

# Legal Protection Principle of the Fulfillment of Children's Maintenance Rights After Divorce

Arief Syahrul Alam  
Faculty of Law, 17 August 1945 University  
45 Semolowaru Praja Street, Surabaya City, Indonesia  
E-mail: sahrulalam@uwp.ac.id

Endang Prasetyawati  
Faculty of Law, 17 August 1945 University  
45 Semolowaru Praja Street, Surabaya City, Indonesia  
E-mail: endang\_pras@untag-sby.ac.id

## Abstract

Legal problem of children's maintenance rights was caused by the absence of legal effort towards the party who didn't perform the decision of children's alimony in the Religious Court Law. In the absence of coercive measures to carry out the decision, it could be said as the vague norms or obscure norms or *vague normen*. This article discussed the legal problems related to the urgency of legal protection to the fulfillment of children's maintenance rights after divorce and the formulation of the fulfillment of children's maintenance rights after divorce. This study is a legal normative research using statute approach, conceptual approach, comparative approach, and philosophical approach. The result showed that parents who ignored children's maintenance rights could be categorized to violate the law and should be held accountable for fulfilling children's rights as legal rights to obtain maintenance rights. In order to implement the fulfillment of children's support in Indonesia, KPAI (Indonesian Children Protection Commission) should be given active and coercive authorities and responsibilities for children's maintenance rights so it can be in accordance with the principle of Convention on the Rights of Child that both parents have common responsibilities for the upbringing and development of the child.

**Keywords:** Legal Protection, Children's Maintenance Rights, Rights of Child, Development of the child

**DOI:** 10.7176/JLPG/127-02

**Publication date:** December 31<sup>st</sup> 2022

## 1. Background

Legal protection of children's rights is a part of human rights that is elaborated in the Constitution of The Unitary State of The Republic of Indonesia. It is regulated in the Article 28 B Paragraph (2) of the 1945 Constitution of the Republic of Indonesia resulting from the 4th Amendment which determines that: "Every child has the rights to viability, growth and development as well as the rights to the protection from violence and discrimination." Moreover, in Article 28 D paragraph (1) of the 1945 Constitution of the Republic of Indonesia determines that "every person has the rights to acknowledgment, assurance, protection and certainty of fair law as well as equal treatment before the law." Article 28 D paragraph (1) of the 1945 Constitution of the Republic of Indonesia shows that all people including children have the rights to acknowledgment, assurance, protection and certainty of fair law as well as equal treatment before the law.

The provision of Article 28 B paragraph (2) and Article 28 D paragraph (1) of the 1945 Constitution of the Republic of Indonesia can be stated as the basis philosophy for children's rights to viability, and the rights to protection from violence and discrimination, as well as the rights to acknowledgement, assurance, protection and certainty of fair law and equal treatment before the law. Thereby, every regulation related to the acknowledgement and protection of children's rights including the implementation of verdict on children's maintenance rights should refer to the philosophical basis of the nation which are Article 28 B paragraph (2) and Article 28 D paragraph (1) of the 1945 Constitution of the Republic of Indonesia.

Based on diverse social studies, known as child abandonment is included in the child abuse category. Theoretically, child abuse is an intentional or unintentional act of letting children's basic needs such as clothing, food, and shelter not be fulfilled.<sup>1</sup> The social consequences that arise can also be seen in the reality from the cases that are often found where even though it was stipulated in the verdict of divorce that the children's maintenance rights have been determined, in reality, mostly it was ignored by the party who is given the responsibility to the children's maintenance rights. The effects of the ignorance of the children's maintenance and the lack of the nation's role are the increasing number of children who are sent by their parents to work on the streets, children who are forced to work in order to fulfill the family needs, sexual assault to the children,

<sup>1</sup> Bagong Suyanto, *Children Social Problems*, Prenadamedia, Jakarta, 2013, p.186.

children trafficking (exploitation) for sexual gratification and other cases that are harmful to the children.<sup>1</sup> There is no particular institution available in Indonesia that handles a father's disobedience to the court decision relating to the children's maintenance rights after divorce. Thus far, there is a legal effort that can be taken through the applicable procedural law, in this case, is *Herzein Inlandsch Reglement* or HIR.

This condition has caused legal problems since the Law on Religious Courts does not specifically regulate legal efforts against the party that does not implement the verdict regarding children's alimony, so the HIR is applied as a coercive effort to implement the verdict. This condition can be said to the vague norms or obscure norms (*vage normen*).<sup>2</sup> This case reflects on the arrangement regarding procedural law at the Court which does not specifically regulate legal efforts against the party that neglects the divorce verdict by parents towards their responsibility of children's maintenance so that civil procedural law regulated in the HIR is used.

Based on the background above, the formulation of problems in this research are:

1. The Urgency of Legal Protection to the Fulfillment of Children's Maintenance Rights After Divorce.
2. The Formulation of Children's Maintenance Rights After Divorce.

## 2. Research Methodology and Problems Approach

This study is a legal normative research that is used to identify legal concepts and legal principles that govern, especially legal concepts and principles that are used as the basic framework in the legislation. The laws and legislations that will be discussed in this research are those related to marriage, religious court, and children's constitutional rights concerning the implementation of the judicial verdict. Furthermore, this research uses the statute approach, conceptual approach, comparative approach, and philosophical approach.

## 3. Discussion

### 3.1 The Urgency of Legal Protection to the Fulfillment of Children's Maintenance Rights After Divorce

Several factors that cause the failure of implementing the decision regarding the implementation of father's responsibility in providing children's maintenance after divorce are the lack of awareness of the laws, lack of understanding of children's rights to livelihood after divorce, low income, other responsibilities of the father after his remarriage and his income is not sufficient as he has more financial expenses.

Seeing the reality in the society, there are many verdicts that contain children's maintenance cannot be enforced and is valueless. This is because the father is not bound by the decision to carry it out obediently for the viability of his children as the victims of their parents' divorce. The complexity of the formal procedures for execution request for the citizens and its steep cost are really imbalance to the amount of children's living expenses that have been determined by the Court. For this reason, the aggrieved party does not take any legal steps that supposed to be taken. Furthermore, children whose rights to maintenance are not decided in the Court should file a new lawsuit to the Court. This will also take a lot of time and cost, thus this legal step is less interesting for the society.

Concerning the issue of children's maintenance, the Religious Courts can only be passive. They cannot decide on the issue of children's maintenance if the application is not being filed. Courts also cannot execute the maintenance of neglected children without request of execution from the the aggrieved party. Furthermore, the Courts also cannot supervise whether the decision that has permanent legal force is performed according to the content of decision or not. If this case is ignored, there will be more children who become the victims of support neglecting after the divorce of their parents. In this case, the role of the state is required to oversee the compliance of children's rights especially after the divorce of their parents.

In the Article 23 of Law No 17 Year 2016 concerning Children's Protection stated that:

1. The State, Government and Regional Government assure the protection, maintenance and welfare of children by paying attention to the rights and responsibility of parents, guardians or other people who are legally responsible to the children.
2. The State, government and regional government supervise the implementation of children's protection.

It is compulsory for the state, government, or regional government to protect and supervise the fulfillment of children's rights. Based on the explanation above, it is seen clearly that in terms of children's maintenance rights protection after a divorce, the state, government and regional government supervision does not exist. Legal protection of children's rights after divorce is actually available, however, the protection is passive. Even though the Law has regulated that the Government or Regional Government also has the responsibility to provide facilities, infrastructure, and the availability of human resources in the implementation of children protection.<sup>28</sup> However, there is no realization from the Law. The state, government, or regional government has not provided the facility, infrastructure, and human resources that protect and supervise the assurance of the fulfillment of

<sup>1</sup> Ryan Chandra Ardhianto, *Optimization of KPAI Roles as A Form of State Auxiliary Organs in Protecting Homeless Children*, Syarif Hidayatullah Islamic State University, 2015, p.51

<sup>2</sup> Yovita Arie Mangesti and Slamet Suhartono, *Contemporary Law Science Breaks The Rigid Limits of Normative Law*, Setara Press, Malang, 2020, p. 70

children's support after divorce.

The state has made an independent institution which is the Indonesian Children Protection Commission (KPAI) which was formed based on the Constitution Number 17 Year 2016 on the Children Protection. Commission of Children Protection of Indonesia (KPAI) is an independent institution that was formed based on the Constitution Number 23 Year 2002 concerning Children Protection in order to improve the effectiveness of the implementation of children protection.

The Indonesian Children Protection Commission (KPAI) is formed to respond to various reports regarding violence, neglect, and non-fulfillment of children's basic rights in Indonesia. The political decision in forming KPAI also cannot be separated from international support. International communities stated their deep concern about the condition of children in Indonesia. The massive amount of children in conflict areas, the involvement of children in armed conflict (child soldiers) as happened in Aceh, child labor cases, high rates of school dropout, underage marriages, trafficking, malnutrition and other suchlike have gained the attention of international communities to urge Indonesian government to create a specific institution that tasked to monitor the condition of children protection in Indonesia.<sup>1</sup>

International pressure is based on the condition that the Convention on the Rights of Child is one of the fastest and most ratified Human Rights International instrument by many countries. Convention on the Rights of Child is ratified by almost all of the UN member countries, except for the United States and Somalia. For that reason, there are many people who say that Convention on the Rights of Child is universal, almost equal to the universality of the 1948 Universal Declaration of Human Rights (UDHR).<sup>2</sup> By that international's pressure, Indonesia finally formed an institution known as Indonesian Children Protection Commission (KPAI) through Presidential Decree Number 77 the Year 2003. At this time, the legal base of KPAI is the Presidential Regulations Number 61 Year 2016. Based on Article 3, KPAI holds the duty to:

1. do monitoring towards the implementation of children's rights protection and compliance;
2. give opinions and suggestions in formulating policies about the maintenance of children's protection;
3. collect the data and information regarding child protection;
4. receive and conduct a review of public complaints concerning the violation of children's rights;
5. mediate the dispute over the violation of children's rights; cooperate with the institutions formed by the society in the children's protection sector; and provide a report to the authorities about the alleged violation of the Law of Children Protection.

The formation of KPAI as a children's protection institution in Indonesia is expected to be able to provide protection to the children that cover the entire activities to assure and protect children and their rights in order to live, grow, develop and participate optimally in accordance with the human dignity, as well as to obtain protection from violence and discrimination.

Based on the duties and authorities of KPAI, it is seen that KPAI as the state institution has duties and authorities as supervisor, not as technical implementor institution of children protection because, in fact, Indonesia has already had technical implementor institutions of children protection. As for the policymakers, there are legislative and executive institutions, especially in law-making. At the policy implementation level, there is an executive institution through the Ministry of Women's Empowerment and Children Protection. Meanwhile, if there is a violation of children's rights, there are already police agencies, prosecutorial institutions, and judicial institutions in order to handle these cases.

In the case of childhood neglect, because their parents do not give the alimony, KPAI can only be a mediator. When there is a complaint about the neglect of children's alimony, KPAI will call out both of the parents to be mediated. If the result of the mediation is a success, then it will be noted in an agreement. However, KPAI has no authorities to oversee the implementation of that agreement. Beside that, the summon for mediation can only be done thrice. If after the third summon and each party or one of the parties is not present, so both parties are considered to be unwilling for a mediation and the case will be closed.<sup>31</sup> As a supervising institution of children protection in Indonesia, in case of children alimony negligence after divorce, KPAI does not have coercive power. KPAI can only be passive. The neglect of children maintenance will only be handled if the aggrieved party files a report to the KPAI.

In the laws and regulations in Indonesia, there are already provisions that regulate administrative and civil legal sanctions that can be applied to the husband who ignores the Court decision to provide alimony for his children until they grow up. However, the administrative and civil sanctions cannot be effective legal means to compel the husband to perform the Court decision. There is no mechanism in the Marriage Law that can be used to ensure the verdict of Religious Court that punish the husband to pay the alimony are truly implemented.

For that reason institutions such as Bahagian Sokongan Keluarga (BSK) or Family Support Section in

<sup>1</sup> Laurensius Arliman S, 'The Position of Indonesian Children Protection Commission as State Auxiliary Bodies in Indonesian Constitutional Law System,' *Justitia et Pax*, 32.3 (2017) <<https://doi.org/10.24002/jep.v32i2.1151>>

<sup>2</sup> Arliman S. *loc.cit*.

Malaysia need to be adopted by the legal transplantation way. The application of the institution function such as BSK can be done through the development of task or to widen the authorities of KPAI as state institution in implementing the Court's decision regarding the granting of children support rights from their parents.

As the authorities given to the BSK, when the decision of children alimony has been stipulated by the judge, BSK will oversee the implementation for the first three months by contacting the mother who holds the children custody to ask if in that month the father has already performed his responsibility or not until the parents' responsibilities to the children is fulfilled. Learning from this experience in Malaysia, by the existence of BSK, children's support rights become more secured and protected. Regulations concerning with the protection of children support rights after divorce are not only limited to the Court's decision but are truly enforced and supervised by the BSK.

### *3.2 Formulation of the Compliance of Children Maintenance Support After Divorce*

Conception about social welfare has emitted the idea of the importance of children welfare increment. This is resulted in the stipulation of Law Number 4 Year 1979 which is the first Law that specifically about children welfare.<sup>1</sup> Based on the Law Number 4 Year 1979 about Children Welfare, Article 1: "Children welfare is a system of life and livelihood of children that can assure their growth and development naturally, both spiritually and physically, as well as socially." This Law becomes a new era in the conception of children protection in Indonesia. Moreover, in Article 2 Law Number 4 Year 1979 conceptions from children's rights consist of:

- (1) Children have the rights to welfare, treatment, concern and guidance base upon the affection from both in the family and in the special care in order to grow and develop properly.
- (2) Children have the rights to the service for developing their skills and social life, in accordance with nation's culture and personality, to be a good and utilitarian citizen.
- (3) Children have the rights to maintenance and protection, both during pregnancy and after birth.
- (4) Children have the rights to the protection from the environment that can endanger or hinder their growth and development reasonably.

Regarding the study in this research, that is about children maintenance rights in terms of children's growth, Article 1 Number 7 describes the definition of neglected children according to Children Welfare Law Year 1979 is children whose parents for a reason neglect their responsibilities, so the children's needs cannot be fulfilled fairly, both spiritually, physically as well as socially. This Law provides obligations for the parents to be responsible in terms of realizing children welfare. In Chapter III, Article 9 and Article 10 of Law Number 4 Year 1979 stated that:

#### Article 9

Parents are the first on the list to be responsible of realizing children welfare spiritually, physically and socially.

#### Article 10

- (1) Parents who are proved to neglect their responsibilities as meant in Article 9, that caused the emergence of hindrance in the growth and development of their children, their custody can be revoked. In this case, an individual or institution will be appointed as the guardian.
- (2) The revocation of custody in paragraph (1) does not omit parents' obligations to support their children's life, maintenance and education according to their abilities.
- (3) The revocation and return of custody is determined by the judge's decision.
- (4) The implementation of the clauses in paragraphs (1), (2) and (3) is regulated further by the Government Regulations.

However, Government Regulations as the implementation of that Article is never been made,<sup>2</sup> so, the technical implementation of Article 10 paragraph (1), (2) and (3) are not well-implemented. Government Regulation that is formed based on the Law Number 4 Year 1979 is the Government Regulation Number 2 Year 1988 about The Effort of Children Welfare for Children with Problems. What is meant by children with problems in this Law is the children who do not have parents and are neglected, homeless children, financially incapable children, children with behavioral problems and disabled children. The effort of children welfare according to this Law firstly and particularly becomes parents' responsibility. The effort of children welfare is shown especially to the children with those problems.<sup>3</sup>

Still, this Government Regulation does not discuss specifically about parents' obligations regarding children welfare. This government regulation provides the techniques about welfare effort for children with problems such as care, help and special services. But, this government regulation gives mandatory to the minister (that is not stated specifically from which ministry) to regulate further about the welfare effort of children with problems,

<sup>1</sup> Ministry of Women's Empowerment and Children Protection of the Republic of Indonesia, *Composite Index of Children Welfare*, Jakarta, 2016.

<sup>2</sup> Direktori JDIH DPR-RI, 'Data Searching Based on the Directory of JDIH DPR-RI', *Accessed on 28 August 2022, 2022*.

<sup>3</sup> Agustinus Supriyanto, 'Indonesia's Perspective on Children Rights: Reflection of the Constitution and Related International Convention', *Mimbar Hukum*, Special Edition.November (2011).

so that, the techniques of this matter have not been explained clearly.

The new paradigm of children welfare has changed since the ratification of Convention On The Rights Of The Child through the Presidential Decree Number 36 Year 1990 about the Attestation of Convention On The Rights Of The Child. By the issuance of that Presidential Decree, a paradigm shift has happened from the need based approach to the right based approach. Children who previously viewed as benefit recipients beside being considered as welfare measurements, which focus mainly on the fulfillment of their basic needs to be a complete individual and attached to basic rights with rights-based approach to children with problems.<sup>1</sup>

Explicitly rights approach mentioned that rights is attached to the subject, in this case is the child. The consequences from that rights statement is the obligations of another party to do the compliance of that rights, and obligations that consequence to sanction if there are violations. Rights approach also provides spaces for protection, justice as well as empowerment issues, that previously are difficult to be accommodated in the need-base approach.<sup>2</sup>

The 1998 reformation brought changes to the direction of legal policies in Indonesia. One of the reformation agendas was the protection of Human Rights. Political configuration at the beginning of 1998 reformation and the transition from authoritarian regime to the democratic also contributed to legal products regarding Human Rights. For this reason, legal products that were produced were still dominated by the accommodation towards Human Rights.<sup>3</sup>

Through the Human Rights Action Plan (RANHAM) which is one of the policy steps taken by the Government in term of protection, respect, enforcement as well as advancement of Human Rights in Indonesia. With the existence of RANHAM, ratification process is expected to proceed as planned.<sup>4</sup>

RANHAM consists of protection effort and Human Rights enforcement in the central to the regional levels through education, counseling and socialisation for law enforcers, government institutions, students and university students. Among other things, legal guarantee is carried out by completing diverse Laws and Regulation related to human rights protection to wit by the ratification of various international instruments related to Human Rights.

Since the formation of RANHAM in 1998, children have become a part of RANHAM implementation target. Children protection in the beginning of RANHAM era that was in 1998-2003 stated that Activity Programs of National Human Rights Action Plan in 1998-2003 in form of Education through Family which were parenting and Family Re-enforcement. At that time, the spirit of children rights fulfilment was still based on the spirit of advancing the implementation of Convention On The Rights Of The Child through the improvement of family roles and values as well as parents' responsibilities. Other social mobilisations were by enhancing awareness of Convention On The Rights Of The Child principles and improving their skills to implement the provisions of the convention through the available programs such as POSYANDU, Prosperous Family, PKK, KAPPA Religion/LSM.<sup>5</sup>

However, looking at the development of children rights enforcement in the RANHAM on the next periods, plans regarding the fulfillment of children rights whose parents have neglected them as a result of not being provided with alimony especially when their parents are divorce are not exist. Looking at 2021-2025 RANHAM what becomes the main focus is the handling of child labour, Children who are Facing Legal Problems, Crimes of Children Trafficking, Juvenile Justice and Exploitation of Children in Cyber and Digital Realm.

Meanwhile, related to the challenges of fulfilling children rights in the 2021-2025 RANHAM, the first point is that the fulfillment of basic rights for children who need special protection is not optimal yet, particularly in the sector of population administration, education and health, what is meant by children who need special protection are:

- a) The residents of Children Social Rehabilitation Center
- b) Children in the Frontier, Remote and Underdeveloped Area and/or in the poverty pocket
- c) Children in the Orphanage or Social Homes
- d) Indigenous People Groups
- e) Believers of Faith
- f) Children with Certain Diseases (HIV/AIDS)
- g) Children who are Facing Legal Problem
- h) Children Out of Wedlock<sup>6</sup>

<sup>1</sup> Susanto, 'Paradigm of System Based Children Protection', *Aspirasi*, 8.1 (2017), 108.

<sup>2</sup> Team PSHK-Unicef, *Report on Mapping Result Towards Legal Framework and Policies Regarding Children in Indonesia*, Jakarta, 2010.

<sup>3</sup> Jefri Porkonanta Tarigan, 'Accommodation of Legal Politics in Indonesia Towards Human Rights Based on Its Thinking Generation', *Constitution Journal*, 14.1 (2017) <<https://doi.org/10.31078/jk1418>>.

<sup>4</sup> Rhona K.M. Smith Smith and others, 'Hukum Hak Asasi Manusia (HAM)', *Evolusi Pemikiran Dan Sejarah Perkembangan Hak Asasi Manusia*, 2008.

<sup>5</sup> *Vide Attachment of Presidential Regulations Number 61 Year 2003 About The Amendment of Presidential Decree Number 129 Year 1998 About Indonesia National Action Plan of Human Rights*

<sup>6</sup> *Vide Attachment of Presidential Regulations Number 53 Year 2021 About 2021-2025*

This RANHAM does not state children who are in the situation where both of the parents are divorce. Even though the child also need protection, particularly regarding his/her maintenance rights for his/her growth and development. If being related to the issue in this research, one of the most relevant RANHAM is the children out of wedlock. Since the children out of wedlock often experience problems particularly related to residence documents. This residence document problem causes the children to face problems when they apply for educational and health administration and others. This void should be the attention of the state, how the national Human Rights Action concerning the enforcement of children rights to obtain alimony from their parents for their growth and development.

The rights to grow and develop for children become one of 4 (four) categories of children rights. Development rights, that is children rights in the Convention of Children Rights which cover the entire form of education (finally and non formal) and the rights to achieve decent living standards for the development of children's physical, mental, spiritual, moral and social (the rights to standard of living). One of the implementations in achieving this right is through the enforcement of rights regarding children's alimony.

Under international law, Article 18 of the Convention on the Right of the Children affirms the principle that both parents have common responsibilities to grow and develop their children. Likewise in the 1945 Constitution of the Republic of Indonesia in Article 28B affirms that the right to survival, grow and develop as one of the human rights of a child.

Theoretically, parents are the very first party who responsible for protection and fulfillment of children rights. Children rights to the parents have been started since the children were born and breathed the air of life.<sup>1</sup> Since that moment, parents' responsibilities for their children is started. One of the rights that should be fulfilled by parents is the subsistence right.

*Nafkah* or subsistence is not only provision that is given by a husband to his wife, but also an obligation between a father and his children. In the book of Islamic Syariah, the word *nafkah* (subsistence) means the whole living expenses that is the rights for a wife and her children regarding food, clothings and shelter as well as other basic needs, even if the wife is a wealthy woman.<sup>2</sup>

In the context of law in Indonesia, as stated in Article 45 of Law Number 1 Year 1974 about Marriage:

- (1) Both parents are responsible to nurture and educate their children well.
- (2) Parents' responsibilities as referred in paragraph (1) of this article is valid until their children are married or be independent. The responsibilities are applied continuously even though the marriage of the parents are broke up.

Even concerning divorce, has been stated in Article 41 Law Number 1 Year 1974 as amended to be Law No. 16 year 2019, hereinafter referred to as Marriage Law:

"The consequences of a broke up marriage due to divorce are:

- a. Both mother or father are still responsible to nurture and educate their children, solely for the sake of children; if there is a dispute about the custody, the Court will decide;
- b. Father is the one who responsible to all the maintenance and education expenses that the children need; if in the practice the father cannot fulfill that responsibility, the Court can determine that the mother is also responsible to those expenses;
- c. The Court may oblige the ex husband to provide living expenses and/or determine a responsibility for his ex wife."

When it is related to the issues which eventually becbecome the main focus of 2021-2025 RANHAM such as Children would Face Legal Problems, Child Labour, Crime of Children Trafficking, Children Exploitation in cyber and digital realms, these cases can be linked to with one of those is the neglect of providing living for children. The consequences from the neglect of providing children support and the lack of the state's role are the increase of children who are forced by the parents to work on the streets, children who are forced to work in order to fulfill the family needs, sexual assault to children, children trafficking (exploitation) to be sexual gratification and other cases that are harmful for children.<sup>3</sup>

Beside the problems related to RANHAM, regarding subsistence rights, particularly children maintenance rights in the positive law in Indonesia also experiences legal obscurity. Law Number 1 Year 1974 about Marriage does not specifically state what does it mean by subsistence, although in Article 41 and 44 state a formulation of articles that are close to the concept of subsistence. Referring to the Compilation of Islamic Law (KHI), according to Article 80 paragraph (4) of KHI, The Third Part of Husband's Responsibilities mentions that in accordance with his income, a husband is responsible for: a. subsistence, *kiswah* and dwelling for wife; b. household expenses, maintenance expenses and medical expenses for his wife and children; c. educational expenses for his children.

<sup>1</sup> Hifzhul Lisan Raja' Thaha Muhammad Ahmad, *Family Moral Guide*, Pustaka Adnan, 2005.

<sup>2</sup> Abdur Rahman, *Marriage in Islamic Syariah*, Rineka Cipta, Jakarta, 1992

<sup>3</sup> Ryan Chandra Ardhianto, 'Optimization Role of KPAI as State Auxiliary Organs in the Protection of Homeless Children', *Экономика Региона*, 2015

The phrase subsistence on letter a separated from letter b regarding household expenses, maintenance and medical expenses for children and letter c regarding educational expenses for children. In the KHI, what does it mean by subsistence as mentioned on letter a is not stated. Besides, the subject of subsistence on letter a is only stated for wife, while the children is not mentioned. This has become a legal obscurity. Whereas, from the book of Islamic Syariah point of view, subsistence is also the rights of children.

However, we can also read on Article 105 of KHI that mentions as follows:

“In the case of a divorce:

- a) The nurturing of a child who has not *mumayyiz* or has not reach 12 years old is the mother's rights.
- b) The nurturing of a child who already *mumayyiz* is given to the child to choose between father or mother as the one who holds his/her legal custody.
- c) Maintenance expenses is the father's responsibility.

While in Article 156 Letter (d) of KHI also regulates children's expenses stated that the whole expenses of *hadhanah* and children maintenance is the responsibilities of father according to his ability, at least until his children grow up and can take care of themselves, that is when the children reach 21 years old.

Theoretically, each nation that ratificates a covenant or international convention, automatically has been bound to several obligations as mentioned in that covenant or convention. Therefore in the international human rights regime, state is the duty bearer. On the other hand, individual or the citizen is automatically positioned as claim holder. What should be understood in a covenant or international convention, a country is actually limiting its sovereignty as well as internationalising it's individuals or citizens as the legal subjects in the international law. Because the nation holds responsibilities to respect, protect and fulfill each individual's basic rights and freedom. The obligations of the state including the responsibilities to children rights. By the ratification of The Convention on The Right of The Child, Indonesia should provide respect, protection of the main rights such as survival right, protection right, development rights and participation rights that also contain rights derived from the main rights, including the obligation to fulfill the standards of good living for the children's physical, mental, spiritual, moral and social development that are the parts of development rights, which includes the rights to children maintenance.

The effort of children maintenance rights fulfillment in Indonesia has become attention of Supreme Court. The Supreme Court has responded to such problems by issuing several internal policies, to wit, Supreme Court Circular Letter Number 3 Year 2015 about the Enforcement of Formulation Results of the Plenary Chamber, in the section of formulation of Law of the Religion Chamber, number 14 stated: "Verdict regarding the responsibility of children support should be followed by an addition of 10% to 20% per year from the decided amount, excluding the expenses for education and health." Apart from that, it is also contained in the Supreme Court Circular Letter Number 2 year 2019 about the Enforcement of the Formulation Results of Plenary Chamber, in the section of Legal Formulation of Religion Chamber, letter (a) stated: "Past subsistence (*nafkah madliyah*) that is neglected by the father can be filed a lawsuit by the mother or person who really takes care of the child." In case of children maintenance, an addition of 10% to 20% per year excluding education and health expenses, is one of the judge's concerns that is stated in the verdict by seeing at the fulfillment of children maintenance rights for a long term, and if the children's maintenance is not fulfilled by the father, so in accordance with the Supreme Court Circular Letter Number 2 Year 2019, lawsuit can be filed to the Religion Court.<sup>1</sup> This matter in a form of concern from the Supreme Court regarding the fulfillment of children maintenance rights. However, several regulations concerning the fulfillment of children maintenance rights, especially post divorce, are actually still limited to paper judgement, while on the practice are still not yet fulfilled maximally.

Another problems are the father's reluctance to comply his responsibilities though it has been decided by the Judge cannot be subjected to criminal sanctions, even though the regulations set the wife to be able to file a lawsuit for the fulfillment of children alimony, however there are a few who did that. Criminal sanctions as mentioned in the Law concerning The Elimination of Domestic Violence applies for husband, wife and children who are still in the marital relationship.<sup>2</sup> Therefore, the decision that punish a father to provide support for his children cannot be controlled further, on one hand, the judge is passive, but on the other hand, there are no specific regulations that regulate the mechanism related to the fulfillment of children alimony after divorce.

This becomes the homework for the state as the party who holds responsibilities to accomplish the rights of its citizens, in this matter is children. The state should ensure how the children obtain their rights regarding livelihood as mentioned in the Convention of Children Rights. Parents are the very first party who are given the obligations to be responsible for their children growth. However, the state should also provide a vessel or stipulate rules or policies in order to fulfill that subsistence rights.

According to Lawrence M. Friedman, in every legal system there are 3 (three) sub systems, to wit: 1.) sub

<sup>1</sup> Sinaga.

<sup>2</sup> Vide Article 2 Paragraph (1) Letter b law Number 23 Year 2004

system of legal substance, 2.) sub system of legal structure; and 3.) sub system of legal culture. <sup>1</sup> Legal substance consists of legal materials which are poured in the Legislation. Legal structure involves of legal implementor institutions, the authorities of institutions and personnel (law enforcement officers). While legal culture consists of society's behaviors (law). The three elements influence the success of law enforcement in a community (nation), which synergize between one another to achieve the aim of legal enforcement, videlicet justice.<sup>2</sup>

Structure is the entire legal institutions, institutions as well as the officers, namely the police with its officers, the Prosecutor's office with its prosecutors and the Court with its judges, and so on. When it is linked to the fulfillment of children maintenance rights, this includes the Indonesian Children Protection Commission (KPAI).

Legal substance is the entire legal rules, legal norms and legal principles written or unwritten, including the Court's decision. When it comes to the fulfillment of children rights, it is by including the policies that are pro to protection such as in the RANHAM or through the Constitution regarding human rights and children rights.

Legal culture is the opinions, beliefs (faith), habits, way of thinking and action, both from the law enforcers and the citizens, about law and various phenomena that are related to law. If it is linked to the fulfillment of children's rights, it is the awareness of parents' responsibilities concerning the fulfillment of children maintenance rights, even though already in divorce status. Therefore, a new movement and the collaboration of the three legal sub systems are required to accomplish children rights, particularly related to children maintenance rights in order to support the children growth.

## 4. Closing

### 4.1 Conclusion

Based on the discussion above, several points can be concluded as follows:

1. Parents who ignore children maintenance rights can be categorized to violate law, and for their mistake they should be liable for the losses or responsible to fulfill children rights as legal rights to obtain maintenance rights from their parents although their parents' marriage broke up due to divorce. In order to perform the fulfillment of children support in Indonesia well, active and coercive authorities and responsibilities should be given to KPAI.
2. Children maintenance rights is one of Human Rights as stated in Children Rights Convention in line with the fulfillment of children growth and development as stipulated in the Constitution, the 1945 Constitution of the Republic of Indonesia Article 28B and the principles in Convention of Children Rights that both parents have mutual responsibilities in raising and developing their children.

### 4.2 Suggestion

1. Government should widen KPAI's authorities as independent institution to provide protection for children maintenance rights that had been decided by the Court by adopting the function and authority of BSK institution in Malaysia by developing duties or widen KPAI's authorities as state institution in the implementation of Court's decision regarding the allotment of children maintenance rights from the parents.
2. In order to provide protection, enforcement and fulfillment of children alimony, that is by incorporating the conception of children maintenance rights into a number of policies related to the fulfillment of children rights, including through the upcoming Nation Action Plan of Human Rights (RANHAM). By including the conception of children maintenance rights in the RANHAM, RANHAM will be reference for policies related to the fulfillment and protection of Human Rights in the future, especially regarding children rights.

## References

- Arliman S, Laurensius, 'The Position Of Indonesian Children Protection Commission As State Auxiliary Bodies In Indonesian Constitutional Law System', *Justitia et Pax*, 32.3 (2017) <<https://doi.org/10.24002/jep.v32i2.1151>>
- Chandra Ardhyanto, Ryan, 'Optimization Role Of Kpai As State Auxiliary Organs In The Protection Of Homeless Children', *Repository UIN Syarif Hidayatullah*, 2015
- DPR-RI, Direktori JDIH, 'Data Searching Based on Directory of JDIH DPR-RI', Accessed on 28 August 2022, 2022
- Friedman, Lawrence M., *American Law: An Introduction, Translated from American Law An Introduction, 2nd Edition*, ed. by Wisnu Basuki Jakarta: Tatanusa, 2001
- Indonesia, Ministry of Women's Empowerment and Children Protection of the Republic, *Composite Index of Children Welfare*, Jakarta, 2016.

<sup>1</sup> Lawrence M. Friedman, *American Law: An Introduction, Translated from American Law An Introduction, 2nd Edition*, ed. by Wisnu Basuki (Jakarta: Tatanusa, 2001)

<sup>2</sup> Ansori Lutfi, 'Reformation Of Legal Perspective Legal Progressive Enforcement', *Juridical Journal*, 4.2 (2017).



- Law Number 23 of 2004 regarding Elimination of Household Violence
- Lutfi, Ansori, 'Reformation Of Legal Perspective Legal Progressive Enforcement', *Juridical Journal*, 4.2 (2017)
- Presidential Regulations Number 61 Year 2003 About The Amendment of Presidential Decree Number 129 Year 1998 About Indonesia National Action Plan of Human Rights
- Presidential Regulations Number 53 Year 2021 About 2021-2025 Indonesia National Action Plan of Human Rights.
- PSHK-Unicef, Team, *The Report of Mapping Result Towards Legal Framework And Policy About Children in Indonesia* (Jakarta, 2010)
- Rahman, Abdur, *Marriage in Islamic Syariah*, Jakarta: Rineka Cipta, 1992
- Raja' Thaha Muhammad Ahmad, Hifzhul Lisan, *Family Moral Guide* Pustaka Adnan, 2005
- Satria, Effendi M. Zein, *Legal Problems of Contemporary Islamic Family: Jurisprudence Analysis Using Ushuliyah Approach*, 2004
- Sinaga, Istiqomah, 'Istiqomah Sinaga, The Fulfillment of Children Maintenance Rights After Divorce in Indonesia, Malaysia and Australia', in *the International Webinar Themed The Fulfillment of Children Maintenance Rights in Several Countries*, 2020, p. 2
- Smith, Rhona K.M. Smith, Njäl Høstmælingen, Christian Ranheim, Satya Arinanto, Fajrul Falaakh, Enny Soeprapto, and others, 'Human Rights Law', *Evolution of Thought and History of Human Rights Development*, 2008
- Supriyanto, Agustinus, 'Indonesia Perspectives on Children Rights: The Reflection of Constitution and Related International Convention', *Mimbar Hukum*, Special Edition. November (2011)
- Susanto, 'Paradigm of System Based Children Protection', *Aspirasi*, 8.1 (2017), 108
- Tarigan, Jefri Porkonanta, 'Accommodation of Legal Politics in Indonesia Towards Human Rights Based on Its Thinking Generation', *Constitution Journal*, 14.1 (2017) <<https://doi.org/10.31078/jk1418>>