

# Parental Child Abduction in Indonesia: A Criminal Law Perspective

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## Abstract

This research examines parental conflicts that lead to "*child abduction*" within families and the criminal law aspects in Indonesia, including its differences from virtual child abduction. It employed the normative method, utilizing a legal framework focusing on criminal law and child protection legislation. Comparative legal approaches were also utilized in the research. The novelty of this study lies in its exploration of resolutions through criminal law for parents who abduct their children without the consent of the other parent. The wrongful actions of a parent who abducts a child without consent include separating the child, restricting access to the other parent, and disrupting the child's normal development. Within the realm of criminal law, this act by a parent is not considered a criminal offense. Consequently, it cannot be reported to the police, and thus, the police cannot process such abduction reports. This

leads to injustice, particularly when the abducting parent prevents the other parent from seeing their biological child. Ultimately, the best interests of the child are no longer prioritized and tend to be neglected. Additionally, in relation to child abduction, perpetrators also utilize digital technology to influence the child. The Indonesian law seems to have failed to protect children from wrongful actions or forced separation from their parents. Therefore, reforms in criminal law related to child protection are needed, particularly concerning cases where a parent abducts their child and separates them from the other parent.

**KEYWORDS** *Child Custody, Parental Conflict, Parental Child Abduction, Digital Technology*

## Introduction

Indonesia ratified the Convention on the Rights of the Child through Presidential Decree Number 36 of 1990.<sup>1</sup> However, the complexities surrounding Indonesian children are still unresolved. Many problems emerge not only from the household, but also from the broader social contexts. Child separation from one parent is still predominantly viewed as a domestic matter. Despite the Convention on the Rights of the Child emphasizing the

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<sup>1</sup> Presidential Decree of the Republic of Indonesia Number 36 of 1990 is the decree that ratified the Convention on the Rights of the Child (CRC). The CRC is an international treaty adopted by the United Nations in 1989 to protect children's rights worldwide. This Presidential Decree demonstrates Indonesia's commitment to supporting and implementing the principles outlined in the CRC, such as the right to life, development, participation, and protection from violence or exploitation. By ratifying the convention, Indonesia officially became a party bound by its provisions and is obligated to incorporate children's rights into national policies. This decree also reflects Indonesia's efforts to ensure the welfare and protection of children as part of its broader goal of human resource development. The CRC thus provides the legal framework for the country to safeguard children's rights in various aspects of life. See Republic of Indonesia, *Keputusan Presiden Republik Indonesia Nomor 36 Tahun 1990 Tentang Pengesahan Convention on the Rights of the Child (Konvensi Tentang Hak-Hak Anak)*, online at <https://bphn.go.id/data/documents/90kp036.pdf>. For the further context and cases, also see Erdianti, Ratri Novita, Wasis Wasis, and Sholahuddin Al-Fatih. "Child Friendly Villages as an Effort to Prevent a Child as Victims and as Perpetrator Crimes." *Jurnal Pengabdian Hukum Indonesia* 5, no. 2 (2022): 317-336; Rasdi, Rasdi, et al. "Reformulation of the Criminal Justice System for Children in Conflict Based on Pancasila Justice." *Lex Scientia Law Review* 6, no. 2 (2022): 479-518.

government's responsibility to ensure the fulfillment and protection of children's rights wherever they may be, challenges persist.

The initiative by the Ministry of Women's Empowerment and Child Protection (KemenPPPA) to establish a complaint mechanism through SAPA 129 has revealed numerous cases of child custody disputes, both nationally and internationally, as evidenced by various reports. These reports reveal cases of mistreatment and neglect of children by one of their parents, typically stemming from parental separation or divorce.<sup>2</sup> Thus, one parent may unlawfully take the child without due process. Problems arise when a child is taken by one parent to a country where they do not reside or to another location within Indonesia, consequently preventing the other parent from fulfilling their obligations to care for the child. This scenario is commonly known as parental abduction, where the abductor is typically one of the child's parents.<sup>3</sup>

In the Indonesian law, such cases are not prosecutable. However, if the perpetrator is someone other than a parent or lacks legitimate custody rights, they may be charged with child abduction, kidnapping, unlawful detention, or hostage-taking under Articles 328, 329, 330, 331, and 333 of the Criminal Code.<sup>4</sup> Law enforcement often finds itself in a quandary when a parent commits abduction, frequently resorting to mediation as a solution.<sup>5</sup> With the rapid development of digital technology, there has been a notable increase in its use to influence children in various ways. From the accessibility of entertainment and education to the potential for harmful interactions, technology has become both a tool for growth and a vehicle for risk. In some disturbing cases, digital

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<sup>2</sup> See Rahma, Anggin Nuzula, et al. "Efektivitas Layanan Sahabat Perempuan dan Anak (SAPA) 129 (Studi Kasus Kualitas SDM Pada Layanan SAPA 129 di Kementerian PPPA)." *Jurnal Good Governance* 18, no. 2 (2022): 113-136.

<sup>3</sup> Penasthika, Priskila, Lita Arijati, and Annissa Gabianti Anggriana. "International Child Abduction: Bagaimana Indonesia Meresponnya?." *Jurnal Hukum dan Pembangunan* 48, no. 3 (2018): 521-541.

<sup>4</sup> Mufrihah, Wilda Malika, and Elan Jaelani. "Perlindungan Hukum Anak Korban International Child Abduction: Tinjauan terhadap Aspek Hukum dan Perlindungan Hak Anak." *Jembatan Hukum: Kajian ilmu Hukum, Sosial dan Administrasi Negara* 1, no. 2 (2024): 24-31. See also Silberman, Linda. "Hague Convention on International Child Abduction: a brief overview and case law analysis." *Family Law Quarterly* (1994): 9-34; Anton, Alexander Elder. "The Hague Convention on International Child Abduction." *International & Comparative Law Quarterly* 30, no. 3 (1981): 537-567; Van Rossum, Wibo. "The clash of legal cultures over the 'best interests of the child' principle in cases of international parental child abduction." *Utrecht Law Review* (2010): 33-55.

<sup>5</sup> Williamson, Richard A. "Virtues (and Limits) of Shared Values: The Fourth Amendment and Miranda's Concept of Custody", *University of Illinois Law Review* 1993, no. 2 (1993): 379-402.

platforms have even been exploited for child abduction, exposing children to a range of online dangers. As a nation dedicated to the well-being and protection of its children, Indonesia faces the responsibility of ensuring that digital platforms are held accountable for the safety and security of young users.

To address these concerns, Indonesia must introduce and enforce regulations that make digital platforms more responsible in safeguarding children online. One critical area is data governance, where the government should strengthen data protection measures and enforce age-appropriate design codes for online services. This would ensure that children's personal data is not exploited or accessed by malicious entities. Another important aspect is digital literacy, health, and citizenship, which involves equipping children with the knowledge and skills to make safe and informed decisions when navigating online spaces. This education would empower children to recognize risks and protect themselves from digital harm. Lastly, child-friendly support services must be made available for those who experience online abuse or exploitation. These services should include intervention mechanisms and resources for children and their families, ensuring that any incidents of online harm are addressed swiftly and appropriately. In this way, Indonesia can create a safer digital environment, reducing the potential for misuse of technology and helping to protect children from being influenced or abducted through online platforms.<sup>6</sup>

Apart from child abduction, another legal aspect involves the unauthorized detention or custody of a child post-court decision. Unauthorized custody may lead to child concealment, exacerbating conflicts. Other common conflicts arise under the pretext of the child's best interests, with accusations of parental neglect and attempts to hinder visitation rights or restrict time with one parent. Furthermore, attempts may be made to influence the child's mindset and psychological well-being regarding the other parent's behavior.

Several other cases related to child custody conflicts include: (a) refusal to allow the child to visit a non-custodial parent; (b) withholding permission for visits from a non-custodial parent; (c) deliberately taking the child away when the former spouse wishes to visit; (d) denigrating the former spouse in front of the children; (e) threatening to give the child to another relative if the child misbehaves.<sup>7</sup> These custody disputes often escalate to attempts to abduct and

<sup>6</sup> Holly, Louise, Sandro Demaio, and Ilona Kickbusch. "Public health interventions to address digital determinants of children's health and wellbeing." *The Lancet Public Health* 9, no. 9 (2024): e700-e704.

<sup>7</sup> Meliani, Meliani, and Indra Budi Jaya. "Pelaksanaan Hak Asuh Bersama Terhadap Anak di Bawah Umur: Analisis Norma Hukum." *Fastabiq: Jurnal Studi Islam* 3, no. 1 (2022):

hide the child, purportedly in the child's best interests. It is within this context that conflicts arise, with one parent abducting, concealing, and depriving access from the other parent, a problem that Indonesian law has yet to resolve.<sup>8</sup>

According to complaints filed with the Indonesian Child Protection Commission (KPAI), child custody falls within the family and alternative care cluster, consistently showing the highest number of cases since 2011. The COVID-19 pandemic has significantly impacted family dynamics, leading to disruptions in child custody arrangements. In 2021, reported cases included 492 instances of access denial to one parent, 423 cases of children affected by custody disputes or family conflicts, 408 cases of child support neglect, 398 cases of problematic custody arrangements, and 306 cases of custody disputes. Identified trends in 2022 are as follows:

**TABLE 1. Cases of Child Custody Conflict**

Case Cluster	Type of Complaint		Media		
	Direct Complaints	Indirect Complaints (Letters and Emails)	Online	Printed	Online
Children victims of problematic custody/family conflicts	113	32	334	0	2
Children victims of custody disputes	25	17	106	0	1
Children victims of illegal relocation within the family	2	0	4	0	1
Children victims of illegal relocation between countries	2	0	0	0	0
Children forcibly separated from family environment	2	4	7	0	1
Children victims of access denial to meet parents	89	31	303	0	1

56-68; Jure, De, and Jurnal Hukum dan Syar'iah. "The Implementing Joint Custody Post Divorce in Indonesia: A Philosophical Viewpoint." *Economics* 2, no. 2 (2023).

<sup>8</sup> Meliani and Jaya, *Pelaksanaan Hak Asuh Bersama Terhadap Anak di Bawah Umur: Analisis Norma Hukum*.

Case Cluster	Type of Complaint		Media		
	Direct Complaints	Indirect Complaints (Letters and Emails)	Online	Printed	Online
TOTAL	234	86	766	0	6

Source: KPAI Data for the Year 2022

These numerical data do not represent all cases, as many real-life situations are unreported and undocumented, forming an iceberg phenomenon. The Indonesian Children's Advocacy Association (PPAI) highlights the experiences of parents who undergo forced separation from their children, which can involve the loss of custody and access rights. In many cases of forced child separation, the fundamental principle of the child's best interests is violated, including the rights of the child to express themselves in determining their own fate, to have friendships, to receive proper education, to grow up healthy, and to receive care from both parents. If forced separation occurs, one parent who controls the child may do so by hiding them, removing them from their peer group, prohibiting them from playing, and halting their education under the pretext of concerns for the child's safety. Home schooling becomes an alternative education chosen by some parents under this context, but it is not known what percentage actually do so due to a lack of specific data.

The separation or divorce of parents and the determination of custody decisions have implications for children's rights violations. Although some parents try to act in the best interests of the child, legal loopholes and ambiguous articles also influence the situation, resulting in the neglect of the child's best interests. Especially when parents separate and the child is still too young to make choices, legal avenues may be pursued.<sup>9</sup> Supreme Court Decision No. 102 K/Sip/1973 dated April 24, 1975, states that "*the biological mother is given priority, especially for young children, based on the child's interests, unless it is proven that the mother is unfit to care for the child.*" Similarly, Supreme Court Decision

<sup>9</sup> Rahman, Tiara Ananda, and Wardani Rizkianti. "Penyelesaian Sengketa Hak Asuh Anak Setelah Perceraian: Perbandingan Antara Indonesia dan Inggris." *Jurnal USM Law Review* 7, no. 1 (2024): 248-363; Haris, Ahmad, and Edy Lisdiyono. "The Reconstruction of Religious Court Decision Execution on the Fulfilment of Children's Rights Post-Divorce in Indonesia." *Revista de Gestão Social e Ambiental* 18, no. 7 (2024): 1-26; Hanifah, Mardalena, and Meidana Pascadinianti. "Function of Non-Judge Mediators in Divorce Settlement Through Religious Courts." *Unnes Law Journal* 9, no. 2 (2023): 377-418.

No. 126 K/Pdt/2001 dated August 28, 2003, states that "*in the event of divorce, custody of underage children should be entrusted to the closest and most intimate relative, namely the mother.*" This is reinforced for parents who receive a decision from the Religious Court, referring to Article 105 of the Compilation of Islamic Law used to determine child custody. Essentially, it states that if the child is under 12 years old, custody will be granted to the mother. However, the implementation of these rules often fails, with toddlers being forcibly separated from their mothers, as experienced by Ms. S and Ms. Ae.<sup>10</sup>

Forced separation of children from their mothers often occurs after legally binding court decisions, through unlawful means such as involving relatives or others, and forms of violence and intimidation involving law enforcement officers. This situation compels mothers, as one of the parents, to report the incidents. However, law enforcement often faces obstacles due to the lack of legal basis<sup>11</sup>, compounded by the persisting mindset that parental abduction is not a crime but rather a domestic issue, leading to the expression "*be patient, the child will seek out their mother when they grow up.*" This contradicts the experience of Ms. YL, who married an Australian citizen despite a Family Court Australia decision granting custody to her.

The weak legal protection for children in cases with final legal force, or in Dutch terms, "*inkracht*", not only has legal implications but can also have psychological impacts, especially on children and one of the parents. Ms. F is one of the parents who have experienced such impacts.<sup>12</sup> Cases involving Ms. S, Ms. Ae, and Ms. F are examples of child custody violations. What about access

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<sup>10</sup> See Purnama, Daffa Ramadhani Yoga. "Analisis Ada Tidaknya Penyimpangan Prinsip Peradilan Stare Decisis dalam Penjatuhan Putusan Oleh Hakim." *Verstek* 10, no. 3 (2022): 513-522; Nashrullah, Yazid, and Endah Hartati. "Pengaruh Prinsip Best Interest of Child Dalam Penentuan Hak Asuh Anak Pada Kasus Perceraian Menurut Hukum Perdata (Analisis Terhadap Putusan-Putusan Pengadilan)." *Lex Patrimonium* 2, no. 2 (2023): 1-12.

<sup>11</sup> This is what the authors refer to as legal vacuum, because there is no explicit legal basis regulating this matter. Additionally, conflicts often arise in interpreting differences between law enforcement and the complainant regarding the use of Article 330 of the Criminal Code (KUHP). The complainant states that Article 330 can be applied to one of the parents who abducts and hides their child. However, law enforcement authorities state that Article 330 of the Criminal Code cannot be applied if the abductor is one of the biological parents of the child. Therefore, this conflict must be resolved through a Judicial Review by the Constitutional Court to provide an authentic interpretation of Article 330 of the Criminal Code.

<sup>12</sup> PPAI, *Summary of Chronology PPAI, Case Position, Efforts, Challenges, Hope/Justice*, (Jakarta: PPAI, 2023)

rights to the child? Mr. S is an example of a violation of access rights to meet his child.

In relation to violations of child custody rights, the Constitutional Court (MK) held a hearing to review the phrase "*Barangsiapa*" (Whoever) in Article 330 paragraph (1) of the Indonesian Criminal Code 1946 (KUHP 1946), on Thursday 2<sup>nd</sup> November 2023, in the MK Plenary Courtroom. Application No. 140/PUU-XXI/2023 was filed by five mothers, namely Aelyn Halim, Shelvia, Nur, Angelia Susanto, and Roshan Kaish Sadaranggani. The petitioners are mothers who are fighting for custody rights. Article 330 KUHP paragraph (1) states, "*whoever intentionally takes a person who is not yet of legal age from the authority established by law over them, or from the supervision of those authorized to do so, is punishable by imprisonment for a maximum of seven years.*"

During the trial, petitioner representative Virza Roy Hizzal stated that all petitioners shared a common experience: after divorcing their spouses, they were entitled to child custody. However, they are currently deprived of this right because their ex-spouses forcibly took their children. For instance, Aelyn Halim admitted she did not know where her daughter is, AG, as she had been hidden by her ex-husband. This incident occurred on August 15, 2020, when AG was 2 years and 8 months old. Aelyn reported the incident to the police, but her report was rejected because the abductor was her biological father. Shelvia faced a similar situation, as her ex-husband forged their child's identity to obtain a passport and take the child abroad without her consent. Nur's second child was abducted by her ex-husband at the end of last December, and to date, he has not been named a suspect, and the whereabouts of their second child remain unknown. Angelia Susanto, who has an ex-husband who is a foreign national, is still searching for her child, who was abducted by her ex-husband in January 2020. Lastly, Roshan Kaish Sadaranggani's child was taken by her ex-husband, and although she reported the incident to the Indonesian Child Protection Commission (KPAI) and filed for execution through the District Court, she has yet to gain access to her child.<sup>13</sup>

Given these phenomena, research on this matter is not limited to civil law but has also extended into criminal law. Although more researchers address child custody issues resulting from divorce from a civil law perspective, it is also crucial to examine them from a criminal law aspect. Several researchers have examined violations of child custody rights or parental abduction. For example, I Komang Oka Raharja et al. conducted a study titled "Parental Child

<sup>13</sup> Argawati, Utami, "Perjuangkan Hak Asuh, Lima Ibu Persoalkan Penculikan Anak oleh Mantan Suami", *Online News Mahkamah Konstitusi Republik Indonesia*, November 2, 2023. Online at <https://www.mkri.id/berita/-19737>



Abduction (A Case Study at the Gianyar District Court)" focusing on legal protection for children from parental abduction and legal sanctions against parents who commit child abduction.<sup>14</sup> Another study, conducted by Priskila Pratita Penasthika et al., titled "International Child Abduction: How Does Indonesia Respond?" focused on the return of children unlawfully detained across borders, involving Indonesia.<sup>15</sup>

This research differs from the aforementioned studies. While many studies have examined child custody issues and parental abduction from a civil law perspective, research specifically addressing parental abduction following divorce remains scarce, despite its existence and the distress it causes to aggrieved parents who are deprived of their parental rights. This study aims to explore criminal conflict resolution regarding child custody following divorce in Indonesia and the criminal law aspects as part of efforts to reform criminal law in protecting and fulfilling the best interests of the child.

Furthermore, this paper further elaborates on specific types of parental conflicts that typically result in a child being taken away by one of the parents. In this context, the national legal framework is discussed and compared to that of other countries regarding the criminal law implications of a parent taking their child away without the consent of the other parent.

Following an explanation of the definition of parental child abduction, this paper examines Indonesian Law to ascertain the extent of regulation and protection against child abduction. Under the results and discussion section of the paper, a comparative analysis is undertaken between Indonesia, Australia and Singapore. The paper ends with concrete recommendations for urgent criminal law reform in Indonesia to include parental child abduction within the country's criminal provisions and to educate the public about joint parenting – including after divorce.

## Parental Child Abduction

Parental child abduction, a term adopted from "The Criminal Justice System's Response to Parental Abduction" (NCJ 1861), refers to the taking, retention, or concealment of children by a parent, family member, or their

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<sup>14</sup> Raharja, I. Komang Oka, Anak Agung Sagung Laksmi Dewi, and Luh Putu Suryani. "Penculikan Anak Oleh Orang Tua (Studi Kasus di Pengadilan Negeri Gianyar)." *Jurnal Konstruksi Hukum* 1, no. 2 (2020): 388-392.

<sup>15</sup> Penasthika, Arijati, and Anggriana. "International Child Abduction: Bagaimana Indonesia Meresponnya?."

agents, diminishing custody rights, including visitation rights, from another parent or family member. The American Bar Association,<sup>16</sup> based in the United States, defines parental abduction based on Girdner's opinion:<sup>17</sup>

*The taking, retention, or concealment of children by parents, other family members, or their agents, diminishing custody rights, including visitation rights, from parents or other family members.*

The Convention on the Civil Aspects of International Child Abduction, adopted on October 25, 1980, highlights primary terminology regarding child abduction, particularly in Article 5 concerning custody and access rights. Custody rights encompass child care and residence, while access rights entail temporary visitation. However, terminology regarding parental custody disputes is not explicitly addressed in Indonesian positive law.

The scope of parental child abduction terminology<sup>18</sup> includes taking (without permission), concealing (withholding location and cutting off communication), or controlling (denying access for the other parent to meet, influencing negativity/hate speech toward the other parent, etc.).

Therefore, several terminologies can be considered in formulating criminal offenses within the scope of parental abduction, including:

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<sup>16</sup> The American Bar Association (ABA) is an association of lawyers founded in 1878 in New York. According to its official website, the American Bar Association has at least 400,000 members. The ABA is headquartered in Chicago, Illinois, and has its largest branch office in Washington D.C. In addition to drafting ethical codes for the legal profession, the ABA has been accrediting law schools in America since 1923.

<sup>17</sup> Chiancone, Janet. "Parental abduction: A review of the literature." *Washington, DC: US Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention* (2001); Lowenstein, L. F. "Parental child abduction: a literature review." *The Police Journal* 75, no. 3 (2002): 234-244.

<sup>18</sup> In the Family Law Act 1975 Australia (amended in 2018), parental child abduction is considered a criminal offense, and the perpetrators can include parents who commit such acts, including attempted child abduction. The Australian Federal Police actively investigate reports of missing children and parental child abduction. In cases of suspected international child abduction, the Australian Federal Police (AFP) collaborate with international agencies to locate and repatriate the children. See Hon. Michael Kirby AC CMG. "Children Caught in Conflict—The Child Abduction Convention and Australia." *International Journal of Law, Policy and the Family* 24, no. 1 (2010): 95-114; Bates, Frank. "Child Abduction: Australian Law in International Context." *International & Comparative Law Quarterly* 37, no. 4 (1988): 945-952.

1. Parental child abduction: Taking a child by one parent and relocating them outside or within Indonesia without permission from the other parent. This term is found in the 1980 Hague Convention.<sup>19</sup>
2. Child abduction: This can be carried out by anyone, including a parent who abducts a child without permission from another parent.<sup>20</sup>
3. Forced separation of a child: It specifically refers to anyone, including a parent, who separates a child from one or both parents.<sup>21</sup>
4. Custody rights seizure: It refers to a situation where, after a custody court decision, one parent seizes or fails to return the child to the other parent who has custody rights.<sup>22</sup>

Parental child abduction occasionally occurs during divorce proceedings or separations. It typically involves a parent who, not granted custody or fearing the loss of custody, removes or retains the child from the other parent, often out of a desire for advantage or revenge. Sometimes, a parent may refuse to return a child to prevent access visits or due to concerns about domestic violence. These abductions can happen within a country's borders or across borders. While international parental child abduction cases are fewer than domestic ones, they are often more challenging to resolve due to conflicting international jurisdictions.<sup>23</sup>

It is important to distinguish parental abduction from child kidnapping. Child kidnapping involves forcibly separating a child by someone other than a parent for exploitation or violence, making the term inappropriate for parental child abduction cases. Research on kidnapping has been extensive in Indonesia, emphasizing the need for focused studies on parental child abduction within the country.

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<sup>19</sup> Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, <https://www.hcch.net/en/instruments/conventions/full-text/?cid=24>.

<sup>20</sup> Department of Justice, "Child Abduction", <https://www.justice-ni.gov.uk/articles/child-abduction-glossary-terms>

<sup>21</sup> Global Protection Cluster, "Child and Forced Family Separation", [https://www.globalprotectioncluster.org/Child\\_and\\_Forced\\_Family\\_Separation](https://www.globalprotectioncluster.org/Child_and_Forced_Family_Separation).

<sup>22</sup> Williamson, "Virtues (and Limits) of Shared Values: The Fourth Amendment and Miranda's Concept of Custody",

<sup>23</sup> Sultan, Naheed, "Innocent Victims of Parental Child Abduction: The Children", *International Journal for Studies on Children, Women, Elderly and Disabled* 5 (October 2018): 305-311.

## Regulation of Children's Rights in Indonesian Law

Indonesia has legal foundations to provide legal protection for children's rights, including the following:

### 1. Presidential Instruction (INPRES) Number 36 of 1990 Regarding the Ratification of the Convention on the Rights of Children

Article 9 states that every child has the right to live with their parents unless it is detrimental to the child—for example, if the child is subjected to mistreatment or neglect by one parent. Every child has the right to maintain contact with their parents if they live apart from one or both parents.

Article 11 stipulates that every child has the right to be protected from abduction, illegal removal, or detention in a foreign country by one parent or another person.

*Article 18 establishes that parents or legal guardians are jointly responsible for raising children, and all parties involved must always consider the best interests of the child. The government should assist by providing services to support parents and guardians, especially if they are employed. During the caregiving process, Article 19 ensures that every child has the right to proper care, protection from violence, abuse, and neglect.*

The regulations are related to a child's right to live a good life with their parents. While with their parents, children must receive proper care, protection from violence, abuse, and neglect. Every child is entitled to maintain a relationship with their parents if they live apart from one or both of them. Parents or legal guardians are jointly responsible for raising the child, and all parties involved must always consider the child's best interests.

However, it is challenging to implement these regulations. Many children still experience violence and neglect. This includes children who suffer due to their parents' divorce and those who cannot meet with their parents because of it.

### 2. Law Number 23 of 2002 Jo Law Number 35 of 2014 concerning Child Protection

Article 14 paragraphs (1) and (2) of Law Number 35 of 2014 concerning Child Protection state that "every child has the right to be cared for by their parents unless there are valid reasons and/or laws indicating that separation is in the best interests of the child and is a last resort." In paragraph (2), it is stated

that in the event of separation as referred to in paragraph (1), the child still has the right to:<sup>24</sup>

- a. Direct meetings and personal interaction with both parents;
- b. Receive care, maintenance, education, and protection for their growth and development from both parents according to their abilities, talents, and interests;
- c. Obtain financial support from both parents; and
- d. Enjoy other rights as a child.

Based on the above article, Indonesia essentially adheres to joint custody, although it is not explicitly regulated in marriage laws. Law No. 35 of 2014 concerning Child Protection prohibits anyone from placing, leaving, committing, instructing, or participating in the abduction, sale, and/or trafficking of children. Violations of Article 76f are punishable by imprisonment for up to 5 years and/or a fine of up to Rp. 100 million.<sup>25</sup>

Article 76f is not appropriate for addressing parental child abduction, as it focuses on criminal issues and imposes criminal sanctions for violations, despite being aimed at ensuring protection of children's rights. Furthermore, Article 29 section (2) and (3) of Law Number 23 of 2002 concerning Child Protection state that in the event of divorce from a marriage as referred to in section (1), the child has the right to choose or, based on a court decision, be under the custody of one of the parents. Section (3) states that in the event of divorce as referred to in section (2), and if the child is unable to make a decision and their mother is an Indonesian citizen, for the best interests of the child or at the mother's request, the government is obliged to manage Indonesian citizenship status for the child.<sup>26</sup>

Article 29 of Law Number 23 of 2002 concerning Child Protection applies to mixed marriages between two countries and explains in section (2) and (3) that children have the right to choose who will care for them, and if their mother is an Indonesian citizen, the Indonesian government must arrange for the child to become an Indonesian citizen. The Child Protection Law regulates the protection that parents must jointly provide to their child. If a separation occurs or a child is separated from the parents, the child is entitled to meet with their parents and receive financial support. There are no provisions for penalties or punishments if these rights are not fulfilled.

Penalties for criminal actions committed by parents, such as sexual violence, child trafficking, and other actions categorized as criminal offenses.

<sup>24</sup> Article 14 section (1) and (2), Law Number 35 of 2014 Concerning Child Protection.

<sup>25</sup> Article 76F, Law Number 35 of 2014 Concerning Child Protection.

<sup>26</sup> Article 29 section (2) and (3), Law Number 23 of 2002 Concerning Child Protection.

This highlights the weakness of the Child Protection Act. Therefore, parents who abscond with their child under the pretext of caregiving cannot be classified under criminal offenses, nor are there provisions for penalties or punishments for parents who fail to fulfill the child's rights as stipulated in Article 14, paragraph (2) of the Child Protection Act.

### 3. Indonesian Criminal Code (KUHP)

Article 330 (1) states that *"anyone who intentionally removes a minor from the authority legally established over them or from the supervision of the person authorized for it, shall be punished with imprisonment for a maximum of seven years"* (2) a maximum imprisonment of nine years is imposed if the act is committed by deception, violence, or threats of violence, or if the minor is under twelve years of age.

This article addresses situations where a child is abducted by someone other than their parents. If one parent takes the child or separates the child from their partner, it is not considered abduction as defined in this article. Article 330 of the Indonesian Criminal Code is ineffective in resolving the criminal act of a parent abducting a child from the custody of the other parent. Law enforcement officials state that this article cannot be used against a parent who abducts their own child. This article only applies if the abductor is a family member other than the child's mother or father.

Given this situation, the Criminal Code is insufficient to protect children from parental abduction. However, there is a Constitutional Court Decision Number 140/PUU-XXI/2023 regarding the reinterpretation of the term "any person" in Article 330 paragraph (1) of the Criminal Code. The Constitutional Court rejected the petition in its entirety, considering that the term "any person" automatically refers to everyone without exception, including the child's parents, both father and mother. The Court focused more on the implementation of this norm, which has not been optimal in its enforcement. In other words, the norm provides protection for children, but its implementation has not yet safeguarded the best interests of the child.

### 4. Civil Code (*Kitab Undang-Undang Hukum Perdata*)

The Civil Code stipulates in Article 246 that after the divorce of both parents, each minor child will be determined by the District Court as to which parent will care for the child. Unless there is a dismissal of parental authority. In this case, it is not specified which parent the minor child will be under the

authority of, but only according to the decision of the District Court based on considerations and observed from the divorce process.<sup>27</sup>

Another issue that may arise from granting custody is the desire of the non-custodial parent to still be able to meet with their children who are under the custody of the parent granted custody. This leads to disputes over custody of underage children that are difficult to resolve. If only one party requests custody of the underage child, the judge may grant it immediately. However, in divorce cases, there is often a dispute over custody of the underage child.<sup>28</sup>

### 5. Law Number 23 of 2004 Regarding Domestic Violence

This law regulates forms of domestic violence, including physical violence, psychological violence, sexual violence, and domestic neglect. Children are within the scope of the legal subjects in this law. Domestic violence can potentially occur to children abducted by their parents, particularly psychological violence, which is addressed in Article 7 as acts resulting in fear, loss of self-confidence, inability to act, helplessness, and/or severe psychological suffering in an individual.

Children suffer due to separation from their parents, leading to psychological trauma and developmental disorders for those abducted by their parents, which can be classified as domestic violence. However, this law has never been applied by law enforcement officers in cases of violence against children within marital and domestic relationships.

### 6. Law No. 1 of 1974 Jo Law No.16 of 2019 Regarding Marriage

Regarding parental obligations to their children, Article 45 of the Marriage Law states that:

- 1) Both parents are obliged to care for and educate their children to the best of their abilities.
- 2) The parental obligation mentioned in section (1) of this article applies until the child marries or becomes self-reliant, which obligation continues even if the marriage between the parents ends.

Referring to the wording of Article 45 section (2) of the Marriage Law indicates that the parental affection for the child should not be severed or

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<sup>27</sup> Khair, Umul. "Pelaksanaan Hak Asuh Anak Setelah Terjadinya Perceraian." *JCH (Jurnal Cendekia Hukum)* 5, no. 2 (2020): 291-306. See also Hartini, Hartini, Haniah Ilhami, and Rahmawati Mohd Yusoff. "Sole Custody and the Implication of Fault-Based Divorce Under the Indonesian Legal System." *Journal of Indonesian Legal Studies* 9, no. 1 (2024): 249-278.

<sup>28</sup> Khair, "Pelaksanaan Hak Asuh Anak Setelah Terjadinya Perceraian."

obstructed. The formal control of the child by one party is essentially to end disputes over children. If the dispute is not settled in court, it will drag on, and the impact will be on the child. However, it is also recognized that many do not dispute custody rights after divorce because both parties agree to care for and educate the child together.<sup>29</sup>

In cases where one parent abducts a child not under their custody, it indicates a misunderstanding of Article 45(2) by the disputing parties. Parental obligations to continue caring for and educating their children should ideally be carried out jointly, without hiding the child from either party, to ensure optimal child development.

Government Regulation (PP) Number 9 of 1975 regarding the implementation of Law No. 1 of 1974 does not address discussions on child custody. However, Article 24 paragraph (2) states "During the divorce proceedings initiated by the plaintiff or defendant, the court may:"

- 1) Determine the alimony to be borne by the husband.
- 2) Determine the measures necessary to ensure the maintenance and education of the child.
- 3) Determine the measures necessary to ensure the preservation of property that is jointly owned by the husband and wife or property that is owned solely by the husband or the wife.

The obligation to care for and educate children is different from the obligation to be a guardian of the children. Both former husbands and former wives are obliged to care for and educate their children based on the children's interests. Husbands and wives together are responsible for all expenses for the maintenance and education of their children. If the husband is unable to do so, the court may determine that the mother bears the child's expenses. As for guardianship of the child, whether the guardian falls on the husband or the wife is determined by the judge.<sup>30</sup>

## 7. Supreme Court Circular No. 1 of 2017 (SEMA)

SEMA states that "*in the determination of child custody, the custodian must include the obligation to grant access to the non-custodial parent to meet with their*

<sup>29</sup> Nugraha, Muhammad Raihan. "Apakah Hak Asuh Anak Bisa Diambil oleh Ayah?", *HukumOnline*, September 24, 2024. Retrieved from <https://www.hukumonline.com/klinik/a/peralihan-hak-asuh-anak-dalam-perceraian-dari-ibu-ke-ayah-lt5ff68fbc2b60b/>

<sup>30</sup> Mandey, Titania Britney Angela. "Hak Pengasuhan Anak Akibat Terjadinya Perceraian Menurut Undang-Undang Nomor 16 Tahun 2019 Tentang Perubahan Atas Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan." *Lex Privatum* 9, no. 9 (2021).



*child. In legal considerations, the panel of judges must also consider that denying access to the non-custodial parent can be grounds for revoking custody rights."* However, SEMA is deemed insufficient to resolve custody conflicts because custody rights (child custody) are not limited to physical custody alone but also encompass legal custody, which is often overlooked.

Religious legal formulations also state that "*in the determination of child custody, the custodian must include the obligation to grant access to the non-custodial parent to meet with their child. In legal considerations, the panel of judges must also consider that denying access to the non-custodial parent can be grounds for revoking custody rights."* The General Civil Chamber Law formulation states that the biological mother's right to care for a child under the age of 12 after divorce can be granted to the biological father as long as granting such rights positively impacts the child's growth and development, taking into account the child's interests, presence, and desires during the divorce process.

#### **8. Supreme Court Decision No. 102 K/Sip/1973**

Further regulations regarding child custody in divorce are found in Supreme Court Decision No. 102 K/Sip/1973 dated April 24, 1975. This decision also emphasizes that in determining child custody in divorce, priority should be given to the biological mother, especially for children under the age of 12. This is established by considering the child's need for the mother's presence.

This decision could serve as a basis or jurisprudence for determining who has the right to child custody for children under 12 years of age. Many cases of custody disputes currently involve fathers taking children under 12 years old, even though custody should be awarded to the mother. This also indicates that previous decisions regarding the determination of child custody after divorce lack the power to enforce them.

#### **9. Presidential Instruction Number 1 of 1991 Regarding the Compilation of Islamic Law**

In Islamic law, the rules regarding child custody after the divorce of parents are stipulated by the Religious Court in Article 105 of the Compilation of Islamic Law, which states that in the event of divorce:

- a. Custody of children who are not mature or under 12 years old is the right of the mother.
- b. Custody of mature children is left to the child to choose between the father or mother as the custodian.
- c. The cost of maintenance is borne by the father.

Furthermore, the consequences of marriage dissolution due to divorce are:<sup>31</sup>

- a. Immature children have the right to maintenance and their mother, except if the mother has passed away, in which case her position is replaced by:
  - 1) Women in the direct line of descent from the mother;
  - 2) The father;
  - 3) Women in the direct line of descent from the father;
  - 4) Female siblings of the child concerned;
  - 5) Female relatives on the father's side.
- b. Mature children have the right to choose to receive maintenance from the father or mother.
- c. If the custodian cannot ensure the child's physical and spiritual safety, even if the cost of maintenance has been provided, the Religious Court, at the request of the concerned relatives, may transfer custody rights to other relatives who also have custody rights.
- d. All expenses for maintenance and sustenance of the child are the responsibility of the father according to his ability, at least until the child reaches adulthood (21 years old).
- e. In case of disputes regarding maintenance and sustenance, the Religious Court decides based on points (a), (b), and (d).
- f. The court may also, taking into account the father's ability, determine the amount of expenses for the care and education of children who do not live with him.

Islamic law also mentions in Articles 105 and 156 that custody of children under 12 years old is the right of the mother, but in practice, this provision is not always followed. Some mothers feel entitled to custody of their children, but custody is awarded to the father according to the court's decision. Every child has the right to be cared for and raised by their parents. There are exceptions to this, such as when a child has the right to be cared for or adopted by another individual if their parents cannot ensure their growth or if the child is abandoned. Article 14(1) of the Child Protection Law states that children have the right to be cared for by their parents unless there are valid reasons or legal provisions explaining that separation is in the child's best interests. However, it should be noted that the relationship between a child and their parents should not be severed, including in the case of divorce. Through this statement, either parent has the right to care for their child, and the child has the right to be cared for by their parents. However, if the mother is prevented

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<sup>31</sup> Article 156, Presidential Instruction Number 1 of 1991 Regarding the Compilation of Islamic Law.

from seeing her child by the father, she can appeal to the court for custody rights, even if she believes she can ensure the child's development.<sup>32</sup>

Nevertheless, custody rights may also be granted to the father in divorce cases. Article 156(c) of the Compilation of Islamic Law explains that a mother may lose custody rights over a child under 12 years old if she cannot ensure the child's physical and spiritual safety. In such cases, upon request from the concerned relatives, the Religious Court may transfer custody to other relatives.<sup>33</sup>

## 10. Ministerial Regulation (*Permen*) Number 21 of 2013 Regarding Child Care

Ministerial Regulation Number 21 of 2013 defines "*child care*" as the effort to fulfill the needs for affection, attachment, safety, and well-being that are settled and continuous for the best interests of the child, carried out by parents or families up to the third degree, as well as foster parents, adoptive parents, guardians, and residential-based care as a last resort alternative. Despite the existence of these regulations, there is still no specific legislation governing parental abduction on a national or cross-border scale. Also lacking is the enforcement of the law to comprehensively protect and fulfill children's rights.

## Parental Child Abduction Cases in Indonesia

Parental abduction is increasingly prevalent in Indonesia, where post-divorce child custody arrangements are often not properly enforced according to court rulings. Cases arise where one parent suffers losses. While most affected are mothers, fathers also face losses due to conflicts over child custody.

One example is the case of forced separation between a mother F and her biological child by her ex-husband. In 2017, custody was awarded to F, but the father MA briefly cared for one of their children for two months, causing psychological distress due to separation from F and lack of visitation rights. In December 2022, MA took another child back and denied visitation rights. No resolution has been reached.

Another case involves a mother S, an Indonesian citizen separated from her child taken by her in-laws to Singapore. However, the Singaporean government cannot provide a legal solution as Indonesia has not ratified the

<sup>32</sup> Sari, Wulan Permata. "Hak Asuh Anak Dibawah Umur Akibat Perceraian." *UNJA Journal of Legal Studies* 1, no. 1 (2023): 185-190.

<sup>33</sup> Nugraha, "Apakah Hak Asuh Anak Bisa Diambil oleh Ayah?",

Hague Convention on International Child Abduction (IPCA Convention), preventing Singapore from intervening in non-member state disputes. In June 2023, S met with J (the child) for 1.5 hours on a YouTube channel. Yet, she still has no information about where the child, is.

The next is Ae's case. Despite being granted custody by the Supreme Court, Ae was separated from her child by her ex-husband. In 2023, she learned that her child had been sold. In a different case, a mother YL faced domestic violence and forced separation from her child for 11 years. Despite her reports, law enforcement responded with, "*The ex-husband isn't a kidnapper but is the father, and he'll surely seek the mother out when the child grows up.*" However, no reunion occurred. While an Australian family court granted custody to YL, an Indonesian court awarded custody to the father, DAM, an Australian citizen. This greatly affected YL's psychological and mental health, requiring medical attention.

Besides mothers, fathers also struggle to see their children despite lacking custody but maintaining visitation rights. A father, Sin, could not see his child upon learning of mistreatment by the stepfather. Sin's case illustrates the neglect of the child's best interests. Father-child relationships are crucial for child development. Indonesia ranks third globally for fatherless families. According to the Center for Public Mental Health (CPMH) at Gadjah Mada University, fathers play a vital role in childcare, not just as providers but also for balanced parental involvement.<sup>34</sup>

In Indonesia, accurate data on age and gender characteristics of children vulnerable to parental abduction is not available. In the US, NISMART found over half of abducted children were under 8 years old, with a quarter under 4. Children aged 3-5 were most likely to be abducted, while infants and teenagers were least likely.<sup>35</sup> This aligns with the experiences of S, YL, Ae, Sin, F, An, R, and the members of PPAI, alongside several unreported cases.

Parental abduction is predominantly perpetrated by men, as reported by members of the PPAI. The NISMART study also supports this, showing that men are more likely to engage in abduction and hiding, exploiting the vulnerability of women as parents. In cases like that of Mother Li, forced separation from her child involved repeated visits by the perpetrator to assess the mother's vulnerabilities. When Mother Li was in the bathroom, the perpetrator

<sup>34</sup> Ramadhaningtyas, Nur. "Apa Itu Fatherless? Indonesia Disebut Urutan Ketiga Kurang Sosok 'Ayah' Saat Anak Tumbuh", *Bangka Tribunnews*, June 6, 2023. Retrieved from <https://bangka.tribunnews.com/2023/06/06/apa-itu-fatherless-indonesia-disebut-urutan-ketiga-kurang-sosok-ayah-saat-anak-tumbuh>

<sup>35</sup> Lowenstein, "Parental child abduction: a literature review."

abducted her 10-month-old child from her home in 2021.<sup>36</sup> Conversely, female perpetrators often focus on violating access rights of other parents. Parental abductions are typically driven by punishment or retaliation stemming from parental conflicts.

Various types of parental conflicts leading to divorce and often resulting in child abduction include: divorce due to polygamy, infidelity, disobedience of the wife to her husband, sexual violence, neglect by the husband, religious differences, prohibition of further education, domestic violence, and frequent indebtedness of the wife. These types of parental conflicts lead to divorce issues that do not end peacefully, thus triggering child abduction by the parents.<sup>37</sup>

International Child Abduction cases can be resolved through the Hague Convention, an intergovernmental agreement aimed at timely resolution of abduction issues. Over 103 countries were signatories to the Convention by 2022, although unfortunately, not Indonesia. Its goal is to promptly return wrongfully removed or retained children to their country of habitual residence. The Convention does not manage custody or access but focuses on returning the child to their home country. Subsequent custody issues are handled by local law. The Convention prioritizes the child's welfare, aiming to restore the child to their pre-abduction environment.<sup>38</sup>

The Hague Convention is a multilateral treaty, which primarily aims to provide a remedy for abductions and to protect and safeguard children from its' dreadful effects. The main objectives of the Convention are to (i) secure a prompt return of children who have been wrongfully removed or retained in any contracting state, and (ii) ensure that the rights of custody and access under the law of one contracting state are effectively respected in other countries. The Convention aims to return the child to the factual status quo of 'habitual residence' immediately preceding the wrongful removal to or retention in another country by one of their parents. Under the Convention, a removal or retention of a child is 'wrongful' if it is in breach of 'rights of custody' in the child's country of habitual residence. The breach of custody rights and determining habitual residence become the decisive points in determining the lawfulness and unlawfulness of removing and retaining a child. The Convention

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<sup>36</sup> Testimony, 31 Agustus 2023.

<sup>37</sup> Maryam, Rini. "Dinamika Konflik Relasi dalam Mediasi Perceraian di Pengadilan Agama dan Berbagai Permasalahannya: Studi Hukum Feminis Terhadap Realitas dan Keadilan Perempuan", *PhD Thesis*, Universitas Indonesia, 2024.

<sup>38</sup> Patel, Mitesh, et al. "International child abduction: The complexities of forensic psychiatric assessments before the Hague Convention." *Frontiers in Psychiatry* 12 (2021): 654634.

attempts to achieve a balance between the varied and often competing interests of the stakeholders; the child, the left-behind parent and the abducting parent. The foundation of the Convention is the 'welfare of the child', the central principle of child jurisprudence.<sup>39</sup>

To address the concerns related to the lack of effectiveness of undertakings as protective measures, the English courts have suggested that the recognition and enforcement of undertakings can be facilitated by the 1996 Hague Convention by treating undertakings as urgent measures of protection under Articles 11 and 23. This is in line with the 1996 Hague Convention Practical Operation Handbook ('the Practical Handbook'), which provides examples of measures which might be covered by Article 11. These include situations where 'there has been a wrongful removal or retention of a child and, in the context of proceedings brought under the 1980 Hague Child Abduction Convention, measures need to be put in place urgently to ensure the safe return of the child to the Contracting State of his/her habitual residence'.<sup>40</sup>

Cross-cultural and cross-border marriages contribute to the vulnerability of parental abduction, and perpetrators exploit this situation. One contributing factor is the weakness in child protection in some countries and cultural norms that support this weakening. For example, the belief that good children will seek out both parents when they grow up, and the perception of parental abduction as a common domestic issue. Legal gaps in the European Community also contribute to the increase in parental abduction cases.<sup>41</sup>

As Nuria Gonzales Martin<sup>42</sup> mentioned, the future, but more importantly the present, of children depends on their wholesome and healthy development within a family unit. Family refers to a variety of family structures, including those involving separation or divorce. The involvement of both parents with their children should be a top priority, but this is not always the case in reality. While individuals may have ex-husbands or ex-wives, there are never ex-fathers or ex-mothers. Emotional, physical, and economic care for

<sup>39</sup> Jolly, Stellina. "International parental child abduction: an explorative analysis of legal standards and judicial interpretation in India." *International Journal of Law, Policy and the Family* 31, no. 1 (2017): 20-40.

<sup>40</sup> Trimmings, Katarina, and Onyója Momoh. "Intersection between domestic violence and international parental child abduction: Protection of abducting mothers in return proceedings." *International Journal of Law, Policy and the Family* 35, no. 1 (2021): ebab001.

<sup>41</sup> This research was conducted on 317 parents who experienced forced separation due to parental abduction. See Lowenstein, "Parental child abduction: a literature review."

<sup>42</sup> Martin, Nuria Gonzalez. "International Parental Child Abduction and Mediation: An Overview." *Family Law Quarterly* 48, no. 2 (2014): 319-350.

children must be considered by both parents when dissolution occurs. In this context, international child abduction, usually by one parent, is a current and relevant topic due to the considerable increase in the number of cases detected. International parental child abduction generally refers to the "*wrongful removal*" or "*wrongful retention*" of a child in another country by the child's parent or guardian. This problem may be growing due to several factors:<sup>43</sup>

1. The internationalization of family relations
2. The crisis of family as an institution, and more specifically of marriage as an institution, as well as the increasing number of crisis among couples.
3. The increase in conflicts arising from the dissolution of marital or sentimental ties when children exist.

Another issue arising from child custody in mixed marriages is the child's citizenship. In Indonesia, regulations regarding a child's citizenship are outlined in Article 6 (1) of Law No. 12 of 2006 concerning the Citizenship of the Republic of Indonesia, which states: (1) In the event of Indonesian citizenship status for a child as referred to in Article 4 paragraphs c, d, h, l, and Article 5 resulting in dual citizenship, after reaching 18 (eighteen) years of age or upon marriage, the child must choose one nationality.

Children born to parents, where one is an Indonesian citizen and the other is a foreign citizen, obtain dual citizenship which can be termed as limited dual citizenship according to Indonesian laws and regulations. For children, dual citizenship is advantageous as it allows them to reside in two countries freely. However, dual citizenship also has disadvantages. From the perspective of International Private Law, dual citizenship has the potential for issues, such as in determining personal status based on the principle of nationality. Therefore, a child may be subject to the regulations of their national country. If the laws of one country do not conflict with another, no problem will emerge. However, if there is a conflict between the laws of two countries, determining personal status will be problematic. It is more challenging when one regulation violates the principle of public order in the regulations of another country.<sup>44</sup>

The legal framework in Indonesia does not prioritize the abduction of a child by one parent as a criminal offense regulated under Indonesian law. This is due to the understanding within Indonesia's legal system that marriage, divorce, and child custody from marriage are governed by the Marriage Law, which falls under private or civil law. Therefore, when a case arises where one

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<sup>43</sup> Martin.

<sup>44</sup> Naratama, Tantri, and Ayu Trisna Dewi. "Perceraian Pada Perkawinan Campuran di Indonesia Dalam Perspektif Hukum Perdata Internasional." *Warta Dharmawangsa* 17, no. 3 (2023): 1283-1294.

parent takes a child away from the custody of the parent granted custody by the court, it is considered a civil case resolved personally between the conflicting parents over custody. In Indonesia, taking one's child away from the custody of the parent with custody rights is not a criminal offense, and there are no criminal laws regulating parents abducting their own child.

From the various cases above, the issue of child abduction by parents becomes an urgent problem requiring criminal law reform and harmonization with international law. Considering cases of child abduction by parents in Indonesia, involving parents with Indonesian citizenship cannot be resolved solely by Indonesian law. Similarly, child abduction by parents with foreign citizenship cannot be adequately addressed, leaving the victims without legal protection. Additionally, children do not receive priority in obtaining the best interests, which is their right.

## **Children, Digital Technology, and Virtual Child Abduction**

### **A. The Relationship between Digital Technology and Child Protection**

Advancements of technology, the use of smartphones and social media, have created opportunities for children to interact, learn, and develop. However, this also introduces new, darker, and riskier dangers, such as the dark web, revenge porn, sexting, and trolling. Technology has introduced a vast and open digital space, but this space can also be dangerous for children who may not fully understand or manage these risks. This is further exacerbated by concerns about privacy and the online exploitation of children. Personal data security, for instance, becomes a critical issue, as children often lack a full understanding of how their information can be misused. Gallagher notes that prevention efforts related to digital sexual abuse are often accompanied by "inaccurate warnings" and "panic-driven recommendations," which can be counterproductive. For example, overly strict parental approaches or excessive control over children's digital interactions can limit their ability to learn to manage issues and build social skills independently. Overly forceful interventions can lead to children feeling isolated or disempowered to make independent decisions in the digital world. Addressing technology with the right balance between protection and freedom is crucial. Children need to be equipped with skills to protect themselves digitally, not just through strict supervision. This includes training on how to recognize potential dangers and



manage their interactions in the digital space wisely. One aspect highlighted by Gallagher is the use of technology to facilitate communication between adopted children and their biological families.

Technology can help maintain these relationships, but it can also be risky if used at the wrong time or in the wrong way. For instance, in the context of children in vulnerable situations, such as adopted children or those separated from their families, poorly managed digital interactions can increase confusion or exacerbate feelings of isolation. On the other hand, wisely utilized technology can be a powerful tool for strengthening family bonds separated by distance or certain circumstances. The effectiveness of technology used to protect children from digital abuse or exploitation has limited evidence. Additionally, there are ethical and practical challenges in its implementation, such as privacy and the collection of children's data. Technology can be used to detect or mitigate risks faced by children online, but proper oversight is needed to ensure that it does not violate children's rights or cause further harm. One of the biggest challenges is the lack of understanding of the long-term impact of digital technology on children's development. Technology can change how children interact with the world, in terms of social relationships, learning, and behavior.<sup>45</sup> Therefore, it is crucial for professionals in child protection to continuously evaluate and adapt to changes in the digital world. Another important point raised by Gallagher is the gap between technological advancements and our understanding of their impact on children. Digital technology has evolved much faster than our ability to anticipate and address it effectively. Thus, approaches to child protection in the digital world must be dynamic and open to change. Interventions should be based on strong evidence but also flexible in anticipating emerging risks. On one hand, digital technology can be used to enhance child protection, for example, through online reporting systems or digital education programs that teach children about potential dangers. On the other hand, the challenge faced by policymakers, educators, and parents is how to manage the negative impacts of digital technology, including its influence on children's mental and physical well-being.<sup>46</sup>

Thus, Gallagher's review provides a very realistic depiction of the challenges we face in protecting children in the digital era. Digital technology holds great potential to improve many aspects of life, but it also poses serious

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<sup>45</sup> Suryani, Adi, et al. "Revisiting Young Children's Technological Learning Behavior within a Microsystem Context for Development of the Next Generation." *Journal of Development Research* 7, no. 2 (2023): 283-298.

<sup>46</sup> Gallagher, Bernard. "The role of digital technology in child protection: still helping and harming?." *Child Abuse Review* 25, no. 5 (2016): 327-331.

risks, especially for children who are not yet mature enough to fully understand and manage potential dangers. Therefore, it is important to continually update our approaches to managing children's use of digital technology, while maintaining a balanced focus on protection, education, and supervision.

## B. Virtual Child Abduction

Virtual child abduction is a crime that utilizes information and communication technology, where the perpetrator contacts the target and pretends to have kidnapped someone important to the target (a child, relative, etc.). The perpetrator then threatens to harm or kill the "*victim*" if a ransom is not paid. Basically, there is no physical abduction; this crime is conducted virtually, without physical contact between the perpetrator, victim, and target. The main characteristic of this abduction is the use of technology, such as telephones, the internet, and other communication platforms, to commit the crime. The primary motive of the perpetrator is economic, aiming to obtain ransom from the target, or psychological tactics, using threats and intimidation to frighten the target and coerce them into paying. An analysis of 75 cases identified various characteristics of the perpetrators and groups involved in virtual abductions, which can include a single perpetrator, a couple, or a more organized group. This crime can be committed by individuals, couples (usually a man and a woman), or more organized groups (consisting of at least a leader, manager, or money courier). Perpetrators can be of various genders and nationalities, although this information is often difficult to identify. The size, structure, and roles of groups involved in virtual abductions can vary. Group members' roles range from leader and organizer to money courier. Perpetrators target family members, important individuals, and people within social environments. Their area of operation is not limited and can even be cross-border.

Child abduction in general, including traditional child abduction, involves taking a child to care for them and separating them from one of the parents. The motivations for abduction vary, ranging from political to economic. Abduction for ransom falls under the economic category. The target of abduction can be anyone, and the location can be anywhere. Women are also involved in abductions, with varying roles. Abductions are often carried out by groups of different sizes and structures. There are various types of child abduction, including swift abduction, planned abduction, and virtual abduction. From a systematic analysis of over 7,000 news reports, official reports, and court documents between January 2000 and March 2022, 75 cases were identified as virtual child abduction and analyzed in depth. Clearly, virtual

child abduction is an act that influences a child before the child is physically taken away by the perpetrator.<sup>47</sup>

AI technology has significant potential in detecting and preventing child abduction crimes. Further research is needed to explore more deeply the role of artificial intelligence technology in addressing child abduction crimes involving children taken by one biological parent who does not have a court order for custody. This includes research on the implementation of this technology in law enforcement practices, the development of more specific policies, and the evaluation of its impact on the overall effectiveness of law enforcement.<sup>48</sup>

### C. The Role of Digital Technology in Resolving International Child Abduction

The use of mediation, including online dispute resolution (ODR), in international child abduction cases, with a focus on the Hague Convention and its Good Practice Guides. This involves exploring current efforts to ensure parents have the opportunity to choose voluntary mediation with skilled international family mediators to resolve disputes, including those involving children, and evaluating the use of technology in these cases. The role of technology is recognized as a powerful tool in mediation, especially in cross-border disputes. Mediators require training in effective online communication (written and forum-based) to build trust and rapport. Cross-border mediation involves many actors (mediators, parents, lawyers, third parties, interpreters), making it difficult to gather everyone in one place. Technology becomes essential to facilitate communication in these situations. Mediators in cross-border child abduction cases need to be "technologically proficient," particularly in written communication (email) in addition to verbal communication (video/phone conferencing). These skills should be included in mediator standards and credentials.

The effectiveness of potential automation, cost savings, and increased party satisfaction are noted. However, the disadvantages of technology include inaccessibility for some parents due to cost, location, education, or cultural

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<sup>47</sup> Maras, Marie-Helen, and Jana Arsovska. "Understanding the intersection between technology and kidnapping: A typology of virtual kidnapping." *International Criminology* 3, no. 2 (2023): 162-176.

<sup>48</sup> Rasyid, Muh Firdaus, Muhammad Zuhud Al-Khaer Zahir, and Burhanuddin Burhanuddin. "Peran Teknologi Kecerdasan Buatan dalam Mendeteksi dan Mencegah Tindak Pidana Penculikan Anak Perempuan Ditinjau dari Perspektif Hukum dan Teknologi (Studi Kasus Nomor. 60/Pid. sus/2017/PN. Makassar)." *Jurnal To Ciung: Jurnal Ilmu Hukum* 4, no. 2 (2024): 83-91.

perceptions. Cultural differences in interpreting online communication are also a concern. The benefits of technology, especially in child abduction cases, include a secure communication environment (transparent and recorded), eliminating face-to-face confrontation, and protecting children from involvement in parental disputes. Child involvement: in some jurisdictions, mediators may interview children. Technology can facilitate this, even when the mediator and child are in different locations. While technology can assist, it is important to be aware of and sensitive to cultural differences in communication styles and interpretations of online interactions. A hybrid mediation model, combining online and offline elements, similar to the German model, is suggested as a potentially most effective approach. The hybrid approach, combining online and offline mediation, is likely the most effective way forward.<sup>49</sup>

## **Legal Regulations and Child Custody: A Case Study of Parental Child Abduction in Australia and Singapore**

California was the first state in the United States to have regulations regarding parental child abduction. Andrea Himel, explains that the situation of child abduction includes: <sup>50</sup>(a) a parent taking a child before a custody agreement or order is made; (b) a parent, violating a custody agreement or order, fails to return or surrender a child at the end of a valid or agreed-upon visit and the child is gone for at least one week; (c) efforts are made to conceal the taking or whereabouts of the child and to prevent contact with the child; or (d) the child is transported out of the province, or there is evidence that the abductor intends to keep the child indefinitely or permanently affect custody rights.

International child abduction is a crime in the United States. Under the International Child Abduction Prevention Act, anyone who "removes a child from the United States, or attempts to do so, or retains a child (who has been in the United States) outside the United States with the intent to obstruct the lawful exercise of parental rights" can be imprisoned for up to three years. Additionally, each state and the District of Columbia have criminal laws

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<sup>49</sup> Martin, "International Parental Child Abduction and Mediation: An Overview."

<sup>50</sup> Mahlobogwane, Frans M. "Parental child abduction cases: prevention is better than cure." *Obiter* 39, no. 1 (2018): 112-125.

regarding parental abduction. It is important for parents to seek legal advice before moving or holding a child across international borders.<sup>51</sup>

The United States child protection agency, as the central authority, trains judges in America on issues of Parental Abduction in accordance with the Hague Convention. Judges who undergo this training can consider legal considerations from the explanations provided in the Hague Convention for legal analysis and also gain knowledge regarding tools and information for preventing child abduction in cases of Parental Abduction.<sup>52</sup>

In 2016, the ASEAN secretariat issued the ASEAN Regional Plan of Action on the Elimination of Violence against Children (ASEAN RPA on EVAC) as a form of agreement among Southeast Asian countries regarding the elimination of violence against children. One of the agreements is regional cooperation in the field of law (legislation). Point 40 of this Regional Plan of Action establishes coherent extraterritorial jurisdiction for violations and transnational crimes related to violence against children such as human trafficking, child trafficking, child prostitution, child care, child pornography, parental abduction, and others related to serious violations against children.<sup>53</sup>

The court can determine custody rights over children born within a marriage by granting joint custody to both parents whose marriage has ended, or sole custody to one of the parents, while the non-custodial parent retains visitation rights. Children benefit more from the presence of both parents even after divorce. However, portraying the other parent negatively can psychologically harm the children.

Indonesia follows sole custody post-divorce, as seen in the Compilation of Islamic Law (KHI) and the Civil Code. Sole custody means only one parent is granted legal or physical custody of the child.

Joint custody, on the other hand, grants equal rights to both parents in terms of physical and legal custody. Both parents have equal time with their children and share decision-making responsibilities regarding their children's future and well-being.

In legal psychology, child care needs can be categorized into two types. First, legal custody involves fulfilling the child's legal needs, including financial support, healthcare, education, and general legal matters, which are typically the joint responsibility of both parents, although these needs are often

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<sup>51</sup> Department of State, United States of America, "Annual Report on International Child Abduction 2022," United States Department of State, 2022, p. 9.

<sup>52</sup> *Ibid*, p. 9

<sup>53</sup> The ASEAN Secretariat, *ASEAN Regional Plan of Action on the Elimination of Violence against Children (ASEAN RPA on EVAC)*, Jakarta, 2016, p. 27

predominantly met by the father. Second, physical custody entails caring for the child's physical well-being, as they are not yet capable of self-care, such as breastfeeding, bathing, dressing, personal hygiene, healthcare, meal services, communication skills, playmates, learning, and overall development.<sup>54</sup>

Generally, child custody is awarded to one party. However, it is also important to consider shared parenting or joint custody, based on the best interests of the child. This approach is rooted in the societal paradigm that whoever holds custody of the child bears full responsibility for their care. It is often heard that a parent is unable to see their child due to restrictions imposed by the custodial parent or their family. Therefore, the concept of shared parenting offers a new paradigm in child care management.<sup>55</sup>

Meanwhile, a scientist from the University of British Columbia, Edward Kurk, stated:

- 1) Legal presumption of shared parental responsibility (Shared parenting is a concept based on the desire for the parent-child relationship to continue after divorce)
- 2) Parenting plans, mediation, and support/intervention in high conflict cases (Both parents are expected to jointly develop a shared parenting framework before the court process with the aim of providing both parents with sufficient options regarding parenting models after divorce)
- 3) Shared parenting education (post-divorce parents are encouraged to find their role in parenting. Parents should not focus on who has more right to parent but on how parenting is carried out for the welfare of the child)
- 4) This parenting concept has been implemented in many countries, but unfortunately, Indonesia is lagging behind. Indonesian law still adheres to single custody, leading to prolonged conflicts. This law needs to be changed promptly.<sup>56</sup>

The Hague Convention on the Civil Aspects of International Child Abduction 1980 has been ratified by 91 countries, with Indonesia being one of the countries that has not ratified this convention. The purpose of the 1980 Hague Convention (hereinafter referred to as the Convention) is: (1) to ensure

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<sup>54</sup> Gushairi, Gushairi, "Eksekusi Anak dan Problematikanya di Indonesia", Presented at the *Judges' Discussion Event*, in the Context of Developing Judges Throughout the Banten High Religious Court Region, November 4, 2022. Online at <https://badilag.mahkamahagung.go.id/artikel/publikasi/artikel/eksekusi-anak-dan-problematikanya-di-indonesia-oleh-gushairi-s-h-i-mcl>

<sup>55</sup> Gushairi.

<sup>56</sup> Kruk, Edward. *Child custody, access and parental responsibility: The search for a just and equitable standard*. Vol. 31. Father Involvement Research Alliance, 2008.

that a child who has been abducted or wrongfully retained in member countries of the Convention can be promptly returned to their habitual residence country. This return must be through a simple and straightforward procedure. (2) to ensure that court decisions regarding custody and access rights of children are respected among member countries of the Convention. Thus, the interaction and communication of the child with both parents continue even though their marital relationship has ended. The custody rights referred to in this convention are joint custody and sole custody.

This Convention does not impose criminal sanctions on parents who abduct or retain a child to ensure that the best interests of the child are facilitated. The best interests of the child include protecting the child from physical and psychological harm when forced to move from their country and familiar environment to a foreign country and environment. Therefore, a child who has been abducted or wrongfully retained must be promptly returned to their habitual residence country.

The Convention regulates the civil aspects of the abduction or retention of a child from their habitual residence country. Abduction or retention of a child is considered wrongful if it prevents the custodial parent from fulfilling their obligations (Article 3 of the Convention). Habitual residence can be understood as the child's everyday place of residence.

## 1. Australia

In Australia, cases of parental abduction, where one parent takes the child without custody rights after divorce, are governed by the Family Act 1975.<sup>57</sup> An example of a child custody dispute arising from a mixed-marriage divorce is the case of Dennis Anthony Michael Keet vs. Yeane Sailan. They first married in Australia in 2002 and in Indonesia in 2003. Since 2003, they have lived in Jakarta, and on July 28, 2003, a child named LK was born with dual citizenship of Australia and Indonesia. When their marriage became strained, the child was taken without the mother's permission or knowledge by the father to Australia. With the assistance of the "Australian Airport Watch List," the mother located the child in Australia. She then applied for custody and requested the return of the child to her in Indonesia, which was the child's habitual residence. The Family Court of Australia granted the mother's request, awarding custody to her and ordering her and the child to return to Indonesia to their residence.<sup>58</sup>

<sup>57</sup> Office of Parliamentary Counsel, Canberra, Family Act 1975, Compilation 88, 2019, p. 240.

<sup>58</sup> Basuki, Zulfa Djoko. *Parental Custody in Mixed Marriages in Indonesia Associated with Indonesia's Participation in "The Hague Convention 1980 on The Civil Aspects of*

Shortly after the Family Court of Australia's decision, the father filed a lawsuit in the District Court of South Jakarta to annul the decision granting custody to the mother, alleging, among other things, that the mother enjoyed her nightlife alone, neglected the child, and the father.

On the grounds that the mother was not a responsible parent, the father's request was granted (Decision dated August 7, 2012). The mother then filed for cassation to the Supreme Court and requested the annulment of the South Jakarta District Court's decision. Through Supreme Court Decision No.3/Pen/Pdt/2013, the Supreme Court declared that the decision of the South Jakarta District Court granting custody to the father was null and void. Therefore, custody remained with the mother. The reason given by the Supreme Court was that the District Court had wrongly applied the law because the determination of custody was examined voluntarily (requested); the mother had obtained custody rights according to the Family Court decision in Sydney, Australia; according to procedural law, revocation of custody of the child must be done through a lawsuit rather than a voluntary procedure, so the petitioner's request should be declared inadmissible.<sup>59</sup>

In this case, there was an incident of child abduction by the father to another country that was not the child's habitual residence, known internationally as international child abduction. According to Zulfa Djoko Basuki, Professor at the Faculty of Law, University of Indonesia, the dissolution of a mixed-marriage followed by child custody, whether in the form of sole custody or joint custody. In this case, one parent may be dissatisfied with the court's custody decision. The parent then abducts the child from the country of habitual residence. This can happen due to the increasing ease of entering and leaving one country for another.<sup>60</sup>

## 2. Singapore

In Singapore, joint custody is practiced, as reflected in a series of regulations governing child welfare, including the Guardianship of Infants Act

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*International Child Abduction*" Presentation Material for the Seminar on Marriage Agreements in Mixed Marriages (Depok: University of Indonesia, 2018).

<sup>59</sup> Mufrihah, Wilda Malika, and Elan Jaelani. "Perlindungan Hukum Anak Korban International Child Abduction: Tinjauan terhadap Aspek Hukum dan Perlindungan Hak Anak." *Jembatan Hukum: Kajian ilmu Hukum, Sosial dan Administrasi Negara* 1, no. 2 (2024): 24-31.

<sup>60</sup> Basuki, *Parental Custody in Mixed Marriages in Indonesia Associated with Indonesia's Participation in "The Hague Convention 1980 on The Civil Aspects of International Child Abduction*.



1934, The Hague Convention, Women's Charter 1961 for non-Muslims, Administration of Muslim Law Act for Muslims, and Children and Young Persons Act 1993. The competent authorities responsible for implementing these regulations are the Ministry of Social and Family Development (MSF) and the Family Justice Court (FJC).

The FJC prioritizes the welfare of children in determining child custody for parents who decide to separate. Based on the Guardianship of Infants Act 1934, a child's father is deemed not to have higher rights than the mother in obtaining custody, as well as in the administrative system. Thus, the priority for the mother to obtain custody rights is higher than that of the father. However, if the father obtains custody rights, the mother still retains access rights for the welfare of the child. The FJC also mandates parents to pay for the child's maintenance periodically, covering accommodation, clothing, food, and education that are reasonable. This obligation is not dependent on whether the child is in the custody of one parent or the other, or whether the child is legitimate or illegitimate.

The role of the Ministry of Social and Family Development (MSF) becomes crucial in overseeing court decisions regarding the fulfillment of children's rights and providing protection to children experiencing adverse situations, including those in divorce or separation situations. To ensure the safety of children, mechanisms such as Care and Protection Orders can be ordered by the court. Regarding joint custody decisions, parents or guardians may be ordered to sign a bond to carry out proper care and guardianship of the child or adolescent.<sup>61</sup>

In the event of violations related to joint custody, criminal provisions apply to parents as regulated under section 16 of the Children and Young Persons Act 1993. In relation to the custody and access mechanisms in fulfilling The Hague Convention, Singapore implements a mechanism where parents who are deprived of their rights can apply to the FJC. If parents may be able to resolve their disputes themselves, a District Judge may direct them to attend mediation or counseling at the Family Relations Chambers. If parents settle their disputes before the hearing, they may appear before a District Judge in chambers to record a consent order. This will end the court process. A consent order is a Court Order confirming the terms agreed upon by the parties to settle their disputes. Otherwise, if disputes are not resolved, the District Judge will hear the application and decide on the issues on behalf of the parents.

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<sup>61</sup> A Singapore Government Agency. "Care and protection orders: overview", <https://www.judiciary.gov.sg/family/care-protection-order-overview>

## **Parental Child Abduction in Indonesia: A Recommendation for Criminal Law Reform**

The legal vacuum regarding forced separation or custody disputes has created the worst situation for children in Indonesia and deprived access to justice, especially for women. Therefore, the State must create a mechanism for the protection and fulfillment of children's rights so that their rights are not violated. There are several proposed regulations that should be created, including:

### **A. Ratification of the Hague Convention on the Civil Aspects of International Child Abduction 1980**

It is crucial to ratify the Hague Convention 1980 to resolve custody conflicts and parental child abduction cases, especially those taken outside Indonesian territory. Some countries refuse assistance in resolving cases of children moved abroad, especially when the parents have different nationalities. Currently, children taken out of Indonesia by one of their parents cannot be resolved because Indonesia is not a signatory country.

Furthermore, the Hague Convention 1980 could serve as a basis for establishing the principle of joint custody in Indonesia's national law in the future. This convention also requires each signatory country to designate a national institution as the Central Authority to implement the mechanism for returning abducted or wrongfully retained children to their country of habitual residence. Each Central Authority from member countries must cooperate to ensure the prompt return of children who have been abducted or wrongfully retained to their country of habitual residence when they were taken. When one parent whose child has been abducted by another parent submits a request to the Central Authority (Central Office) in their country, the receiving Central Authority forwards the request to the Central Authority where the child is suspected to be located. Subsequently, if the child's location is found, the Central Authority of that country must promptly return the child or facilitate their voluntary return to the child's country of origin.<sup>62</sup>

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<sup>62</sup> Articles 8-10 of the Hague Convention on the Civil Aspects of International Child Abduction 1980

The ministries authorized to ratify the convention are the Ministry of Law and Human Rights, the Ministry of Women's Empowerment and Child Protection, and the Ministry of Foreign Affairs. The steps of the ratification process will, of course, adhere to Law Number 24 of 2000 concerning International Agreements. It is hoped that this ratification can be completed by at least 2024, or at the latest by 2025.

## **B. Issuing Supreme Court Regulation (*PERMA*) on the Mechanism of Implementing Child Custody Decisions**

In determining child custody decisions, both Religious Courts and District Courts tend to use the principle of sole custody rather than joint custody. The establishment of Supreme Court Regulation (*PERMA*) on the Settlement of Child Custody Issues is expected to integrate the joint custody model, so that court decisions (Religious Courts and District Courts) will no longer grant custody to only one parent, but rather to both parents jointly responsible for fulfilling the rights of the child until adulthood.

Furthermore, this *PERMA* also needs to regulate the implementation of court decisions once the court has determined the type of custody. The procedures for implementing these decisions need to be specified in this *PERMA* when one parent refuses to comply with a legally binding court decision.

Additionally, this *PERMA* should also regulate emergency/temporary custody orders when both parents are undergoing divorce proceedings until a final decision is rendered by the judge and becomes legally binding. This is done to provide a sense of security and comfort for the child and to prevent psychological impact on the child due to the uncertainty of custody arrangements during the parents' divorce process. Specifically, *PERMA* should accommodate several aspects as follows:

- a. Child custody principles prioritizing joint custody, although sole custody remains a last resort option.
- b. Mechanisms for implementing legally binding decisions when the child is in the care of a parent who is not designated as the custodial parent.
- c. Mechanisms for joint custody determined by the court, ensuring equal rights and responsibilities for both parties in raising the child.
- d. Establishment of technical units within the judiciary to enforce legally binding decisions, involving the Ministry responsible for child protection affairs and/or relevant child protection agencies, child psychologists,

social workers, and support from law enforcement when implementing such decisions.

- e. Temporary custody mechanisms when the court has not yet decided or when the decision regarding child custody is not legally binding.

The drafting of this PERMA is the responsibility of the Supreme Court of Indonesia and is scheduled to be formulated and implemented in 2024.

### **C. Issuing a Government Regulation in Lieu of Law (PERPPU) for the Third Revision of Law Number 23 of 2002 to Address Parental Abduction, or Amending the Child Protection Law**

Government Regulation in Lieu of Law (PERPPU) for the third revision of the Child Protection Law (Law Number 23 of 2002). This PERPPU is intended to regulate criminal acts for parents who abduct children from custody determined by the court or abduct children without permission from the other parent or hide children from one parent. Or imposing criminal sanctions on one parent who obstructs another parent from meeting their child.<sup>63</sup> The proposed formulation for parental abduction is as follows:

*Anyone who fails to surrender, takes away, hides, obstructs, or limits access to the parent determined by the court as the legal guardian of the child with legally binding force shall be punished with imprisonment for up to 7 years.*

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<sup>63</sup> Article 453 of Law Number 1 of 2023 regarding the Criminal Code states the following: Any person who conceals a child who has been removed or removes themselves from authority as stipulated by the applicable regulations, or from the supervision of an authorized person, or removes them from an investigation by an official, shall be punished with imprisonment for a maximum of 4 (four) years or a fine of up to category III. If the act described in paragraph (1) is committed against a child under 12 (twelve) years of age, the punishment shall be imprisonment for a maximum of 7 (seven) years. Article 453 still contains ambiguity regarding whether the legal subject (perpetrator) who conceals the child includes parents or if parents are excluded from this article. The explanation of Article 453 clarifies that this provision relates to a child removed from lawful authority or supervision and then concealed from the investigative interests of authorized officials.

*Anyone who takes away a child without the consent of one or both parents or guardians shall be punished for kidnapping with imprisonment for up to 7 years.*

*Anyone who denies access to a parent to meet their child shall be punished for obstructing access with a maximum penalty of 7 years' imprisonment.*

The proposed articles need to be carefully considered and discussed further. Additionally, the criminal provisions above should be made reportable offenses, so that the legal process is initiated only upon complaint from one of the legitimate parents and not from others. Moreover, the penalty will be dropped if the complaint is withdrawn due to an agreed-upon mediation process by both parties.

Defining Parental Abduction (taking away a child by a biological parent) in one of the articles within the revised Child Protection Act, is needed so that the Child Protection Act has clear regulations regarding the criminal act of abducting a biological child from the lawful custodian in Indonesia. This is necessary to provide a legal instrument in Indonesia that clarifies the elements of the crime related to child abduction committed by parents who do not have custody rights granted by the court, enabling the police to have clear rules for addressing such crimes.

The PERPPU should ideally be initiated by the Ministry of Women Empowerment and Child Protection (KEMENPPA) together with the Ministry of Law and Human Rights (KEMENHUKHAM), and it is hoped that it can be accomplished by 2024 or at the latest by 2025. The preparation of this PERPPU could refer to the preparation of PERPPU Number 1 of 2016 regarding the Aggravation of Punishment for Sexual Violence Perpetrators, which at that time was drafted by KEMENPPA together with other relevant ministries.

## **D. Judicial Review of Article 330 of the Indonesian Criminal Code on Child Abduction: Expanding Its Scope to Include Parental or Guardian Actions**

Against Article 330 of the Indonesian Criminal Code, there has been a petitioner who submitted a Judicial Review to the Constitutional Court, namely the Law Office of Sisca Siagian and partners through Request Number 140/PUU-XXI/2023. This petition was filed by five applicants: Aelyn Halim,

Shelvia, Nur, Angelia Susanto, and Roshan Kaish Sadaranggani. The five applicants, whose cases were discussed above, are mothers who are fighting for custody rights over their children. This petition is still in the process stage at the Constitutional Court.

The Constitutional Court, through its decision on September 26, 2024, stated in its considerations that the term "*addressaat*" norm using the phrase "*whoever*" in Article 330 paragraph (1) also includes acts that are prohibited (punishable) as "*intentionally removing someone who is underage from the authority determined by law over them or from authorized supervision.*" The Court opined that actions by a biological parent who does not hold custody rights and forcibly takes and controls the child can be considered a criminal act if the actions meet criminal offense elements. Thus, even if the child is taken by a biological parent, if done forcibly without rights or permission, the action falls within Article 330 paragraph (1) of the Criminal Code. This means that if the child is taken by a biological parent without custody rights according to a court decision, without the knowledge or permission of the custodial parent, and accompanied by force or threats of force, the action may be categorized as a violation of Article 330 paragraph (1) of the Criminal Code. Therefore, in applying Article 330 paragraph (1) of the Criminal Code, there must be evidence that the intent to take the child without the custodial parent's permission genuinely originated from the perpetrator, even if it is the child's biological parent.<sup>64</sup>

This Constitutional Court decision has altered the interpretation of Article 330 of the Criminal Code, so that if one parent has been designated by the court as the custodial parent, and the child is abducted by the other parent who is not the custodian, the act of abducting the child is categorized as a criminal offense under Article 330 of the Criminal Code.

## **E. Establishing a Task Force for Resolving Parental Abduction Conflicts**

A task force (*Satgas*) needs to be promptly established through a Presidential Regulation (Perpres), Joint Ministerial Decree (*Surat Keputusan Bersama*, SKB), or Ministerial Regulation. This task force will be mandated to resolve cases of parental abduction where one party forcibly separates the child from the parent granted custody by a court decision that has obtained final legal force. The roles of the task force should include:

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<sup>64</sup> Constitutional Court Decision Number 140/PUU-XXI/2023, p. 130

- 1) Mapping cases of forced separation and child detention by one parent post-court decision on child custody allocation.
- 2) Locating the whereabouts of children abducted or detained by one parent.
- 3) Ensuring the voluntary return of children or providing resolutions for their return.
- 4) Initiating or facilitating legal or administrative processes aimed at child return, and in certain cases, reaching agreements to ensure the effectiveness of access and custody rights.
- 5) Providing or facilitating legal assistance and resources, including the provision of lawyers and legal consultants.
- 6) Providing necessary facilities to ensure the safe return of children.

The formation of this task force is urgent and should have been established in 2023. To ensure its broader functionality, it is advisable for it to be initiated by the Ministry of Political, Legal, and Security Affairs (KEMENKOPOLHUKAM) or through a presidential decree to accommodate the needs of the task force. The Ministry of Women's Empowerment and Child Protection (KEMENPPA) should take the lead in expediting the establishment process of this task force. Alternatively, a special team could be formed within KEMENPPA to address ongoing cases of custody disputes before the task force is fully established.

## **F. Incorporating Penal Provisions for Parental Abduction into the Child Custody Bill (Child Custody Bill Draft)**

Parental Abduction (the act of a biological parent abducting a child) should be included into the Child Custody Bill. For cases where a child is forcibly separated from the custodial parent by a biological parent who does not have custody rights, stringent penalties should be imposed on the perpetrators for violating court decisions.

As the substance of this law is initiated by the Ministry of Social Affairs, it is necessary to establish a small team or special team to accommodate the needs of child custody, including its penal provisions. This small team should consist of the Ministry of Social Affairs, the Ministry of Women's Empowerment and Child Protection, academics, representatives from the community, the Indonesian Child Protection Commission (KPAI), and related government agencies. This small team has already started its work in 2024.

## **G. Implementing Preventive Measures through Education Programs and Campaigns on Joint Custody Parenting**

It is crucial to conduct preventive measures through education programs and campaigns aimed at promoting joint custody parenting both within marriages and during divorces. It is also important to integrate children's rights within marriages and prevent children from being treated as objects in custody battles during divorces. Therefore, efforts can be made through campaigns, enhancing the capacity of marriage counselors, and providing education to couples who are getting married. The ministries involved in this program are the Ministry of Religious Affairs, the Ministry of Women's Empowerment and Child Protection, and the National Population and Family Planning Board (BKKBN). These three agencies are recommended to develop programs for marriage counselors and provide education to couples who are getting married or already married, integrating children's rights in parenting, ensuring that children are not treated as objects in custody battles, and ensuring that parenting is carried out jointly even in cases of divorce. This program should ideally be implemented within the year 2024.

## **Conclusion**

Taking a child away or separating a child from one parent is not yet considered a criminal offense in Indonesia. Similarly, Indonesia has not ratified the Hague Convention, which includes provisions prohibiting the separation and abduction of children. Regarding the use of digital technology in child abduction crimes, parents are beginning to monitor digital media, including social media, used by children, as there is a possibility that one parent or a third party may exploit the child to share their location and activities, making them known to the perpetrator. In addressing child abduction issues that exploit digital gaps, it is crucial to recognize contacts made by the child with one parent or a party instructed by the non-custodial parent, who may unlawfully relocate the child.

However, various cases of parental child abduction continue to occur, causing harm to the other parent and especially failing to protect the best interests of the child. Resolving conflicts caused by child abduction and separation should be addressed through criminal law, considering that such



actions disrupt the child's development and may constitute criminal acts, such as separating a toddler from their mother, forcibly separating a child from their mother, cutting off access to the custodial parent, and other actions that cause harm to the other parent and, most importantly, the child. Therefore, it is necessary to reform criminal law related to promptly ratifying the Hague Convention, followed by harmonizing various legal regulations, including the creation of Supreme Court regulations on the implementation mechanism of child custody, revising the Child Protection Law to include the definition of parental child abduction, drafting the Child Custody Bill to include parental child abduction and its criminal provisions, and educating the public about joint parenting both within marriages and after divorce. Based on the Constitutional Court Decision Number 140/PUU-XXI/2023, any person, including a biological parent who abducts their child without being the custodial parent as determined by a court decision, is subject to criminal penalties as stipulated in Article 330 of the Criminal Code.

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