

## Legal Certainty for Mothers in Child Custody Disputes: Implications of Deficiency of Child Custody in the Indonesian Legal System

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### ABSTRACT

This study aims to analyze the impact of confiscation of custody rights for mothers and children and its implications for the Indonesian legal system, in order to formulate an ideal legal settlement for child custody disputes in the future so that justice is achieved for the mother. This study uses a normative juridical research method using statute approach and case approach. The research resulted that it was found the impact of the confiscation of child custody rights not only affects the psychological condition of the mother and child, but also creates uncertainty in the justice system in Indonesia. The confiscation of custody rights by ex-husbands shows weaknesses in law enforcement and a lack of adequate protection for mothers and children.

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## **INTRODUCTION**

Child custody is one of the crucial issues in divorce disputes. In the Indonesian legal system, child custody is regulated in various laws and regulations. However, even though it has been regulated normatively, the polemic of child custody after divorce often causes various problems, especially when there is a seizure of custody rights by the ex-husband. This situation creates legal uncertainty and often harms mothers who are actually entitled to child custody after divorce. Most Indonesian people still adhere to a patriarchal culture that tends to give more authority to men in managing household life, including child custody. In fact, legally, custody should be based on the best interests of the child, which does not always mean being under the care of the father. The custody rights are often contested by both parents in divorce disputes. Although the court has the authority to determine who has the right to care for the child, in practice there are many cases where the custody rights of the child are forcibly seized by the ex-husband of the mother who has actually obtained custody rights through a court decision.

Cases like these show gaps in the justice system, where mothers often do not receive adequate legal protection. One example that has emerged in society is the case of a mother who was entitled to custody of her child based on a court decision, but her ex-husband forcibly took the child without the mother's permission. The mother reported this incident using Article 330 of the Criminal Code, but law enforcement officers were slow to act on the grounds that the matter was considered to be within the family's private sphere. This case not only harms the mother but also the child who is a victim of the unclear law regarding child care after divorce. Furthermore, this problem also reflects the powerlessness of women in dealing with legal issues involving their children. Based on Article 45 of Law Number 1 of 1974 concerning Marriage, both parents are obliged to care for and educate their children until they are adults or able to stand on their own. However, the implementation of this provision is often ineffective in the context of divorce, especially because the courts in many cases have not fully considered the best interests of the child as a whole.

Law no. 23 of 2002 in conjunction with Law no. 35 of 2014 concerning Child Protection emphasizes that in all actions related to the best decision for the child must be the main consideration. Children must receive protection from all forms of violence, neglect, and exploitation, including in matters of custody. In the Criminal Code, specifically in Article 330 paragraph (1) which states that "Anyone who pulls a person who is not yet of age from the authority that is determined by law over him, or from the supervision of a person authorized to do so, is threatened with a maximum imprisonment of seven years.", while paragraph (2) states "If in this case there is trickery, violence or threats, or if the child is not yet twelve years old, a maximum imprisonment of nine years is imposed." This legal regulation was actually made so that mothers can take legal action if their ex-husband seizes the custody of the child that has previously been decided by the court to fall into the hands of the mother. Even so, many cases of child custody seizure cannot be handled effectively due to the lack of firm implementation by law enforcement officers. In some cases, mothers who are

victims of custody deprivation do not have sufficient access to file complaints or obtain prompt and adequate legal assistance. This problem causes injustice that has an impact on the psychology of mothers and children, and damages the concept of social justice in society.

One case that attracted quite a lot of attention was the case of a mother in Jakarta who won custody of her two children after divorcing her ex-husband. However, the ex-husband, with the help of his family, forcibly took the children from the mother's house without the knowledge and permission of the authorities. Although the mother had pocketed a court decision granting her custody, efforts to return her children to her embrace encountered many obstacles, including a weak response from the police. This shows a gap in law enforcement in Indonesia, especially in the area of child custody arrangements, where court decisions regarding child custody are often not accompanied by effective coercive efforts from law enforcement officers to enforce them. In this case, the mother had to go through a long and tiring process to get her children back. The failure of law enforcement to act quickly on violations of child custody rights reflects a lack of coordination between court decisions and implementation in the field, which has a direct impact on the legal uncertainty experienced by mothers as holders of custody rights.

This problem requires serious attention from all parties, including law enforcement officers, judicial institutions, and policy makers in guaranteeing the child custody rights that are the rights of mothers. The current legal regulations are not yet sufficient to provide legal certainty for mothers in child custody disputes, especially when the ex-husband forcibly takes over the custody rights. A more comprehensive legal reform is needed and an increase in the capability of law enforcement officers in handling similar cases. The study entitled "Legal Certainty for Mothers in Child Custody Disputes: Implications of the Deprivation of Child Custody Rights Based on the Indonesian Legal System" is expected to contribute to efforts to reform the law that is more responsive to the rights of mothers, especially in child custody disputes. This study is also expected to be a basis for initiating legal reform, so that child custody is no longer a polemic for divorced mothers, but rather becomes an instrument that prioritizes the best interests of children and provides justice for mothers who are fighting to obtain their rights that have been legally decided by the court. Based on the background explanation above, several problems can be formulated, namely: What is the impact of the confiscation of child custody rights on the mother's psychology and child development, and its implications for the Indonesian justice system?; and What is the ideal legal approach to resolving cases of confiscation of child custody rights by ex-husbands in order to create legal certainty for mothers?

## **LITERATURE REVIEW**

### ***Theory of Legal Certainty***

Legal certainty is one of the objectives of law which is also a basic principle in a state of law (*rechtstaat*). Legal certainty requires clarity, consistency, and the enforcement of the execution of legal rules so as to provide protection for

everyone. According to Gustav Radbruch, legal certainty is one of the three objectives of law, besides justice and benefit. Radbruch emphasized that legal certainty can be realized through clear, consistent, and unambiguous regulations, thus providing legal consistency for legal subjects (Julyano and Sulistyawan, 2019). Friedrich Carl von Savigny, a figure in the historical school of law, argued that law must develop in accordance with the social development of society and can provide legal certainty in a way that reflects the needs and values in that society (Darmawan et al, 2022). In the context of child custody disputes, legal certainty is important because it concerns the protection of the rights of children and mothers.

### ***Theory of Justice***

The theory of justice is a concept that discusses what is considered fair in society, including how rights and obligations should be distributed among individuals. According to Thomas Aquinas, justice is giving what is due to someone based on the principle of equality. He distinguishes between distributive justice (the distribution of goods or resources based on proper proportions) and retributive justice (the imposition of fair punishment for violations of the law) (Anwar et al, 2021). On the other hand, the principle of justice according to John Rawls is that everyone has the right to the same basic freedoms and social and economic inequality is permissible only if it benefits everyone, especially the most disadvantaged (Taufik, 2023).

### ***Child Negligence Regulation in Indonesian Positive Law***

Child negligence is an immoral conduct against parent's obligation to provide protection and compassion toward their children. Law No. 23 of 2002 concerning Child Protection (as been revised as Law No. 35 of 2014 and Law No. 17 of 2016) clearly states in article 76B that every act of child negligence by their parents will subjected to criminal law. This regulation reinforced by Article 304 of Indonesian Criminal Law Book which stated every parents who neglect their children that will endangered their lives because of the parents won't take responsibilities over the will be sentenced of imprisonment up to 5 years and 6 months.

### ***Child Custody Rights in Indonesian Positive Law***

Regulations regarding child custody rights in divorce have been regulated in several laws and regulations, including:

1. Law no. 23 of 2002 concerning Child Protection Article 14  
Affirming that protection of the physical and psychological condition of children is a top priority even if the parents are no longer married, have different beliefs, or have different nationalities.
2. Law no. 1 of 1974 concerning Marriage Articles 41, 45, and 47  
Broadly speaking, it states that both parents are responsible for the care and education of their children. In the event of a divorce, a judge can determine child custody based on the best interests of the child.
3. Compilation of Islamic Law (KHI)

Being a reference in custody disputes in the Religious Court, especially for Muslim families. KHI regulates that custody of children under the age of 12 is generally given to the mother, unless there is a strong reason that can endanger the child's development.

### *Previous Study*

Study conducted by Martha and Achmad in 2022 entitled Protection Against Neglect of Child Custody Rights Due to Divorce has shown result that in some divorces, children often neglected or abandoned by their parents and taken custody by their grandparents. These acts clearly violated the regulations of Law no. 23 of 2002 concerning Child Protection Article 14. The reasons are vary, but the common reason is that the parents don't want to take responsibilities because of economic condition. Nevertheless, any reason according children negligence by their parents aren't accepted.

Another study organized by Sidabukke in the same year with title Child Custody Struggle as a Form of Violation of Children's Rights had result that child custody must mostly accommodated child's rights. Child protection as regulated in Law no. 23 of 2002 cannot be thwarted by parents even they are divorced. They have to take care of their children or otherwise they will charge of child negligence and will be subjected to imprisonment up to 5 years and 6 months according to Article 305 of Indonesian Criminal Law Book of 1946.

### **METHODOLOGY**

This study uses a normative legal research method with an emphasis on the study of laws and regulations, doctrines, legal principles, and court decisions related to child custody and deprivation of custody that occurs in divorce disputes. This study will use several approaches, including: 1) Statute Approach, this approach is used to analyze applicable laws and regulations, especially related to Article 330 of the Criminal Code, Law Number 35 of 2014 concerning Child Protection, Law Number 1 of 1974 concerning Marriage, and other regulations related to child custody in divorce and dispute resolution related to child custody; 2) Case Approach, this approach is used to study relevant court decisions regarding child custody disputes, especially cases involving deprivation of child custody experienced by the mother by her ex-husband.

The primary legal materials in this study include laws and regulations, such as: Law Number 1 of 1974 concerning Marriage, Law Number 23 of 2002 concerning Child Protection (and its amendments), Criminal Code Article 330, and relevant court decisions related to child custody and deprivation of custody in divorce. The legal materials in this study were collected through literature studies, namely by tracing laws and regulations, legal documents, and various court decisions related to child custody disputes. In addition, researchers will analyze secondary literature, such as books, scientific journals, and other relevant scientific works. Data obtained from primary and secondary legal materials will be analyzed using qualitative analysis methods. Researchers will describe and analyze various laws and court decisions related to child custody disputes and

deprivation of custody by ex-husbands. The results of this analysis will then be used to answer the previously determined problem formulation.

## RESEARCH RESULT AND DISCUSSION

### *The Impact of Child Custody Deprivation on Mother's Psychology and Child Development and Its Implications for the Indonesian Justice System*

The deprivation of child custody rights by an ex-husband in a divorce dispute is a complex problem and can affect various aspects of life, including the mother's psychological condition and the child's development. The deprivation of child custody rights not only has a negative impact on the mother, but can also affect the child's psychological and emotional development. In addition, this problem also has implications for the justice system in Indonesia, especially regarding the effectiveness of legal protection and justice provided in custody disputes.

Child custody is often given to the mother, especially if the child is still very young. However, in some divorce cases, the ex-husband can seize custody in various ways, either through legal manipulation or violent acts (Sidabukke, 2022). Research conducted by Retno Amelia in 2023, stated that mothers who lose custody of their children experience a significant decline in their quality of life, both emotionally and physically (Amelia et al, 2023). The negative impact on the mother's psychology does not only occur in the short term but also in the long term. The psychological impacts that can be felt by the mother if her custody rights are taken away include (Amelia et al, 2022):

1. Emotional Trauma

Losing custody of a child can be a source of deep emotional trauma for a mother. As someone who is biologically and psychologically closely related to the child, this forced separation can lead to feelings of loss, depression, and anxiety. Mothers who lose custody of their children tend to experience prolonged stress and are susceptible to other psychological disorders such as post-traumatic stress disorder (PTSD).

2. Guilt and Shame

Mothers who lose custody of their children often feel guilty for failing to protect their children or fulfill their role as good mothers. This is exacerbated by the social stigma that still holds mothers as the ones most responsible for the welfare of their children.

3. Loss of Identity

The role of mother is closely related to the identity of women, especially those who have children, and when child custody is taken away, this can damage the mother's self-confidence and identity. This loss of identity is often followed by social isolation and loss of community support, which can worsen the psychological impact experienced by a mother.

Deprivation of child custody not only affects the mother but also the child itself. Children who are separated from their mothers due to deprivation of custody by their fathers can experience various negative impacts, both psychologically, emotionally, and socially. These negative impacts can be (Maretta and Ahmad, 2022):

1. Emotional Disturbance

Children who are separated from their mothers can experience profound feelings of abandonment, confusion, and loss. Loss of contact with the mother, especially during early developmental years, can interfere with the formation of healthy, stable relationships between children and parents. Children who experience this type of separation often show symptoms of depression, anxiety, and emotional instability.

2. Performance Decline

Children who experience custody conflicts tend to have lower academic achievement than children who grow up in families with stable structures. Emotional instability and trauma from separation from the mother can interfere with a child's concentration and motivation to learn.

3. Socialization Problems

Children involved in custody conflicts often have difficulty forming healthy social relationships. They tend to have difficulty trusting others or even building stable relationships as adults. This condition can have an impact on the development of a child's character and behavioral patterns.

In the legal context, deprivation of child custody often involves imperfections or inconsistencies in the justice system. Some implications that need to be considered in cases of deprivation of child custody are as follows (Sidabukke, 2022):

1. Legal Uncertainty

Cases of child custody seizures often show weak law enforcement related to the protection of the rights of mothers and children in divorce. Articles in laws and regulations that regulate child custody are sometimes not applied consistently, especially when there is legal manipulation by more powerful parties. This creates legal uncertainty for mothers who should be entitled to child custody.

2. Weak Law Enforcement Effectiveness

In some cases, child custody rights are confiscated due to weak law enforcement or the absence of strong protection mechanisms for mothers and children. The justice system in Indonesia needs to strengthen law enforcement in custody disputes, including imposing strict sanctions on parties who unlawfully confiscate custody rights.

3. Failure to Achieve Justice

In many cases, mothers who lose custody of their children often have difficulty accessing the justice system effectively. Lack of resources, costs, and a lack of understanding of legal procedures are barriers for mothers to seek justice in child custody cases.

***The Ideal Legal Approach to Resolving Custody Cases Children by Ex-Husband to Create Legal Certainty for Mothers***

Child custody is a crucial issue in every divorce case, and in many cases, there are problems where the ex-husband seizes the custody of the child from the ex-wife. This situation often results in injustice, legal uncertainty, and psychological impacts on the mother and child (Siburian et al, 2023). Therefore, an ideal legal approach is needed to resolve this issue so that legal certainty for

mothers can be realized. An ideal legal approach must consider the best interests of the child, justice for the mother, and the integration of criminal, civil, and family law in providing effective protection.

To create legal certainty for mothers in cases of child custody deprivation, a holistic and comprehensive legal approach is needed. This approach involves several legal aspects that need to be strengthened and refined:

1. Strengthening in the Mediation Process

The first approach that can be taken is to strengthen the mediation mechanism in child custody disputes. In civil law, mediation can be an alternative to resolving disputes that is faster and more peaceful than litigation. The mediation process allows both parties, namely ex-husband and wife, to negotiate child custody by considering the best interests of the child. Research by Feingold (2008) shows that mediation in child custody disputes often results in decisions that are more satisfactory to both parties than court decisions. In addition, mediation can reduce tension and conflict between the two parties that can have a negative impact on the child.

2. Improving Judges' Competence

Settlement of child custody disputes must involve judges who have in-depth knowledge and understanding of child psychology and family dynamics. These judges must be given special training in handling family and child cases, so that the decisions rendered truly consider the needs and interests of the child optimally.

3. Imposition of Criminal Sanctions for Perpetrators of Deprivation of Child Custody Rights

The criminal law approach should also be put forward in the context of this legal phenomenon, especially if the deprivation of custody is carried out by illegal means such as kidnapping or legal manipulation. Articles in the Criminal Code, such as Article 330, relating to the deprivation of a person's liberty or falsification of documents can be used to ensnare ex-husbands who forcibly deprive children of custody. Stricter sanctions need to be applied to parties who deprive children of custody outside the provisions of the law. Strict law enforcement will create a deterrent effect and ensure that the rights of mothers and children are optimally protected.

4. Provision and Strengthening of Legal Protection for Mothers and Children

In cases where the mother experiences threats or physical or psychological violence due to custody disputes, criminal law must provide maximum protection. Protection through court orders, such as supervision orders or witness protection, must be implemented so that the mother and child are not intimidated during the legal process. In many cases, mothers are often in a weak position legally and economically after divorce. Therefore, the Indonesian legal system must be more responsive in providing legal assistance to mothers who do not have access to lawyers or legal counsel. Providing pro bono (free) legal assistance to mothers who are fighting for child custody is one form of responsive law that needs to be strengthened.



## CONCLUSIONS AND RECOMMENDATIONS

### *The Impact of Child Custody Deprivation on Mother's Psychology and Child Development and Its Implications for the Indonesian Justice System*

The impact of child custody deprivation not only affects the psychological condition of the mother and the development of the child, but also creates serious problems in the justice system in Indonesia. The deprivation of custody by the ex-husband shows weaknesses in law enforcement and a lack of adequate protection for mothers and children. To improve this situation, a reform of the justice system is needed that is more responsive to the needs of mothers and children in custody disputes. Some recommendations that can be given include: a) Increasing legal protection for mothers who are entitled to child custody; b) Stricter law enforcement against parties who illegally deprive children of their custody; c) Strengthening the mechanism for mediation and resolution of child custody disputes that are more effective and fair; d) Increasing access to justice for underprivileged mothers in cases of child custody disputes. By taking these steps, it is hoped that legal certainty and protection for mothers and children in cases of custody disputes can be realized better.

### *The Ideal Legal Approach to Resolving Cases of Child Custody Confiscation by Ex-Husbands to Create Legal Certainty for Mothers*

To create legal certainty for mothers in cases of child custody deprivation, the ideal legal approach must involve integration between civil law, criminal law, and a responsive approach. Mediation should be prioritized as an initial solution to resolve child custody disputes peacefully. However, if the deprivation of custody is carried out in ways that violate the law, a criminal law approach must be used to provide strict sanctions to the perpetrators. A responsive legal approach is also important to ensure that the law does not only function as a formal tool, but also as a tool that is responsive to the needs of the community, especially mothers and children. The legal aid and protection system must be strengthened to provide fairer and more equitable access for mothers who are struggling to maintain child custody. Thus, the implementation of this comprehensive legal approach is expected to create legal certainty and better justice for mothers and children in cases of child custody deprivation.

## ADVANCED RESEARCH

This study should be researched in two field of law, civil dan criminal, but this study still focused in criminal solution. Future research hopefully can cover those two field of law or maybe more, so we can get better insight for similar problems.

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