

A JURIDICAL ANALYSIS OF CHILD CUSTODY RIGHTS AFTER DIVORCE UNDER INDONESIAN AND THAI LAW

Dhiyaa Syauqi Siregar ^{a*)}, Teguh Syuhada Lubis ^{a)}

^{a)} Universitas Muhammadiyah Sumatera Utara, Medan, Indonesia

^{*)}Corresponding Author: dhiyasyauqi549@gmail.com

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Abstract. Divorce is a legal event that not only terminates marital relations but also creates legal consequences for children, particularly concerning child custody arrangements. As subjects of law, children are entitled to proper care, protection, and optimal development; therefore, custody decisions after divorce must be based on the principle of the best interests of the child. This study aims to conduct a juridical analysis of child custody regulations after divorce under Indonesian and Thai law and to examine the differences in custody settlement mechanisms between the two legal systems. This research employs a normative legal research method using statutory and comparative law approaches. The legal materials consist of primary legal sources, including statutes and civil law codes, as well as secondary legal materials such as legal literature and scholarly journals. The findings indicate that Indonesia adopts a pluralistic legal framework for child custody, influenced by national law and religious law, particularly through the Marriage Law, the Child Protection Law, and the Compilation of Islamic Law. In contrast, Thailand applies a more flexible approach under the Thai Civil and Commercial Code by granting broad discretion to the courts to determine custody based on factual circumstances and the welfare of the child. Despite these differences, both legal systems consistently emphasize the principle of the best interests of the child as the primary consideration in post-divorce custody decisions.

Keywords: Child Custody; Divorce; Comparative Law

I. INTRODUCTION

Marriage is a physical and spiritual bond between a man and a woman aimed at forming a happy and enduring family based on the belief in One Almighty God. This objective is normatively affirmed in Article 1 of Law Number 1 of 1974 on Marriage as amended by Law Number 16 of 2019. However, in the practice of married life, not all marriages can be maintained. Various factors such as disharmony, prolonged conflict, domestic violence, and failure to fulfill respective roles often lead to divorce as a last resort [1].

Divorce not only results in the legal termination of the marital relationship but also gives rise to more complex legal consequences, particularly concerning the continuity of life and welfare of children born from the marriage. Children are the most vulnerable parties affected by divorce, psychologically, socially, and juridically. Therefore, the determination of child custody after divorce constitutes one of the most important and sensitive issues in family law, as it directly relates to the fulfillment of children's rights as legal subjects. In the perspective of modern law, children are positioned as individuals possessing inherent

human rights that must be protected by the state, parents, and society. The principle of child protection at the international level is affirmed in the Convention on the Rights of the Child (CRC), which places the best interests of the child as the primary consideration in all policies and decisions concerning children, including the determination of post-divorce custody. This principle has also been adopted within Indonesia's national legal system [2]

The regulation of child custody after divorce in Indonesia is dispersed across various legal instruments, including Law Number 1 of 1974 on Marriage, [3]. Law Number 35 of 2014 on Child Protection, and the Compilation of Islamic Law (Kompilasi Hukum Islam/KHI) for Muslims. Article 105 of the KHI normatively stipulates that custody of a child who has not yet reached the age of discernment (*mumayyiz*) shall be granted to the mother, while the father remains obligated to provide financial support. Nevertheless, developments in judicial practice indicate that this provision is not applied absolutely. Judges frequently consider factual circumstances, parental

suitability, and the best interests of the child when rendering custody decisions. [4]

On the other hand, Thailand, as a country adhering to a civil law system, has its own legal framework governing child custody after divorce as regulated in the Thai Civil and Commercial Code (TCCC). The Thai legal system recognizes the concept of parental power, under which the court has full authority to determine which parent is most suitable to hold custody of the child after divorce. This approach emphasizes the comprehensive welfare of the child without automatically prioritizing one parent based on gender or specific legal status (Bagenda, 2024).

Differences in legal systems and approaches between Indonesia and Thailand in determining post-divorce child custody reflect divergent legal philosophies and orientations of legal protection. Indonesia remains influenced by legal pluralism that accommodates national law, religious law, and judicial practice, whereas Thailand tends to apply a unified and centralized civil law system emphasizing judicial authority. These differences have implications for variations in court decisions, levels of legal certainty, and the protection of children's rights. Moreover, the increasing phenomenon of mixed marriages and cross-border population mobility has made issues of child custody across jurisdictions increasingly relevant. In the context of divorces involving citizens of Indonesia and Thailand, disparities in legal regulations may give rise to legal conflicts, particularly concerning court jurisdiction and the enforcement of child custody decisions. This condition necessitates a comprehensive understanding of the legal systems of both countries [5]

Based on the foregoing, this research is important to conduct in order to juridically analyze the regulation of child custody after divorce under Indonesian and Thai law, as well as to examine the differences in principles and dispute resolution mechanisms. This comparative analysis is expected to contribute academically to the development of family law and comparative law, while also serving as practical consideration for policymakers and law enforcement authorities in realizing optimal legal protection for children after divorce.

II. RESEARCH METHODS

This research is a normative legal study (doctrinal research) employing a comparative law approach.[6] Normative legal research is applied because the focus of the study is directed at positive legal norms governing child custody after divorce within the legal systems of Indonesia and Thailand, rather than examining social behavior or empirical practices in society. This research aims to examine, interpret, and compare the applicable legal provisions in order to identify similarities, differences, and distinctive characteristics of child custody regulation in both countries.

The approaches used in this research include the statutory approach and the comparative approach. The statutory approach is utilized to analyze various legal regulations governing post-divorce child custody, such as Law Number 1 of 1974 on

Marriage as amended by Law Number 16 of 2019, Law Number 35 of 2014 on Child Protection, and the Compilation of Islamic Law in Indonesia. Meanwhile, within the Thai legal system, the analysis focuses on the provisions of the Thai Civil and Commercial Code and other relevant child protection regulations.[7]

The comparative law approach is employed to compare the concepts, principles, and mechanisms for resolving post-divorce child custody issues between Indonesia and Thailand. The comparison is conducted functionally by examining how each legal system regulates and resolves child custody matters, as well as how the principle of the best interests of the child is applied in judicial decisions. This approach aims to achieve a comprehensive understanding of the strengths and weaknesses of each legal system.[8]

The legal materials used in this research consist of primary legal materials, secondary legal materials, and tertiary legal materials. Primary legal materials include statutes and regulations, legal compilations, and civil law codifications directly related to post-divorce child custody in Indonesia and Thailand. Secondary legal materials comprise legal textbooks, scholarly journals, previous research findings, and academic articles discussing family law, child protection, and comparative law. Tertiary legal materials include legal dictionaries, legal encyclopedias, and other supporting references.

The technique for collecting legal materials is conducted through library research by examining statutory regulations, legal literature, and relevant scholarly publications. All legal materials are collected, classified, and systematized according to the research questions, thereby facilitating the process of analysis and conclusion drawing.

The analysis of legal materials in this research is carried out using a qualitative normative method, namely by interpreting legal norms, legal principles, and legal doctrines related to post-divorce child custody. The analysis is prescriptive in nature, aiming to provide legal arguments regarding how child custody regulations should be applied in order to ensure the best interests of the child. The results of the analysis are subsequently compared between the Indonesian and Thai legal systems to identify both conceptual and normative differences. Through this normative legal research with a comparative approach, the study is expected to present a systematic and comprehensive overview of post-divorce child custody regulation in Indonesia and Thailand, while also contributing academically to the development of family law and child protection..[9]

III. RESULT AND DISCUSSION

Legal Regulation of Child Custody in Indonesia

The legal regulation of child custody after divorce in Indonesia is governed by several interrelated legal instruments that together form a comprehensive child protection system. The principal instruments include Law Number 1 of 1974 on Marriage, as amended by Law Number 16 of 2019, Law Number 35 of 2014 on Child Protection, and the Compilation of Islamic Law (Kompilasi Hukum Islam/KHI) for Muslim

communities.[10] The existence of these various regulations demonstrates that the state does not regard child custody merely as a legal consequence of divorce, but rather as an issue of protecting children's human rights that must be continuously guaranteed [11]

The Marriage Law explicitly positions children as parties who must remain protected even after the dissolution of their parents' marriage. This is reflected in Article 41 of Law Number 1 of 1974, which stipulates that both father and mother remain obligated to care for and educate their children to the best of their ability for the benefit of the child. This provision implies that divorce cannot be used as a justification to evade parental responsibility, whether in terms of physical care, mental development, or education of the child [12].

The same article also grants authority to the court to determine child custody in the event of a dispute between the parents. This judicial authority indicates that child custody constitutes a legal matter that must be resolved objectively by judges, rather than being based solely on the unilateral will or interests of either parent. Accordingly, the court plays a crucial role in ensuring that custody decisions are genuinely oriented toward the best interests of the child.

Further reinforcement of this principle can be found in Law Number 35 of 2014 on Child Protection, which explicitly recognizes children as legal subjects possessing inherent human rights that must be respected, protected, and fulfilled by the state, parents, and society. This law affirms that every child has the right to receive proper care, protection from violence and discrimination, and opportunities to grow and develop optimally in accordance with human dignity.

In the context of post-divorce custody, the Child Protection Law emphasizes that the principle of the best interests of the child constitutes a fundamental standard that must underpin all policies, actions, and legal decisions concerning children. This principle requires judges to consider various aspects, including the child's psychological condition, emotional bonds with each parent, the stability of the caregiving environment, and the parents' capacity to meet the child's physical and mental needs on a sustainable basis. [13].

For Muslim couples, child custody arrangements are more specifically regulated under the Compilation of Islamic Law (KHI), which serves as a source of substantive law for the Religious Courts. In the KHI, child custody is referred to as *hadhanah*, defined as the obligation to care for, nurture, and educate a child who is not yet capable of managing his or her own affairs. The regulation of *hadhanah* aims to ensure the continuity of the child's life and welfare following divorce.[14] Article 105 of the KHI provides that a child who has not yet reached the age of discernment (*mumayyiz*), or is under the age of twelve, shall in principle be placed under the custody of the mother, based on the assumption that the mother is better able to provide the attention and affection required by children at an early age. Meanwhile, a child who has reached the age of *mumayyiz* is granted the right to choose whether to live with the father or the mother. Regardless of which parent is awarded

custody, the father remains legally obligated to provide financial support and cover the child's educational expenses in accordance with his capacity. [15]

The provision granting custody to the mother for children who have not yet reached the age of *mumayyiz* is not absolute. In judicial practice, judges possess the authority to deviate from this rule if there are compelling reasons indicating that granting custody to the mother would not align with the best interests of the child. Such reasons may include the mother's inability to provide proper care, conduct that endangers the child's development, or other conditions that may adversely affect the child's welfare (Thaher, 2025).

This practice illustrates that the regulation of child custody in Indonesia is not merely normative and textual, but also adaptive to evolving factual conditions within society. Judges are not rigidly bound by age thresholds or parental gender, but are instead required to conduct a comprehensive assessment to ensure that the child receives care that best guarantees safety, comfort, and future well-being. Therefore, it can be concluded that the legal regulation of child custody in Indonesia represents a synthesis of statutory provisions, child protection principles, and judicial discretion. This system places the welfare of the child as the primary objective while simultaneously providing flexibility for courts to tailor custody decisions to the concrete circumstances of each divorce case. [16]

Legal Regulation of Child Custody in Thailand

The legal regulation of child custody after divorce in Thailand is comprehensively governed within a centralized family law system, primarily through the Thai Civil and Commercial Code (CCC), which remains the principal reference in resolving family law disputes. Unlike Indonesia, which adopts a pluralistic legal system, Thailand applies a single codified framework regulating marriage, divorce, parental authority, and child custody in an integrated manner. This centralized codification provides a relatively higher degree of legal certainty and consistency in the application of child custody regulations [17]

Under the Thai Civil and Commercial Code, child custody is considered an integral part of parental power, encompassing both rights and obligations to care for, educate, determine the child's residence, and protect the child from any actions that may be detrimental to his or her interests. Parental power is, in principle, jointly exercised by both father and mother during the marriage. However, following divorce, the exercise of such authority must be clearly determined either through mutual agreement between the parents or by a court decision [4]

The Thai Civil and Commercial Code provides substantial space for parents to independently determine child custody arrangements through mutual agreement. In cases of consensual divorce, parents may decide whether parental authority will be exercised jointly (joint parental authority) or vested in one parent. Such agreements must be submitted to the Family Court for approval, and as long as they do not conflict with the best interests of the child, the court will generally endorse them. [2]

Where no agreement is reached between the parents, the Thai Family Court will determine child custody based on juridical and factual considerations. In this context, judges possess broad discretion to determine the custody arrangement most suitable to the child's condition. There are no rigid statutory provisions regarding age limits or the preferential status of either parent; instead, each case is assessed on a case-by-case basis with primary emphasis on the child's welfare (Lia Magfiroh, 2025).

Child custody regulation in Thailand is further reinforced by the Child Protection Act B.E. 2546 (2003), which remains in force and serves as a fundamental legal basis for child protection within the Thai legal system. This Act affirms that children are subjects entitled to protection from all forms of violence, neglect, exploitation, and inhumane treatment. In the context of post-divorce custody, the Act requires all parties, including the courts, to prioritize the best interests of the child.

The principle of the best interests of the child in Thai law is applied broadly and substantively. Judges consider various factors, including the child's emotional relationship with each parent, the parents' capacity to fulfill the child's physical and psychological needs, educational continuity, stability of the living environment, and the moral and social conditions of the parents. This approach demonstrates that child custody determinations are not based solely on normative assumptions, but rather on a comprehensive evaluation of the child's actual circumstances (Asy'ari, 2025).

Thai law also pays particular attention to maintaining the continuity of the child's relationship with both parents. In many judicial decisions, even when primary custody is awarded to one parent, the court ensures visitation rights for the other parent. This arrangement aims to preserve the child's emotional bonds with both parents, provided that such interaction does not jeopardize the child's development.

Another distinctive feature of child custody regulation in Thailand is the absence of explicit statutory provisions prescribing a specific age threshold for custody determination. Unlike Indonesia, which recognizes the concept of *mumayyiz* under the Compilation of Islamic Law, Thailand fully entrusts custody assessment to judicial discretion. Consequently, children are not automatically placed under the care of either parent based on age, but rather based on an objective assessment of who is best able to safeguard the child's best interests. [1]

Although Thai courts often consider the mother's role as the primary caregiver, particularly for young children, this consideration is not binding and may be set aside if the father or another party is deemed more capable of providing a stable and secure caregiving environment. This reflects Thailand's relatively gender-neutral legal approach in determining child custody. Accordingly, it can be concluded that child custody regulation in Thailand is flexible, centralized, and strongly oriented toward the welfare of the child. Through the Civil and Commercial Code and the Child Protection Act, Thai law affords judges broad discretion to tailor custody decisions to the child's concrete needs, while also encouraging amicable settlements between parents in the child's best interests following divorce.

Comparison of Child Custody Regulation and Dispute Resolution in Indonesia and Thailand

A comparison of post-divorce child custody regulation between Indonesia and Thailand reveals fundamental differences in legal structure, normative approaches, and dispute resolution mechanisms adopted by each country. Indonesia applies a pluralistic family law system that integrates national law, child protection law, and religious law particularly Islamic law through the Compilation of Islamic Law for Muslims. In contrast, Thailand employs a more centralized legal system with a single primary codification, namely the Civil and Commercial Code, which comprehensively regulates all aspects of family law.

In terms of legal foundations, Indonesia regulates child custody through multiple dispersed statutory instruments, including the Marriage Law, the Child Protection Law, and the Compilation of Islamic Law. This fragmentation requires judges to interpret and harmonize various legal norms when adjudicating child custody cases. Conversely, Thailand's legal framework is relatively simpler and more consistent, as child custody regulation is directly embedded within a unified family law regime, resulting in more uniform application.

A significant difference also appears in the normative approach to determining child custody. In Indonesia, particularly in cases governed by the Compilation of Islamic Law, the concept of *mumayyiz* distinguishes custody arrangements based on the child's age. Children who have not yet reached the age of *mumayyiz* are, in principle, placed under the mother's care, while those who have reached such age may choose which parent to live with. While this approach provides clear normative guidance, it may potentially limit judicial flexibility if not balanced with substantive application of the best interests of the child principle.

In contrast, Thai law does not recognize any specific age threshold as a determinant for child custody. The Thai Civil and Commercial Code fully entrusts custody determinations to judicial discretion based on the principle of the best interests of the child. The absence of rigid age-based rules allows Thai judges broader discretion to comprehensively assess the child's concrete circumstances and parental conditions, including psychological, emotional, and social factors.

In dispute resolution practice, Indonesia tends to apply a sole custody model, where custody is granted to one parent while the other is accorded visitation rights. Explicit and comprehensive regulation of joint custody has not yet been firmly established in Indonesian legislation, resulting in limited application that largely depends on judicial discretion. This differs from Thailand, which normatively and practically remains more open to joint custody arrangements when both parents are capable of cooperating for the child's benefit.

Another notable difference lies in the role of parental agreement. In Thailand, parental agreements play a central role and are prioritized in determining child custody, provided they do not conflict with the child's best interests. Thai Family Courts generally function as supervisory and ratifying institutions for

such agreements. In Indonesia, although parental agreements are considered, the court maintains a dominant role in determining custody based on prevailing legal norms.

From a legal-philosophical perspective, Indonesia continues to reflect strong normative and moral influences derived from religious law and societal values in its child custody regulation. This is evident in the preference for maternal custody of young children and the imposition of financial responsibility on fathers as heads of households. Thailand, by contrast, adopts a more neutral and secular approach, assessing parental capacity without prioritizing gender roles.

Despite these differences, Indonesia and Thailand share a fundamental similarity in placing the best interests of the child as the primary principle in resolving child custody disputes. Both legal systems recognize that children are not objects of dispute, but legal subjects whose rights must be maximally protected following their parents' divorce. Accordingly, the differences between Indonesia and Thailand lie in the degree of legal flexibility, judicial discretion, and system structure. Indonesia's system is more normative and multilayered, while Thailand's is more centralized and discretionary. This comparison demonstrates that each system possesses distinct strengths and weaknesses, while also providing insights for the development of Indonesian family law toward a more adaptive, responsive, and substantively child-centered child custody framework.

I. CONCLUSIONS

Based on the analysis of the legal regulation of child custody after divorce in Indonesia and Thailand, it can be concluded that in Indonesia, child custody is regulated within a pluralistic legal system that combines the Marriage Law, the Child Protection Law, and the Compilation of Islamic Law for Muslim couples. These regulations affirm that divorce does not eliminate parental obligations toward children and that child custody determinations must be grounded in the principle of the best interests of the child. Although normative provisions such as the mumayyiz age threshold exist within the Compilation of Islamic Law, judicial practice demonstrates a degree of flexibility through judicial discretion, allowing judges to depart from such provisions when they are not aligned with the child's welfare. Furthermore, the legal regulation of child custody in Thailand reflects a more centralized and flexible approach through the Civil and Commercial Code and the Child Protection Act. The Thai legal system does not recognize specific age thresholds or normative preferences in determining child custody, but instead fully entrusts the assessment to the courts based on the principle of the best interests of the child. Thai Family Courts also provide broad space for parental agreements, whether in the form of sole custody or joint custody, as long as such arrangements ensure optimal protection and development of the child. The comparison between the two countries indicates that the principal differences lie in the structure of their legal systems and their approaches to resolving child custody disputes. Indonesia tends to adopt a normative and multilayered approach, with strong ties

to statutory provisions and religious legal values, whereas Thailand applies a more discretionary approach grounded in factual assessments of the child's circumstances. Nevertheless, both countries share a fundamental similarity in placing the best interests of the child as the primary principle in determining post-divorce child custody. Accordingly, this comparative analysis suggests that strengthening child custody regulation in Indonesia may be directed toward enhancing legal flexibility and providing clearer recognition of joint custody arrangements, without undermining the existing values and principles of child protection.

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