

LEGAL PROTECTION OF ADOPTED CHILDREN IN POST-DIVORCE CUSTODY DISPUTES: A COMPARATIVE STUDY BETWEEN NATIONAL LAW AND THE PRINCIPLE OF THE BEST INTERESTS OF THE CHILD UNDER THE CRC

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Abstract

The rising divorce rate in Indonesia has generated complex legal issues, particularly regarding the custody of adopted children following the dissolution of marriage. Adopted children occupy a vulnerable position as Indonesian positive law lacks specific regulations governing their custody when adoptive parents divorce. This study examines the legal protection of adopted children's guardianship rights post-divorce and evaluates its conformity with the best interests of the child principle under the Convention on the Rights of the Child (CRC). A normative juridical method was applied using statutory, conceptual, and comparative approaches through library research. The findings reveal that although the 1945 Constitution, Law no. 35 of 2014, Government Regulation no. 54 of 2007, and the Compilation of Islamic Law provide a legal foundation, these instruments remain general and lack specific judicial guidelines. As a result, court decisions in custody disputes involving adopted children tend to be inconsistent. This study recommends the development of specific national judicial guidelines and the inclusion of custody clauses in notarial requirements of adoption to ensure optimal legal protection.

Keywords: *adopted children, child custody, divorce, best interests of the child, legal protection*

A. INTRODUCTION

1. Background

The increasing divorce rate in Indonesia has given rise to various legal issues, one of which is child custody disputes. While these disputes are already a sensitive issue for biological children, they become even more complex when they involve adopted children. The differing status of adopted children in Indonesia often creates legal uncertainty, particularly in the context of post-divorce custody protection. In divorce cases, children are the most vulnerable. Divorce not only severs the legal bond between husband and wife, but also creates uncertainty regarding care, affection, and guarantees regarding the fulfillment of children's rights. The Indonesian Child Protection Commission (KPAI) confirms that children affected by divorce often face serious problems, ranging from custody disputes to neglect of their psychological and emotional needs.¹

In the modern era, divorce cases in Indonesia continue to increase year after year. Data from the Directorate General of Religious Courts at the Supreme Court recorded 447,743 divorce cases in 2021, a figure that then increased to 516,334 in 2022.² This problem becomes even more complex when adopted children are at stake. Although socially adopted children are part of the family, in legal practice their status often does not receive equal attention to biological children. Yet, the number of adoptions in Indonesia is quite significant. Data from the Ministry of Social Affairs shows an increase in the number of official adoptions: 1,093 children (2020), 1,225 children (2021), and 1,565 children (2022).³ This increase has become a real and complex social issue, directly impacting family stability and child development, posing significant challenges to the protection of children's rights, particularly in custody disputes. This confirms that adoption is a social reality that cannot be ignored in the national legal system.

¹ Indonesian Child Protection Commission (KPAI), *2023 Child Protection Report* ,

² Directorate General of Religious Courts, *Divorce Case Statistics 2022* , Supreme Court

³ Ministry of Social Affairs of the Republic of Indonesia, *Child Adoption Data 2020-2022* .

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Government Regulation (PP) Number 54 of 2007 concerning the Implementation of Child Adoption states that an adopted child is a child whose rights are transferred from the family of origin to the adoptive parents based on a court decision or ruling.⁴ However, this regulation does not always explicitly regulate the custody (hadhanah) of adopted children in every post-divorce situation. Adopted children have the same status in terms of care (custody, education, daily care) as biological children **except** in the relationship of lineage, inheritance, and marriage guardianship.

Thus, there are substantial differences between biological and adopted children in terms of inheritance law and blood relations, which are still applied under civil law and Islamic law. This situation gives the impression that adopted children are not completely "equal" in all aspects of civil law, especially in the event of divorce of the adoptive parents. In Islamic law, the Compilation of Islamic Law (KHI) and positive legislation describe hadhanah (child custody), particularly for biological children. While the literature provides for the right to custody of adopted children, it is unclear when and how the adoptive parents divorce.⁵

Government Regulation (PP) Number 54 of 2007 concerning the Implementation of Child Adoption stipulates that child adoption must be carried out through a court order, fulfilling formal requirements, such as the child's age, the consent of the biological parents or guardians, and the suitability of the prospective adoptive parents.⁶ However, this regulation does not specifically regulate the mechanism for resolving disputes over custody of adopted children following the divorce of the adoptive parents. To date, there is no provision that expressly states that the decision to adopt a child automatically grants hadhanah rights to one of the parties after a divorce.

This ambiguity creates legal uncertainty in jurisprudence. Judges often interpret cases involving adopted children by referring to analogies with biological children or by considering justice and traditional values, as there are no written regulations that explicitly regulate the status of adopted children in custody (hadhanah) after divorce. Due to the lack of normative legal certainty, divorce can place both adoptive parents and adopted children in a vulnerable position of losing custody, even if the parenting relationship has existed *de facto* or *de jure*. The court's decision ultimately depends heavily on the judge's interpretation of the extent to which the adopted child has sufficient legal standing to claim custody. Although Government Regulation No. 54 of 2007 mentions adoption and child adoption as protection measures, its implementation in practice is hampered by a lack of public understanding of formal procedures and a lack of judges' decisions that clearly regulate post-divorce custody rights for adopted children.⁷

Uncertainty also arises regarding the name and administrative status of adopted children, such as changes to population data and formal recognition in court. Failure to comply with these requirements could result in the adopted child losing their rights to custody, visitation, and post-divorce stability. Normatively, adopted children have the right to receive child support, but the effectiveness of this provision is largely determined by the court's decision and the adoptive parents' ability to fulfill their obligations.⁸

In cases of divorce, children are generally highly vulnerable to changes in family status, emotional relationships, and parenting conditions. This becomes even more complex when the issue involves adopted children, as their legal and social status often differs from that of biological children. The principle of the best interests of the child is universally recognized as the primary standard in all decisions concerning children, including determining custody after divorce. Several recent studies have highlighted that custody arrangements in Indonesian national law should increasingly be oriented towards this principle, to ensure children receive optimal care, education, and protection.⁹ When custody applies to adopted children, the application of this principle takes on even more complex relevance, given that adoption often presents additional factors, such as the legal validity of the adoption process, emotional and legal closeness to the

⁴ Ministry of Finance Legal Documentation and Information Network (JDIH Kemenkeu), *PP No. 54 of 2007 concerning the Implementation of Child Adoption*.

⁵ Ibid

⁶ Serui Religious Court, Implementation of PP No. 54 of 2007 in Determining Child Adoption.

⁷ Journal of Muhammadiyah University of Palu, Implementation of Positive Law on Legal Protection for Adopted Children Based on PP No. 54 of 2007, Vol. 6 No. 2 (2021).

⁸ Ar-Raniry Journal of Islamic Law, Fulfillment of the Rights of Biological and Adopted Children through Court Decisions, Vol. 4 No. 2 (2022).

⁹ Appihi Journal, The Principle of the Best Interests of the Child in Custody Disputes in Indonesia, Vol. 5 No. 1 (2023).

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adoptive parents, and the post-divorce parenting situation. Various studies on the legal status of adopted children in Indonesia show that after a divorce between adoptive parents, adopted children often find themselves in a legal situation of uncertainty. This is due to the adoption mechanism not being fully clarified formally, the lack of specific regulations regarding post-divorce custody of adopted children, and judicial practices that tend to vary in their interpretation.

As a result of these conditions, adopted children often find themselves in a vulnerable legal and social position. Custody can be unclear, while economic and inheritance rights are potentially limited. Furthermore, the relationship between adopted children and their adoptive parents is often neglected after divorce. This situation can significantly lead to discrimination in legal protection for children, as if adopted children do not enjoy equal status with biological children, even though they are in fact part of the adoptive family.

Indonesia has ratified the Convention on the Rights of the Child (CRC) through Presidential Decree No. 36 of 1990, marking the country's commitment to respect, protect, and fulfill children's rights without discrimination.¹⁰ Through this ratification, Indonesia is legally bound to align national laws and regulations with the principles set out in the CRC. The Convention affirms that every child, regardless of birth, parentage, or adoption, has equal rights to legal protection, adequate care, access to education, and optimal opportunities for physical and emotional growth and development.¹¹

Furthermore, the CRC also recognizes the right of children to participate and express their opinions in every decision that directly impacts their lives, including in determining post-divorce custody. In the context of adopted children, this principle requires that the state and judicial institutions not only consider the formal aspects of adoption status, but also consider the best interests of the child as the primary basis for every decision. Therefore, the ratification of the CRC should serve as a normative and moral foundation for national legal reform in strengthening the protection of adopted children so that they receive equal treatment with biological children in the Indonesian legal system.

Given this, in the context of post-divorce custody disputes, it is crucial to examine the extent to which national legal norms and jurisprudential practices in Indonesia align with the principle of the best interests of the child as mandated by the CRC. Recent studies have shown that although this principle is normatively recognized in Indonesian regulations, its actual implementation still faces obstacles such as legal uncertainty, inconsistent interpretations, and a lack of specific guidelines regarding the protection of adopted children in custody.¹²

Although Indonesia has a number of national regulations governing adoption, such as Law Number 23 of 2002 concerning Child Protection amended by Law Number 35 of 2014 and Government Regulation Number 54 of 2007 concerning the Implementation of Adoption, normative research shows that there is still a significant gap between written provisions and their implementation in court practice or family administration. For example, studies show that although PP No. 54 of 2007 emphasizes that adoption is carried out "in the best interests of the child" and through a court order, in reality informal adoption processes or adoptions that do not go through complete procedures still occur, and formal documentation is often a major obstacle in custody or inheritance proceedings for adopted children.¹³

This phenomenon creates legal uncertainty for adopted children and their adoptive parents. For example, if the adoption is not registered or declared valid by the court, then when the adoptive parents divorce, the adopted child's position in custody disputes can be vulnerable both in terms of documentation, legal recognition by the court, and the application of the principle of Best Interest. Reliance on formal evidence, differences in local/customary interpretations, and the lack of specific judicial guidelines for adopted children are potential weaknesses identified in normative and empirical research. In this regard, comparative studies are essential. These studies compare national legal norms (UU, PP, KHI, KUHP, data) with the international human rights instrument, the Convention on the Rights of the Child (CRC), to systematically identify gaps in both normative (rules) and implementation (in practice). This stage is crucial

¹⁰Presidential Decree of the Republic of Indonesia Number 36 of 1990 concerning Ratification of the Convention on the Rights of the Child.

¹¹UNICEF Indonesia, Convention on the Rights of the Child: Country Implementation Report, (2023).

¹²Lestari, Dian. Implementation of the Best Interest of the Child Principle in Adopted Child Custody Disputes in Indonesia. *APPIHI Journal of Law and Justice*, Vol. 5 No. 2 (2022)

¹³Mulyani, Siti. Regulatory Gaps and Adoption Practices in Indonesia: A Normative Analysis of Government Regulation No. 54 of 2007. *Unismuh Palu Law Journal*, Vol. 6 No. 1 (2021).

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for generating recommendations for improving national family law policies and practices, ensuring that adopted children receive equal treatment in post-divorce custody disputes and comply with international standards. Considering the complexity of the legal and social issues faced by adopted children after divorce, as well as the lack of harmonization between national norms and international standards, an in-depth analysis of the ideal form of legal protection is necessary. Therefore, this study examines the legal protection of adopted children in post-divorce custody disputes through a comparison between national legal norms and international human rights instruments.

2. Formulation of the problem

Based on the background above, the problem formulation in this research is:

1. How is the legal protection for adopted children regarding post-divorce custody rights?
2. Is post-divorce custody of adopted children in accordance with the principle of Best Interest of the Child?

3. Research methods

The research method used is normative juridical, namely research based on the analysis of legal norms, legal principles, and relevant laws and regulations. This research focuses on positive legal principles governing the protection of adopted children in post-divorce custody disputes and assesses their compliance with international instruments, namely the Convention on the Rights of the Child (CRC), particularly regarding the principle of the best interests of the child.

The approaches used include the statutory approach, conceptual approach, and comparative approach. The statutory approach is carried out by examining the Civil Code, the Compilation of Islamic Law, Law Number 35 of 2014, and Government Regulation Number 54 of 2007. The conceptual approach is used to understand the concept of custody (hadhanah), child protection, and the best interests of the child, while the comparative approach compares national law with the provisions in the CRC.

The data sources consist of primary, secondary, and tertiary legal materials obtained through library research from laws and regulations, jurisprudence, scientific literature, and official sources such as the JDIH and the Supreme Court. The data were analyzed descriptively and qualitatively by describing and comparing national legal norms with international standards to identify any conformities or gaps, and to formulate recommendations for strengthening legal protection for adopted children in post-divorce custody disputes.

B. DISCUSSION

Legal Protection for Adopted Children Regarding Post-Divorce Custody Rights

Divorce fundamentally not only results in legal consequences, such as the dissolution of the marital relationship between husband and wife, but also raises other issues regarding child care. In such circumstances, children are the most vulnerable, facing changes in family structure, emotional instability, and the potential neglect of their rights. These issues become even more complex if the child is adopted. Although socially and psychologically, adopted children have become part of the family, in practice, there remains uncertainty regarding their status in post-divorce custody disputes.

Legal protection is an effort to safeguard a person's interests by granting them authority over their rights so that they can be enjoyed fairly.¹⁴ In the context of adopted children, legal protection means state guarantees to ensure the fulfillment of the child's rights to care, education, welfare, identity, and certainty of legal status, even if the adoptive parents divorce. Therefore, legal protection for adopted children is part of the state's responsibility to ensure the fulfillment of children's rights without discrimination.

An adopted child is a child whose rights to care, maintenance, education, and welfare are transferred from their biological parents, legal guardian, or other responsible party to the adoptive parents based on a court order.¹⁵ Therefore, adoption is not merely a social relationship, but a legal relationship that gives rise to rights and obligations for the adoptive parents towards the child they are caring for. Legal protection for adopted children in Indonesia has a strong constitutional basis. Article 28B paragraph (2) of the 1945 Constitution of the Republic of Indonesia states that every child has the right to survive, grow, develop, and receive protection from violence

¹⁴ Satjipto Rahardjo, *Legal Studies*, Bandung: Citra Aditya Bakti.

¹⁵ Andre Wahyu Pratama, et al., "Protection of the Rights of Adopted Children and its Civil Implications in Family Law in Indonesia." *Yustisi*, 2024.

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and discrimination.¹⁶This provision does not differentiate between biological children and adopted children, so that both have the same right to receive proper care. Adoptive parents have a legal obligation to meet the physical, emotional, and social needs, as well as the education of the child while in their care.¹⁷This obligation is binding from the issuance of a court order and cannot be waived unilaterally, including in situations of divorce.

In addition, Law Number 35 of 2014 concerning amendments to Law Number 23 of 2002 concerning Child Protection, emphasizes that every child has the right to be cared for by their own parents, unless there are valid reasons and/or legal regulations indicating that the separation is in the best interests of the child.¹⁸This provision contains the principle of non-discrimination which implicitly applies to adopted children. Thus, adopted children who have been legally adopted through a court order have the right to receive equal treatment with biological children in terms of care and maintenance, regardless of their background.

Adoption is specifically regulated in Government Regulation Number 54 of 2007 concerning the Implementation of Adoption, which explains that adoption is a legal act that transfers a child from the sphere of authority of the biological parents, legal guardian, or other party responsible for the child to the family environment of the adoptive parents based on a court decision.¹⁹This decision forms the legal basis for the legal relationship between the adopted child and the adoptive parents. Without this decision, the fostering relationship that occurs is only *de facto* and does not give rise to binding legal consequences, so it cannot be used as a basis for a claim for custody in the judicial process. The implication is that many children who have actually been cared for for years by adoptive parents do not receive optimal legal protection when a dispute arises, because the adoption process was never formalized through the courts.

The adoption process is also carried out selectively, prioritizing the best interests of the child. Minister of Social Affairs Regulation Number 110/HUK/2009 concerning Adoption Requirements stipulates that the adoption process must meet administrative, social, economic, and psychological requirements before obtaining permission to adopt.²⁰This provision demonstrates that the state not only functions as a facilitator of the adoption process, but also as a guarantor that the adoption is carried out solely for the benefit and welfare of the child, not to fulfill the unilateral interests of the prospective adoptive parents. Strict supervision in this pre-adoption stage is essentially the initial implementation of the principle of best interest of the child in the Indonesian national legal system.

Applications for adoption must be submitted to the Religious Court for Muslims or to the District Court for non-Muslims to obtain legal confirmation, ensuring the adopted child's legal status and ensuring their rights are clearly protected.²¹However, in practice, many adoptions are conducted informally without going through court procedures, either due to the public's lack of understanding of applicable legal procedures or due to cost and time constraints.²²This phenomenon creates a gap between social reality and legal certainty, ultimately harming the adopted child when conflict or divorce occurs within the adoptive family. In Islamic law, adoption does not sever the family relationship with biological parents. This differs from the concept of adoption in the civil law system, which can sever the legal relationship with biological parents. In the Compilation of Islamic Law (KHI), adopted children do not automatically receive inheritance rights from their adoptive parents, but can only receive property through a mandatory will mechanism.²³This difference reflects the dualism of the legal system in Indonesia,

¹⁶Republic of Indonesia, 1945 Constitution of the Republic of Indonesia, Article 28B paragraph (2)

¹⁷Ahmad Kamil and Fauzan, *Child Protection and Adoption Law in Indonesia* (Jakarta: RajaGrafindo Persada, 2010), p. 75.

¹⁸Republic of Indonesia, Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection, Article 14. JDIIH BPK RI: <https://peraturan.bpk.go.id/Details/38723>.

¹⁹Republic of Indonesia, Government Regulation Number 54 of 2007 concerning the Implementation of Child Adoption, Article 1 number 2. Available at: <https://peraturan.bpk.go.id/Details/4792>.

²⁰Ministry of Social Affairs of the Republic of Indonesia, Regulation of the Minister of Social Affairs Number 110/HUK/2009 concerning Requirements for Child Adoption, Article 4. JDIIH Kemensos: <https://bphn.go.id/data/documents/09pmsos110.pdf>

²¹Siti Nurhalimah, "Custody of Adopted Children After Divorce Reviewed from the Principle of Best Interest of the Child," *Journal of Islamic Family Law*, Vol. 5, No. 1 (2022), p. 34. Available at: <https://journal.iainlangsa.ac.id/index.php/asas/article/view/3145>.

²²Nurul Umam, "Legal Protection for Adopted Children in the Indonesian Legal System," *Jurnal Lex Renaissance*, Vol. 6, No. 2 (2021), p. 316. Available at: <https://journal.uui.ac.id/Lex-Renaissance/article/view/19540>.

²³Compilation of Islamic Law, Article 171 letter h in conjunction with Article 209 paragraph (2).

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where adopted children are treated differently depending on the religion of their adoptive parents and the legal basis used in the adoption process, namely the Civil Code for non-Muslims and the KHI for Muslims. However, these differences cannot be used as a reason to reduce the rights of adopted children to receive affection, care, education, and legal protection after the adoptive parents' divorce. The principle of equality in parenting must still be upheld because adopted children are legal subjects who have basic rights that cannot be reduced, including the right to stable parenting and the continuity of emotional bonds that have been formed during the parenting process.²⁴ Adopted children, like biological children, have interests that must be protected by the state and its judicial system, regardless of the differences in legal status between the two.

Divorce of adoptive parents raises complex and sensitive custody issues because they relate to the authority to care for, educate, maintain, and make important decisions regarding the child's life. In divorce, changes in family structure have legal consequences for child care. Adopted children are the most vulnerable parties, both psychologically and legally. This situation becomes even more complex for adopted children, especially if the adoption process is not carried out according to established legal procedures, creating uncertainty regarding the status and protection of children's rights in post-divorce custody disputes.²⁵

Normatively, the regulation of custody rights in Indonesia can be found in Article 105 of the Compilation of Islamic Law, which states that children who are not yet mumayyiz (not yet able to distinguish between good and bad, generally under the age of 12) are generally under the care of the mother, while the father remains responsible for providing for the child's maintenance and care.²⁶ This provision is essentially intended for biological children, but in judicial practice is often used as a reference for adopted children as long as it is in line with the child's best interests.

Law No. 1 of 1974 concerning Marriage, as amended by Law No. 16 of 2019, affirms that both parents retain the obligation to care for and educate their children even after a marriage has ended due to divorce.²⁷ Therefore, divorce does not remove parental responsibility for children; it merely changes the parenting pattern, which must be determined by a court decision. Although Indonesia has various regulations regarding adoption, Indonesian Positive Law does not yet specify the mechanism for determining the custody of adopted children following the divorce of the adoptive parents. To date, there is no provision explicitly stating that the determination of adoption automatically grants hadhanah rights to one of the parties following the divorce. This lack of norms has led to ambiguity in jurisprudence, with judges often interpreting cases involving adopted children by referring to the analogy of biological children or through considerations of justice and prevailing values in society, without specific and standardized judicial guidelines.²⁸

In practice, custody disputes often arise from competing interests between parents or negligence in fulfilling parenting responsibilities. Judges consider not only biological relationships or legal formalities, but also emphasize the principle of the child's best interests. In this regard, judges consider various aspects, such as the child's psychological condition, the parents' economic capacity, emotional closeness, environmental stability, and the parties' ability to ensure the child's well-being.²⁹ Adopted children should not be viewed merely as objects of the adoption process, but as legal subjects with the right to love, identity, education, and a decent future. This principle aligns with the Best Interest of the Child Act, ratified by Indonesia through Presidential Decree No. 36 of 1990, which affirms that all actions related to children must consider the child's best interests as the primary consideration.

²⁴Andre Wahyu Pratama et al., "Protection of Adopted Children's Rights and Its Civil Implications in Family Law in Indonesia," *Yustisi: Journal of Law and Islamic Law*, Vol. 11, No. 1 (2024), pp. 20-22. Available at: <https://ejournal.iaida.ac.id/index.php/yustisi/article/view/2419>.

²⁵Siti Nurhalimah, "Custody of Adopted Children After Divorce Reviewed from the Principle of Best Interest of the Child," *Journal of Islamic Family Law*, Vol. 5, No. 1, 2022.

²⁶Indonesia, Compilation of Islamic Law, Article 105.

²⁷Republic of Indonesia, Law Number 1 of 1974 concerning Marriage in conjunction with Law No. 16 of 2019, Article 45 paragraph (2). JDIH BPK RI: <https://peraturan.bpk.go.id/Details/47776>.

²⁸Zahara Maulidya et al., "Legal Protection of Adopted Children in Indonesia," *Swarajustisia: Journal of Law and Justice*, Vol. 7, No. 2 (2023), p. 115. Available at: <https://ejournal.uniks.ac.id/index.php/swarajustisia>.

²⁹"Application of the Principle of *The Best Interest of the Child* in Child Custody Disputes at the Ngamprah Religious Court," *Qanun: Journal of Islamic Laws and Studies*, 2025.

The divorce case of Ridwan Kamil and Atalia Praratya serves as a factual example of the suboptimal legal protection for foster and adopted children after divorce in Indonesia. In this case, their foster child, Arkana Aidan Misbach, was not included in the custody decision of the Bandung Religious Court because he still has the status of a state child under the foster care mechanism or temporary care and has not yet obtained a legal adoption order.³⁰ This condition shows that the Indonesian legal system still places the formal legality of adoption as the primary basis for determining the recognition of custody rights.

Socially, Arkana lived, was raised, and cared for within the family of Ridwan Kamil and Atalia Praratya and is publicly recognized as part of that family. However, this emotional relationship and continuity of care are not considered sufficient to constitute legal consequences in a post-divorce custody dispute. This demonstrates a gap between social reality and normative provisions in national law.

When linked to the principle of the best interests of the child in the Convention on the Rights of the Child (CRC), the determination of child protection and care should not be based solely on administrative formalities, but also consider the child's emotional stability, continuity of care, sense of security, and overall well-being. Therefore, this case demonstrates the need for more comprehensive regulations regarding the legal status of foster and adopted children in post-divorce custody disputes to create legal certainty and optimal protection of children's rights.

Post-Divorce Custody of Adopted Children in Accordance with the Principle of Best Interest of the Child

The principle of the best interest of the child occupies a central position in all decision-making concerning the life and future of children, including in disputes over parental rights. Article 41 of Law Number 1 of 1974 concerning marriage expressly states that even after a marriage has ended, both parents remain obligated to care for and educate their children, solely based on the child's best interests.³¹ Therefore, determining custody after a divorce is not solely a matter of parental rights, but rather the child's interests and welfare are the primary considerations.³²

In Indonesian judicial practice, the application of this principle in determining custody rights still faces obstacles due to the lack of clear, uniform, and measurable parameters. This condition causes judges' considerations to vary in each case, depending on the authority and assessment of each panel of judges.³³ This situation is further complicated when custody disputes involve adopted children, given that Indonesian positive law does not specifically regulate the mechanism for determining custody rights for adopted children following the divorce of the adoptive parents. In such cases, legal certainty derived from a court ruling is crucial as the foundation for recognizing the binding legal relationship between adopted children and their adoptive parents. As emphasized in civil law studies, a court ruling is an irreplaceable legal basis for recognizing the legal relationship between the parties, so its absence has the potential to create a vacuum that is detrimental to the most vulnerable party, namely the adopted child itself.³⁴

Adopted children are legal subjects who have the right to protection, care, and welfare equal to biological children. Law Number 35 of 2014 concerning Child Protection defines an adopted child as a child whose rights are transferred from the family authority of the parents, legal guardian, or other person responsible for the care, education, and upbringing of the child to the family environment of the adoptive parents based on a court decision.³⁵ This transfer of rights is legally binding and creates responsibilities that cannot be waived unilaterally, including in the event of divorce between the adoptive parents.

³⁰Attorney: Ridwan Kamil's Adopted Child, Atalia, Not Included in Judge's Decision," ANTARA News, January 8, 2026, accessed via <https://sumbar.antaranews.com/berita/737469/kuasa-hukum-anak-adopsi-ridwan-kamil-atalia-tak-masuk-putusan-hakim>

³¹ Yazid Nashrullah and Endah Hartati, "The Influence of the Principle of Best Interest of Child in Determining Custody Rights in Divorce Cases According to Civil Law (Analysis of Court Decisions), *Lex Patrimonium*, Vol.2, No. 2 (2023), pp.2-3

³² Republic of Indonesia, Law Number 1 of 1974 concerning Marriage in conjunction with Law Number 16 of 2019, Article 41 letter a.

³³Syahan Nur Muhammad Haiba and Anjar Sri Ciptorukmi Nugraheni, "Determination of Child Custody Rights After Divorce Based on the Principle of the Child's Best Interests," *Alliance of Law, Education and Social Humanities Journals*, Vol. 1 (March 2024), p. 154

³⁴ Satino, S.Sos., MH, "Resolving Disputes over Land Ownership with Dual Certificates" *Jurnal Juridical*, Vol. 6, No. 1 (2019), DOI: <https://doi.org/10.35586/jyur.v6i1.398>

³⁵ Andre Wahyu Pratama et al., "Protection of Adopted Children's Custody Rights and Its Civil Implications in Family Law in Indonesia," *Yustisi: Journal of Law and Islamic Law*, Vol. 11, No. 1 (2024)

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Thus, the status of adopted children as subjects of legal protection should not be degraded simply because they lack a biological relationship with their adoptive parents. Any difference in treatment that results in reduced legal protection for adopted children compared to biological children is a form of discrimination that contradicts the basic principles of child protection law.³⁶ Non-discriminatory legal protection must reach all vulnerable legal subjects without exception based on their legal status, so that adopted children in custody disputes are entitled to the same strong protection as that afforded to biological children. This is in line with the view that legal protection for vulnerable parties must be comprehensive and not discriminate against subjects based on their social background or legal status.³⁷

One important implication of the best interest of the child principle is that courts, when deciding custody disputes, must not only focus on formal and administrative aspects but also comprehensively consider the reality of the care provided. In this regard, the parties who have played an active role in caring for, educating, and meeting the child's physical and emotional needs are crucial aspects to assess.³⁸ An approach that relies solely on legal formalities without considering the actual circumstances of care has the potential to result in decisions that are detrimental to the child's interests.

In the context of adopted children, the actual circumstances of foster care carry even greater weight. This is due to the fact that the relationship between adopted children and adoptive parents is essentially established through the foster care process itself, not through blood ties. Article 41 of the Marriage Law stipulates that the court may require the father to provide maintenance and impose certain obligations on the mother after a divorce.³⁹ Therefore, judges handling foster care cases need to thoroughly explore the quality of the foster care relationship that has been established, not simply examining the completeness of the formal adoption documents. Compliance with legal norms in this context needs to be understood substantively as a concrete effort to fulfill the child's rights in their actual circumstances. This understanding places the fulfillment of rights as the primary objective of the law, rather than merely fulfilling procedural administrative requirements.⁴⁰

In addition to the actual circumstances of parenting, psychological and social aspects are crucial factors in determining custody of adopted children after divorce. Research on the protection of adopted children's rights in divorce conflicts confirms that a comprehensive approach encompassing legal, social, and emotional aspects is necessary to ensure the protection of children's rights, including through the provision of psychological support and a thorough evaluation of the child's emotional needs and environmental stability.⁴¹ In practice, abrupt transfers of custody without careful consideration have the potential to cause trauma, feelings of loss, and serious disruption to a child's development.

For adopted children, the psychological impact of changes in parenting due to divorce can be profound and complex. Adopted children who have been emotionally attached to their adoptive parents for years cannot be simply transferred to another party's care for formal reasons, without considering the child's psychological condition and readiness.⁴² Studies on post-divorce custody of adopted children confirm that a stable care environment is one of the most important factors in supporting a child's healthy physical and psychological development.⁴³ Therefore, a judge's considerations in determining custody of an adopted child should encompass

³⁶ Rania Muhammad Basyarahil, Della Ragil Putri, and Arrely Syamsa Kartika, "Implementation of Legal Protection of Children's Rights in the Process of Granting Child Custody Rights Due to Divorce" *UNES Law Review*, Vol. 7, No. 1 (2024), p. 75.

³⁷ Sulastri, S., Satino, S., & Yuli W., "Legal Protection for Wives as Victims of Domestic Violence," *Jurnal Juridical*, Vol. 6, No. 2 (2019), pp. 73-92, DOI: <https://doi.org/10.35586/jjur.v6i2.1616>.

³⁸ Hilmi Kurniawan, "Protection of Children's Rights in Divorce Conflicts: An Analysis of Indonesian Family Law," *Wathan: Journal of Social Sciences and Humanities*, Vol. 1, No. 3 (2024), pp. 314-324, DOI: <https://doi.org/10.71153/wathan.v1i3.167>.

³⁹ Yazid Nashrullah and Endah Hartati, "The Influence of the Best Interest of Child Principle in Determining Child Custody Rights in Divorce Cases According to Civil Law," *Lex Patrimonium*, Vol. 2, No. 2 (2023), pp. 5-7

⁴⁰ Siregar, RNA & Satino, S., "The Urgency of Legal Compliance in Fulfilling Insurance Claims in Indonesia: A Contractual Perspective and Its Implications" *USM Law Review Journal*, Vol. 7, No. 3 (2024), DOI: <https://doi.org/10.26623/julr.v7i3.10336>.

⁴¹ Hilmi Kurniawan, "Protection of Children's Rights in Divorce Conflicts: An Analysis of Indonesian Family Law," *Wathan: Journal of Social Sciences and Humanities*, Vol. 1, No. 3 (2024), pp. 318-319, DOI: <https://doi.org/10.71153/wathan.v1i3.167>.

⁴² Dika Hikmah Wicaksana et al., "Legal Considerations in Child Custody Rights After Divorce," *Indonesian Legal Media*, Vol. 2, No. 3 (2024)

⁴³ Siti Nurhalimah, "Custody of Adopted Children After Divorce Reviewed from the Principle of Best Interest of the Child" *Journal of Islamic Family Law*, Vol. 5, No. 1 (2022)

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these psychological and social aspects in depth, not simply an assessment of the adoptive parents' economic capabilities. Judicial considerations that do not include the child's psychological and social aspects have the potential to result in a decision that is formally valid but substantively detrimental to the child's best interests.

In addition to being an object of protection, children are also subjects who have the right to participate in every decision-making process that has a direct impact on their lives. Article 12 paragraph (1) of the CRC guarantees the right of children who are able to form their own views to express those views freely in all matters concerning them, with the child's views being given appropriate weight according to their age and level of maturity.⁴⁴ This principle is an important part of a comprehensive best interest of the child approach, because determining the best interests of a child cannot be done without considering the child's own opinions and wishes.

Committee on the Rights of the Child in General Comment No. 14 emphasizes that assessing a child's best interests must include providing the child with the opportunity to be heard in decision-making processes related to him or her, including in custody matters.⁴⁵ Under Indonesian national law, a child's right to be heard is reflected in the provisions of the Child Protection Law, which places children as parties entitled to comprehensive protection, including the right to express their opinions. In this case, the child's opinion is important because the child has experience and an emotional bond with the party who has been caring for them. Therefore, listening to the child's views is part of legal protection for children. Without considering the child's opinion, custody decisions risk not reflecting the child's best interests but only the interests of the disputing parents.⁴⁶

Although the principle of "best interest of the child" has been normatively adopted in various national regulations, its implementation in cases of adopted child custody still faces a significant gap between written provisions and practice. Indonesia lacks specific and uniform judicial guidelines regarding the parameters for determining post-divorce custody of adopted children.⁴⁷ As a result, judges' decisions in similar cases have the potential to vary, depending on the considerations and assessments of each panel of judges without clear standards guaranteeing consistency and fairness.

This lack of judicial guidelines not only creates legal uncertainty for adopted children and adoptive parents, but also reflects the limitations of the Indonesian legal system in optimally carrying out its protective function. This is clearly reflected in a comparative study of three religious court decisions in various regions, where although all three are based on Article 41 of the Marriage Law, Article 105 of the Compilation of Islamic Law, and the principle of the best interest of the child, the consideration patterns used by each panel of judges differ significantly. The Maros PA in Decision Number 75/Pdt.G/2020/PA.Mrs emphasizes the emotional aspects of children through the Attachment Theory approach; the Klaten PA in Decision Number 0918/Pdt.G/2023/PA.Klt emphasizes social and environmental factors with the Ecological Systems Theory approach; Meanwhile, the Semarang District Court, in Decision Number 1101/Pdt.G/2022/PA.Smg, interpreted the law progressively in the interests of the child, even though the mother who raised him had apostatized (left Islam). A comparative study of religious court decisions in various regions shows that although family law is dynamic and responsive, specific and uniform national guidelines are still needed to maintain consistent application of the principle of the child's best interests across all courts.⁴⁸

This situation indicates that the application of the principle of best interest of the child to adopted children still relies heavily on the judgment of individual judges, rather than on a legal system that consistently guarantees child protection. The discrepancy between legal provisions and their implementation indicates the need for systematic improvement. Without a mechanism that ensures consistent application of norms for the protection of adopted children, the rights of adopted children will continue to depend on subjective factors that cannot be relied upon to guarantee adequate protection.⁴⁹

⁴⁴ Convention on the Rights of the Child, Article 12 paragraph (1).

⁴⁵ United Nations Committee on the Rights of the Child, *General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interest Taken as a Primary Consideration*, UN. Doc. CRC/C/GC/14, 2013.

⁴⁶ Satino, S.Sos., SH, MH, "Resolution of Disputes over Land Ownership with Dual Certificates" *Jurnal Juridical*, Vol.6, No. 1 (2019), DOI: <https://doi.org/10.35586/jjur.v6i1.398>.

⁴⁷ Zahara Maulidya et al., "Legal Protection of Adopted Children in Indonesia:", *Swarajustisia: Journal of Law and Justice*, Vol. 7, No. 2 (2023),

⁴⁸ Muizzuddin et al., "Comparative Analysis of Judges' Considerations in Determining Child Custody Rights After Divorce (Study of Decisions of the Maros PA, Klaten PA, and Semarang PA)," *Journal of Law, Humanities and Politics*, 2024.

⁴⁹ Siregar, RNA & Satino, S., "The Urgency of Legal Compliance in Fulfilling Insurance Claims in Indonesia: A Contractual Perspective and Its Implications" *USM Law Review Journal*, Vol. 7, No. 3 (2024), DOI: <https://doi.org/10.26623/julr.v7i3.10336>.

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International human rights instruments, particularly the CRC, provide a strong foundation for strengthening the protection of the custody rights of adopted children after divorce in Indonesia. Article 2 of the CRC affirms the principle of non-discrimination, which obliges state parties to respect and ensure the fulfillment of the rights of every child without discrimination of any kind, including on the basis of birth, parentage, or adoption.⁵⁰ This principle is directly relevant to adopted children in custody disputes, as it requires them to be treated equally with biological children in obtaining legal protection from the judicial system.

Furthermore, Article 21 of the CRC specifically stipulates that in all processes relating to adoption, the best interests of the child shall be the primary consideration.⁵¹ This provision should be interpreted broadly, encompassing not only the adoption process itself, but also all legal implications that accompany the status of an adopted child, including the determination of custody in the event of divorce of the adoptive parents. The UN Committee on the Rights of the Child itself emphasizes that the best interests of the child are both a substantive right and a principle of legal interpretation that must be the basis for all norms and actions concerning children.⁵²

C. CLOSING

The post-divorce custody arrangements for adopted children in Indonesia are supported by an adequate legal basis, both through national legal instruments and ratified international instruments. However, all of these regulations are still general in nature and unable to address the social, cultural, and religious diversity of Indonesian society. As a result, court decisions recognizing the legal relationship between adopted children, adoptive parents, and adopters still create a legal vacuum when divorce occurs, so that judges ultimately have to rely on their own judicial considerations due to the lack of specific and uniform judicial guidelines.

To bridge this normative gap, one preventative measure that can be taken is to include a special clause regarding the custody of adopted children in the notarized adoption deed, which contains the parties' agreement regarding the custody mechanism in the event of a future divorce. Based on Article 1338 of the Civil Code, a legally made agreement applies as law for the parties, so that the notarized deed can serve as a judicial reference that provides legal certainty for judges while guaranteeing the continued protection of the adopted child's best interests.

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⁵⁰Convention on the Rights of the Child, Article 2 paragraph (1) concerning the Principle of Non-Discrimination.

⁵¹Convention on the Rights of the Child, Article 21

⁵² UN Committee on the Rights of the Child *General Comment No. 14 (2013)*, paragraph 6.

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