terms of the Creative Commons Attribution-NonCommercial 4.0 International License (<http://creativecommons.org/licenses/by-nc/4.0/>), which permits any noncommercial use, sharing, adaptation, distribution and reproduction in any medium or format, as long as you give appropriate credit to the original author(s) and the source, provide a link to the Creative Commons license and indicate if changes were made.

The images or other third party material in this chapter are included in the chapter's Creative Commons license, unless indicated otherwise in a credit line to the material. If material is not included in the chapter's Creative Commons license and your intended use is not permitted by statutory regulation or exceeds the permitted use, you will need to obtain permission directly from the copyright holder.

