

# Child Support Right In The Human Rights Perspective

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## Abstract

**Introduction:** The provision of Article 28 B paragraph (2) and Article 28 D paragraph (1) of the 1945 Constitution of the Republic of Indonesia can be stated as the philosophical basis for children's rights on viability, growth, and development; and the rights to protection from violence and discrimination; as well as the rights to recognition, assurance, fair legal protection, and certainty, as well as equal treatment in front of the law.

**Purposes of the Research:** To find out that every regulation related to child support rights from the human rights perspective should refer to the philosophical basis of the nation that is Article 28 B paragraph (2) and Article 28D paragraph (1) of the 1945 Constitution of Republic of Indonesia. The focus of the legal problem in this study is child support rights from the human rights perspective.

**Methods of the Research:** The juridical normative method with statute approach, conceptual approach, constitutional approach, and Comparative approach is used as the research methodology in this study.

**Results of the Research:** However, with the implementation of Article 28 B paragraph (2) of the 1945 Constitution of Republic of Indonesia that placed the State, Government, and Regional Governments are obliged to ensure the protection, care, and welfare of the children by paying attention to the rights and obligations of the parents, guardians or other people who legally responsible to the children. The provision of that Article asserts that the problem of children's protection is not only the responsibility of their parents, but also has become the responsibility of the state, government, and regional government. Therefore, it can be concluded that the post-divorce child maintenance rulings in Malaysia are better than those in Indonesia, as the implementation of child maintenance rulings in Malaysia is monitored by the BSK, which is a part of the Court responsible for handling all matters related to child support.

**Keywords:** Children's Rights; Human Rights; Legal Protection.

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## INTRODUCTION

Conception and concept have different meanings, although they are from the same word root which is 'concept'. The term 'concept' refers more to the result of one's or a group's thoughts which are expressed in a definition to generate a knowledge product that consists of principles, law, and theory. If referring to the Grand Dictionary of Bahasa Indonesia, a concept is an idea or understanding that is abstracted from a concrete incident.<sup>1</sup> Meanwhile, the meaning of conception is one's understanding or interpretation of a certain concept within the framework that already exists in his mind, and every new concept is gained and processed with the concepts that he already has. According to Van Den Berg, conception is the personal interpretation of a knowledge concept. A conception is someone's description

<sup>1</sup> KBBI, *Kamus Besar Bahasa Indonesia* (Kemendikbud, 2022).

of a concept made by scientists. So, conception is someone's interpretation of a particular concept. Therefore, it can be said that conception is someone's way of seeing a concept.

The concept of Human Rights enforcement in the world is by the ratification of The Universal Declaration on Human Rights 1948. In which the subject of Human Rights is every person or every human, including family and children. The more specific context of children's rights in this matter is the fulfillment of child support rights in Indonesia, its constitutional basis is regulated in Article 28 B paragraph (2) of the UUD NRI 1945 which placed the State, Government, and Regional Government are obliged to assure the protection, care and welfare of children by noticing the rights and responsibilities of parents, guardians or other people who are legally responsible for the children.<sup>2</sup> Besides being responsible for ensuring the protection, maintenance, and welfare of children, the state, government, and regional governments oversee the enforcement of child protection. The provisions of those articles affirm that the case of child protection is not only the responsibility of parents but also of the state, government, and regional governments.<sup>3</sup>

Generally, legal principles contained in the Children's Rights Convention adopt legal principles that are formulated in the Convention on the Rights of the Child. There are four (four) general principles regarding child protection that become the basis of each country's enforcement of child protection: the non-discrimination principle, the best interest of the child principle, the right to life, survival and development principle, and respect for the views of the child principle.

The principle of the best interest of the child reminds all of the organizers of child protection that consideration in decision-making regarding the future of a child is not in adult measure or even centered on an adult's interest.<sup>4</sup> What an adult thinks is good is not always good based on the measure of a child's interest. The adult may want to provide aid and help, but what happens is that it destroys the child's future.

The principle of the right to life, survival, and development delivers a message that the state must ensure the viability of each child will be assured since the right to life is something that attaches to himself, not something that is given by the state or an individual. To assure that right to life, the state must provide a conducive environment, adequate facilities and infrastructure, as well as access for each child to obtain his basic needs.

The right to achieve a decent standard of life is necessary as an effort of legal development in Indonesia.<sup>5</sup> That statement is in Romli Atmasasmita's opinion, which states that children's protection is one of the fields of national development. The basic legal protection of children's rights is to protect and build humans as fully as possible. The relevance between the protection of children's rights and national development is essential that national development is the full development of Indonesians. When the state ignores the issue of

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<sup>2</sup> Fanisyah Salsabila Octavianti, "Implementasi Konvensi Hak Anak Di Kota Jakarta Utara (Studi Kasus: Pemenuhan Hak Asasi Manusia Perspektif Pendidikan Bagi Pelajar SMA)," *Pedagogi: Jurnal Ilmu Pendidikan* 23, no. 1 (2023): 30-37, <https://doi.org/10.24036/pedagogi.v23i1.1476>.

<sup>3</sup> Silvia Fatmah Nurushshobah, "Konvensi Hak Anak Dan Implementasinya Di Indonesia," *BIYAN: Jurnal Ilmiah Kebijakan Dan Pelayanan Pekerjaan Sosial* 1, no. 2 (2019): 125.

<sup>4</sup> Mashuril Anwar and M Ridho Wijaya, "Fungsionalisasi Dan Implikasi Asas Kepentingan Terbaik Bagi Anak Yang Berkonflik Dengan Hukum: Studi Putusan Pengadilan Tinggi Tanjung Karang," *Undang: Jurnal Hukum* 2, no. 2 (2020): 265-92, <https://doi.org/10.22437/ujh.2.2.265-292>.

<sup>5</sup> Gede Yudi Antara and Deli Bunga Saravistha, "Implementasi Konvensi Internasional Perlindungan Anak Di Lembaga Pembinaan Khusus Kelas II Kabupaten Karangasem," *AL-DALIL: Jurnal Ilmu Sosial, Politik, Dan Hukum* 1, no. 1 (2023): 28-33, <https://doi.org/10.58707/aldalil.v1i1.435>.

children's protection, it will cause various social issues that can affect law enforcement, order, security, and national development.<sup>6</sup>

International convention about children's rights also contains the principles of the right to life, survival, and development.<sup>7</sup> That is, the participant states admits that every child has an attached right to life. It is also confirmed in Article 6 which states that "States Parties recognize that every child has the inherent right to life." Children's rights protection is also contained in the legal system in Indonesia. Children's rights can be traced from the history of law since the independence of Indonesia to this time. Especially related to the discussion of children's rights in Indonesia's legal system, it will be divided into two sub-discussions: first, children's rights in the Indonesia Constitution, and; second, children's rights in the statutory regulations under the Constitution.

Studying a concept in the Indonesian constitution, one of them means to trace the historical side of the applied Constitution and also that has been applied in Indonesia. The first one is the 1945 Constitution, 18 August 1945. As mentioned in the previous sub-chapter Todung Mulya Lubis opined that the inclusion of Human Rights in the 1945 Constitution was limited.<sup>8</sup> That limitation not only means that those rights would be regulated further in the Constitution but also a conceptual sense. He expressed that the Human Rights concept in the 1945 Constitution at that era was the rights of the citizens and was not Human Rights. The use of the concept of citizenship rights means that the view of natural rights, which states that Human Rights is the rights owned by human as he is born, is not recognized implicitly. As a consequence of that concept, the state is placed as the regulator of rights, not as the guardian of human rights, as positioned by the International Human Rights Protection. This case can be understood considering the spirit of rights in that era was oriented more toward rights to obtain independence. Thus, the focus of the relevant formulation in this research is how child support rights are from the human rights perspective.<sup>9</sup>

Indonesia and Malaysia, as examples of two countries that have both ratified the Convention on the Rights of the Child and incorporated it into their national laws share similarities. Additionally, both countries have a majority Muslim population. Malaysia has declared Islam as the official religion of the state whereas Indonesia does not designate Islam as the official religion but recognizes Islamic law as one of the sources of legislation. Consequently, these differences result in varying approaches to legal implementation. Similarly, regulations regarding child allowances will also differ in their application. Despite both countries adhering to Islamic law, particularly in family matters, and having ratified the Convention on the Rights of the Child, it is not guaranteed that children's rights are always prioritized in these nations.<sup>10</sup> Basically, the responsibility for nurturing, caring for, and educating children is the joint responsibility of both parents. However, when parents

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<sup>6</sup> Amanda Tikha Santriati, "Perlindungan Hak Pendidikan Anak Terlantar Menurut Undang Undang Perlindungan Anak," *El-Wahdah: Jurnal Pendidikan* 1, no. 1 (2020): 1-13.

<sup>7</sup> Haikal Mubarak et al., "International Legal Protection of Child Soldiers in Areas of Armed Conflict Perlindungan Hukum Internasional Terhadap Tentara Anak Di Daerah Konflik Bersenjata" 3, no. 4 (2024): 875-84.

<sup>8</sup> Harisman Harisman, "Protection of Human Rights in the Amendment of the 1945 Constitution of The Republic of Indonesia," *Proceedings of the 1st International Conference on Law and Human Rights 2020 (ICLHR 2020)* 549, no. 1clhr (2021): 384-89, <https://doi.org/10.2991/assehr.k.210506.050>.

<sup>9</sup> Zainudin Hasan et al., "Pancasila Dan Hak Asasi Manusia : Perspektif Menuju Manusia Yang Adil Dan Beradab Membentuk Identitas Dan Karakter Bangsa . Nilai-Nilai Yang Terkandung Di Dalamnya Tidak Hanya" 2, no. 2 (2024).

<sup>10</sup> Nafi Mubarak, "Pemenuhan Hak Anak Di Negara-Negara Rumpun Melayu," *Al-Hukama'* 12, no. 2 (2022): 21-46, <https://doi.org/10.15642/alhukama.2022.12.2.21-46>.

are unable to fulfill their duties properly, the child's rights must still be protected so that they are not abandoned due to their parents' circumstances.

As a country that has ratified the Convention on the Rights of the Child, Malaysia has incorporated the convention into the Child Act 2001 (Act 611) This Act serves to consolidate laws related to the care, protection, and rehabilitation of children, as well as all matters pertaining to children.<sup>11</sup> In Act 611, it is stated that the responsibility for a child is the responsibility of all parties Each has duties and responsibilities, both morally and legally and this duty is primarily imposed on the mother, father, or guardian of the children under their care.

The law explains that a father's obligation to provide maintenance continues even if the child is no longer under his care, such as in cases of divorce where the child lives with the mother The duty to provide maintenance includes housing, clothing, food, health, and education, taking into account the father's ability to provide and the child's needs To assess whether this law is truly implemented, it is necessary to consider the decisions regarding child maintenance post-divorce in the Federal Territory Sharia Court of Kuala Lumpur from 2012-2015.<sup>12</sup>

The Islamic Family Law of Malaysia already has detailed regulations regarding child maintenance However, of course, these laws still have weaknesses, especially in enforcing child maintenance orders when fathers do not comply with the rulings and neglect their responsibilities This certainly poses a significant problem as it could lead to child neglect and become a heavy burden for mothers who have custody of the children.<sup>13</sup> Realizing this, in 2007 the government through the National Council for Islamic Affairs Malaysia at the 46th meeting held by the Prime Minister, decided that the Malaysian Sharia Judiciary Department (JKSM) needed to take immediate action to resolve the issue of maintenance After consultations with various parties, finally on October 22, 2008, the Family Support Division (BSK) was officially established as one of the units under JKSM During the inauguration, BSK received RM 500,000 from the Federal Territory Islamic Religious Council (MAIWP) and RM 15,000,000 from the Federal Government as initial funds to manage all matters related to maintenance for children affected by divorce.<sup>14</sup>

Generally, the BSK has five important roles First, it serves as a place for complaints and requests for assistance from those who feel aggrieved due to the opposing party's non-compliance with the court's order to pay maintenance Second, it addresses delays in enforcing maintenance decisions Third, it protects the rights of those entitled to maintenance and ensures that the responsibilities of the providing party are carried out properly Fourth, it ensures that Sharia Court decisions are respected and implemented, and enhances the status and position of the Sharia Court, particularly in terms of compliance and execution of its rulings. With the existence of BSK, the maintenance rights of children in Malaysia are better ensured and protected The laws regarding post-divorce child

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<sup>11</sup> Hubungan Antara et al., "Fakultas Psikologi Universitas Islam Negeri Ar-Raniry Banda Aceh 2022 M / 1443 H" 611 (2022).

<sup>12</sup> Tarmizi M. Jakfar and Nur Azizah Fayyadhah Binti Baharuddin, "Peran Majelis Sulh Dalam Penyelesaian Hak Hadhanah Pasca Perceraian (Studi Kasus Di Mahkamah Syariah Kabupaten Tawau, Provinsi Sabah, Negara Malaysia)," *Samarah* 2, no. 1 (2018): 195-215, <https://doi.org/10.22373/sjhk.v2i1.3112>.

<sup>13</sup> Mohamad Afandi Md Ismail Mohd Sabree Nasri, Mohd Shauqi Saiful Suhardi, "Hak Isteri Selepas Perceraian Menurut Undang-Undang Keluarga Islam Di Malaysia: Analisis Faktor Penghalang Memperolehnya," *Journal of Law & Governance* 3, no. 1 (2020): 42-58, <http://www.kuim.edu.my/journal/index.php/JLG>.

<sup>14</sup> Agustin Hanafi and Mohamad Hedhayatullah Bin Mohamad, "Peran Bahagian Sokongan Keluarga Dalam Masalah Pemenuhan Nafkah Isteri Pasca Perceraian (Studi Kasus Di Mahkamah Tinggi Syariah Kedah, Malaysia)," *Media Syari'ah* 20, no. 1 (2020): 57, <https://doi.org/10.22373/jms.v20i1.6501>.



maintenance rights are not only limited to legislation, but are truly enforced and monitored by BSK.<sup>15</sup>

In Indonesia and Malaysia, the implementation of child support has become a significant issue. Many children are left abandoned as victims of divorce because they are not provided with financial support by their fathers. However, in Malaysia, this issue is promptly addressed by establishing the Family Support Division (BSK), which is tasked with overseeing the fulfillment of child support rights after divorce. BSK monitors cases from reporting, mediation, court proceedings, to the execution of court orders, ensuring that they are not overlooked. Since its official establishment, the implementation of child support decisions in Malaysia has gradually improved, with many cases being resolved by BSK, and post-divorce child support rights becoming more secure.<sup>16</sup>

The issue of fulfilling child support rights after divorce research conducted by Lutfi Yana and Ali Trigiyatno that the implementation of child support rights after divorce has not been implemented properly. There are several patterns in its implementation, some always give, sometimes give, once give and never give. In this case, there are efforts made by the mother, namely communicating and sending people (children) so that the ex-husband does not forget his obligation to provide for the child. However, there are also those who do not make any efforts, because they are still able to meet the needs of children alone.<sup>17</sup>

Second, according to the research conducted by Nurhadi and Alfian Qodri Azizi, from a legal perspective in Indonesia, the obligation of child support is primarily the responsibility of the father. However, if the father is unable to provide, then the mother also shares the burden of these expenses. The amount of required child support should be in accordance with the father's ability, covering household expenses, healthcare, medical treatment, and education from birth until the age of 21 or until marriage, except in cases of physical disability. Specifically for civil servants (PNS), child support is one-third of the father's salary.<sup>18</sup>

Thirdly, the implementation of court decisions regarding post-divorce child support in the Religious Court of Pekanbaru, conducted by Muhammad Azani and Cysillia Anggraini Novalis, is still not fully carried out. Many ex-husbands do not comply with the court's rulings due to a lack of legal awareness and obedience. Despite the condemnatory nature of these decisions, which have executive power, there is no enforcement. The former husband's side didn't follow the court decision at all, even since the divorce was granted by the religious court judge. And when it comes to post-divorce child support, it's mostly the responsibility of the former wife, despite the court ruling placing it on the former husband.<sup>19</sup>

Fourthly, the results of progressive legal research on the handling of child maintenance rights in divorce cases in religious courts (a study conducted in the Surakarta religious court) by Masrukhin and Meliana Damayanti indicate that in divorce cases where the

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<sup>15</sup> Zulzaidi Mahmud, Ahmad Hidayat Buang, and Afifah Baharuddin, "Cabaran Penguatkuasaan Penghakiman Mahkamah Syariah: Kajian Peranan Bahagian Sokongan Keluarga Terhadap Hak Wanita Dan Kanak-Kanak Di Sarawak," *Malaysian Journal of Social Sciences and Humanities (MJSSH)* 6, no. 10 (2021): 252–67.

<sup>16</sup> Zulzaidi Mahmud, Ahmad Hidayat Buang, and Afifah Baharuddin.

<sup>17</sup> Lutfi Yana and Ali Trigiyatno, "Pemenuhan Hak Nafkah Anak Pasca Perceraian," *Al-Hukkam: Journal of Islamic Family Law* 2, no. 2 (2022): 113–24, <http://repository.uingusdur.ac.id/979/>.

<sup>18</sup> Nurhadi Nurhadi and Alfian Qodri Azizi, "Filosofis Kewajiban Nafkah Anak Dalam Uup Islam Indonesia," *Jurnal Ilmiah Ahwal Syakhshiyah (JAS)* 1, no. 2 (2019): 55, <https://doi.org/10.33474/jas.v1i2.3707>.

<sup>19</sup> Muhammad Azani Azani and Cysillia Anggraini Novalis Cysillia, "Pelaksanaan Putusan Pengadilan Agama Mengenai Pemenuhan Hak Nafkah Anak Pasca Perceraian Di Pengadilan Agama Pekanbaru," *Jotika Research in Business Law* 1, no. 2 (2022): 46–59, <https://doi.org/10.56445/jrbl.v1i2.43>.

plaintiff does not specifically request child maintenance, the judge cannot exceed what is demanded by the plaintiff in the divorce petition. However, based on the judge's ex officio authority, the judge can impose obligations on the husband to fulfill the rights of the former wife and the child. Therefore, the costs of child maintenance and child support are borne by the husband, unless the husband is unable to do so, in which case the wife is also obligated to assist in covering the costs of child maintenance and support. For children under 21 years old, the amount of alimony is 1/3 of the husband's income or more. Judges tend to favor the child's rights in a progressive manner, even using persuasive approaches to encourage the husband to provide the best for their child. The legal basis used by the judge is the judge's ex officio authority, Article 105 of the Islamic Law Compilation, and Supreme Court Regulation No 3 of 2017.<sup>20</sup>

Fifth, the research results on the father's obligation regarding child support after divorce in the religious court: from a human rights perspective conducted by Imma Indra Dewi Windajani, Cunduk Wasiati, and Bagus Anwar Hidayatullah state that fulfilling the rights of women and children after divorce is a fundamental right in Indonesia, which is guaranteed in the 1945 Constitution. It becomes the duty of the ex-husband, after officially divorcing, to fulfill his responsibility as a father by providing financial support to his children. However, the fact is that after divorce, not all fathers or ex-husbands follow the court order properly, one of which is the order to take responsibility for child support and maintenance costs until the child reaches 21 years old. Therefore, both the child and the interested party (in this case, the child or the person represented by the mother) can make efforts by submitting a request to the court so that the father or ex-husband pays their obligation to provide support to their child.<sup>21</sup>

If compared to those five studies, this research has quite a fundamental difference. It can be seen that this article will examine child support rights from a human rights perspective. Therefore, there is something new in this research compared to previous studies. The results of this study are expected to provide constitutional recommendations related to child support.

To achieve this goal, this research will be divided into five sub-discussions. The first one is about the laws of Indonesia and human rights in Indonesia and Malaysia. The scope of human rights principles is closely related to the application of laws and the enforcement of human rights. The principle of human rights protection is one of the fundamental principles stated in the preamble of the 1945 Constitution. The concept of rights is one of the common approaches used to evaluate the goodness or badness of an action or behavior. The concept of rights is also an aspect of balancing obligations because fundamentally, rights are related to obligations. One of the fundamental pillars of human rights enforcement in the world is the adoption of the Universal Declaration of Human Rights in 1948. The subjects of human rights include every person or every human being, including families and children.

The third children protection in the legislation under the constitution also means tracing the historical aspect of the constitution that has been in effect or previously in Indonesia. Constitutional amendments also uphold the concept of protection for abandoned children.

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<sup>20</sup> M Masrukhin and Meliana Damayanti, "Hukum Progresif Penanganan Hak Nafkah Anak Dalam Kasus Perceraian Di Pengadilan Agama (Studi Di Pengadilan Agama Karesidenan Surakarta)," *Al-Ahkam Jurnal Ilmu Syari'ah Dan Hukum* 5, no. 1 (2020): 25-36, <https://doi.org/10.22515/alakhkam.v5i1.1794>.

<sup>21</sup> C Wasiati, B A Hidayatullah, and I I D Windajani, "Kewajiban Ayah Terkait Nafkah Anak Setelah Terjadinya Perceraian Di Pengadilan Agama: Perspektif Hak Asasi Manusia," *Juris Humanity: Jurnal Riset ...*, 2023, 11-21, <http://jrkhm.org/index.php/humanity/article/view/25>.

as stated in Article 34 paragraph (1), which declares that the poor and abandoned children are taken care of by the state. The constitution also mandates that further provisions regarding the implementation of state care for these abandoned children be regulated by law. And the fourth child support rights discuss being part of human rights, especially children's rights where one important right is the right to grow and develop (development rights) which is part of the concept of rights in the convention on children's rights. To realize the right to grow and develop (development rights), one way is through fulfilling the child's maintenance rights, which is the responsibility of parents based on the principle that both parents share the responsibility for raising and developing the child.

In Indonesia, the law has stipulated that the state must protect the rights of children and provide facilities for their protection. However, the implementation of this law regarding child support is still very weak. There is no institution that can ensure that child support is truly enforced by fathers after a legally binding child support decision. Protection of post-divorce child support rights is still limited to regulations outlined in the law and has not been fully implemented. This has resulted in cases of neglected children due to lack of financial support, which remains a significant issue for Indonesia.

## METHODS OF THE RESEARCH

This research uses the normative study method, an approach based on the basic legal material by studying theory, concepts, legal principles, and positive legislation that are applied. Besides that, this research also uses the statute approach, conceptual approach, constitutional approach, and Comparative approach. against cases of child support rights after a divorce. The legislative approach is carried out by seeing the statutory legislation concerning the problem formulation.<sup>22</sup> The conceptual approach is used to obtain scientific clarity and truth about legal concepts that are sourced from legal principles. The constitutional approach is used to dig basic principles of statutory regulations under it, considering that the Constitution is apart from being the highest law in a state. Comparative approach comparative law is the method used to compare legal systems, norms, and principles from various countries or jurisdictions. this approach aims to understand the differences and similarities between different legal systems, as well as to identify best practices or innovative solutions that may be applicable in a specific legal context.<sup>23</sup> The sources of legal materials in this research are primary and secondary legal materials. Primary legal materials are principles and regulations of law in the form of statutory regulations, and secondary legal materials are supportive materials such as books of law, journals of law, etc. To analyze the legal materials that have been collected, analysis is performed and the result of the analysis is compared to several available approach methods, then it is re-analyzed and re-constructed through several descriptive statements.<sup>24</sup>

## RESULTS AND DISCUSSION

This research has some fundamental differences, and it can be seen that this article will examine child support rights from a human rights perspective. Therefore, there is something new in this research compared to previous studies. The results of this research are expected to provide constitutional recommendations regarding child support. To achieve this goal,

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<sup>22</sup> Irwansyah, *Penelitian Hukum; Pilihan Metode Dan Praktik Penulisan Arikel* (Yogyakarta: Mirra Buana Media, 2020).

<sup>23</sup> Peter Mahmud Marzuki, *Penelitian Hukum Edisi Revisi Cet-11* (Jakarta: Kencana Prenada Media Group, 2019).

<sup>24</sup> Marzuki.

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The third children protection in the legislation under the constitution also means tracing the historical aspect of the constitution that has been in effect or previously in Indonesia. Constitutional amendments also uphold the concept of protection for abandoned children as stated in Article 34 paragraph (1), which declares that the poor and abandoned children are taken care of by the state. The constitution also mandates that further provisions regarding the implementation of state care for these abandoned children be regulated by law. And the fourth child support rights discuss being part of human rights, especially children's rights where one important right is the right to grow and develop (development rights) which is part of the concept of rights in the convention on children's rights. To realize the right to grow and develop (development rights), one way is through fulfilling the child's maintenance rights, which is the responsibility of parents based on the principle that both parents share the responsibility for raising and developing the child.

#### **A. State Law of Indonesia and Human Rights in Indonesia**

In the concept of the Legal State, it is idealized that the law should be used as the commander in the dynamics of state life and not the politics or economy that becomes the commander of state life. For that reason, a jargon commonly used in English to refer to State Law Principles is 'the rule of law, not of man'. What is called a government is essentially law as a system and not as an individual who acts as a 'puppet' of a scenario of the system that regulates it.<sup>25</sup>

Since its independence, the Unitary State of the Republic of Indonesia has been designed as a legal state, although it does not purely adhere to the concept of *rechtstaat* from the legal tradition of the Continental European countries that have administrative character and also is not based on civil law system legalism, meanwhile, the rule of law concept grows from the legal tradition of Anglo Saxon countries which is based on the Common Law System and have judicial character. The concept of legal state applies in Indonesia both during the enactment of the pre-amended 1945 Constitution and in the amended 1945 Constitution is a legal concept that has distinct characteristics of Indonesia that is based on the values contained in the Pancasila. The preference for Pancasila as the formation base of the legal state of Indonesia is because Pancasila is the basis for the national and state life. Thus, the Legal State of Indonesia is called the Legal State of Pancasila.<sup>26</sup>

Soepomo opined that in the concept of an intergalactic 'state', as an orderly nation, as a well-organized unified people, then, basically there will not be any dualism of "staat" and individual, conflict between the structure of the "staat" and the structure of individual law,

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<sup>25</sup> Anwar and Wijaya, "Fungsionalisasi Dan Implikasi Asas Kepentingan Terbaik Bagi Anak Yang Berkonflik Dengan Hukum: Studi Putusan Pengadilan Tinggi Tanjung Karang."

<sup>26</sup> Nurushshobah, "Konvensi Hak Anak Dan Implementasinya Di Indonesia."



as well as dualism (the state and the people are free from state interference). According to him, a state is the integral structure of society, its members and parts are an organized unity of people, a unity that does not prioritize individuals and overcome all groups, a familial unified life.

Hatta and Yamin succeeded in urging several articles about civil rights in the body of the 1945 Constitution. However, Todung Mulya Lubis opined that the inclusion of Human Rights in the 1945 Constitution was limited.<sup>27</sup> This limitation does not only mean that those rights will be further regulated by the Constitution but also conceptually. He stated that the Human Rights concept in the 1945 Constitution of that era was the Rights of the Citizens and not the Human Rights. The use of this Citizen's Rights concept means that implicitly the concept of natural rights, which states that Human Rights are the rights owned by a human as he was born, is not recognized. As a consequence of this concept, the state is placed as the regulator of rights, not as the guardian of human rights as positioned by the International Human Rights Protection System.<sup>28</sup>

## **B. State Law of Malaysia and Human Rights in Malaysia**

The discourse on human rights is based on natural law. The logical reasoning begins with a proposition that every person, wherever they may be, is an equal creature and therefore has equal rights. That kind of reasoning underlies the claim that those rights are fundamental. Rights are inherent to every human being by nature, and therefore cannot be erased. In their nature, every human being is equal, hence they possess the same fundamental rights. Human rights are universal, in the sense that they are inherent to every single person.

Indonesia and Malaysia are two countries that have ratified the Convention on the Rights of the Child. Indonesia ratified in 1990 and Malaysia ratified the Convention on the Rights of the Child in 1995. Since then, Indonesia and Malaysia have opened and initiated a new era for children by taking responsibility to safeguard and uphold their rights.

The Convention on the Rights of the Child is an international agreement that governs the basic principles of child protection on Earth. The international movement for children's rights has indeed begun since 1879. However, it was only in 1989 that the United Nations (UN) approved the CRC. Although it has been nearly 110 years to grant recognition to children. According to UNICEF (United Nations Children's Fund), a UN agency that specifically deals with children's issues worldwide, CRC is the most comprehensive and recognized UN convention on human rights instruments in the history of the organization's growth.<sup>29</sup>

As a country that has ratified the Convention on the Rights of the Child, Malaysia has incorporated the CRC into the Child Act 2001 (Act 611). This Act is an Act to consolidate laws related to the maintenance, protection, and rehabilitation of children and all matters related to children. In Act 611, it is stated that the responsibility for children is the responsibility of all parties. Each has duties and responsibilities, both in terms of morality and in terms of the law. And that task is primarily assigned to the mother, father, or

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<sup>27</sup> Harisman, "Protection of Human Rights in the Amendment of the 1945 Constitution of The Republic of Indonesia."

<sup>28</sup> M. F. Said, "Perlindungan Hukum Terhadap Anak Dalam Perspektif Hak Asasi Manusia [Legal Protection of Children in the Perspective of Human Rights]," *Jurnal Cendekia Hukum* 4, no. 1 (2018): 141-52, <http://e-jurnal.stih-pm.ac.id/index.php/cendekiahukum/article/view/97/110>.

<sup>29</sup> Procedia Economics et al., "Peranan Unicef Dalam Aspek Hukum Internasional Terhadap Perlindungan Atas Hak-Hak Anak," *Corporate Governance (Bingley)* 10, no. 1 (2020): 54-75.

guardian of the children under their care. All duties and responsibilities under the law are specified in this Act 611 to the mother, father, or guardian. This is all aimed so that mothers, fathers, or guardians are more responsible in protecting children's rights.<sup>30</sup>

The laws in Malaysia regulate it under the Islamic Family Law (Federal Territories) Act 1984: "It is the duty of a man to provide for the maintenance of his children, whether the child is under his care or under the care of someone else, whether by providing them with a place to live, clothing, food, medical care, and education as is reasonable considering his ability and standard of living, or by paying for their expenses." The law explains that the father's obligation to provide financial support continues even if the child is no longer under his care, such as in cases of divorce where the child stays with the mother. The obligation to provide for such necessities includes housing, clothing, food, health, and education, taking into account the father's ability to provide and the child's needs.

### C. Children's Rights in the International Convention

In the previous sub-chapter, it was stated that one of the basic pillars in the enforcement of Human Rights in the world was the ratification of The Universal Declaration on Human Rights 1948.<sup>31</sup> The subject of Human Rights is every person or every human, including families and children. Regarding the family and children, Article 25 of The Universal Declaration on Human Rights 1948, states as follows: 1) Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing medical care, and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control; 2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.<sup>32</sup> This international convention about children's Rights also contains the principles of the rights to life, survival, and development. That is, the participant countries acknowledge that every child has an adherent right to life. It is also confirmed in Article 6 which states that "States Parties recognize that every child has the inherent right to life".

Based on the agglomeration that had been formulated by The Convention on The Right of The Child, at least the rights given to children such as survival, protection, development, and participation rights has become a reference of legal development in Indonesia especially those related to the children rights protection in Indonesia.<sup>33</sup> In implementing international conventions in various countries, obstacles caused by interest in each country often arise. This case is also experienced in the implementation of children's conventions, where not all the main principles in children's conventions can be implemented easily in Indonesia. One of them, that has not been implemented fully, is the one regarding child support rights as a part of human rights.

### D. Children Protection in the Legislation under the Constitution

Indonesia has just ratified the Convention of Children's Rights in 1990 by the issuance of Presidential Decree Number 36 Year 1990 about the validation of the Convention On The Rights Of The Child. However, the regulation on children's rights has already been alluded

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<sup>30</sup> Antara et al., "Fakultas Psikologi Universitas Islam Negeri Ar-Raniry Banda Aceh 2022 M / 1443 H."

<sup>31</sup> Ni Ketut Suriati, Ni Putu Rai Yuliantini, and Dewa Gede Sudika Mangku, "Perlindungan Hak-Hak Anak Dalam Aspek Hukum Internasional," *Ganesha Law Review* 4, no. 2 (2022): 63-72, <https://doi.org/10.23887/ glr.v4i2.1428>.

<sup>32</sup> Christy Edotry Torry Karwur, Theodoros H.W Lumunon, and Edwin Neil Tinangon, "Pemenuhan Hak Memperoleh Kesehatan Ditinjau Dari Pasal 28 H Ayat 1 Undang - Undang Dasar Negara Republik Indonesia Tahun 1945," *Jurnal Fakultas Hukum Unsrat Lex Privatum* 13, no. 02 (2024).

<sup>33</sup> Economics et al., "Peranan Unicef Dalam Aspek Hukum Internasional Terhadap Perlindungan Atas Hak-Hak Anak."

to in various laws and regulations in Indonesia although they are still not specific, and in general, they are even combined with other protection (such as family protection and social protection).<sup>34</sup>

The 1945 Constitution (pre-amended) has mandated that the indigent and the foundlings are cared for by the state. As the derivative of this mandate, the People's Consultative Assembly (or Temporary People's Consultative Assembly during the old order), which at that time, as the holder of the people's sovereignty as well as the highest state institution, issued several stipulations regarding social protection in the Outlines of the State Policy (GBHN) or the Outlines of Universal National Development Patterns in the Old Order term.<sup>35</sup>

One of the examples is the decree of the People's Consultative Assembly of the Republic of Indonesia Number IV/MPR/1973 about Outlines of the State Policy which is on one of the attachments of that TAP explains the direction of the social protection for the next five years since the issuance of that TAP. As an implementation of the TAP MPR, the president of the Republic of Indonesia, who at the time was the power holder in law-making, with the approval of the House of Representatives formed Constitution Number 6 in 1974. Article 1 paragraph (1) defines social welfare as a material and spiritual social order of life and livelihood covered by a sense of safety, decency, and inner and outer peace that might enable each citizen to exert the fulfillment of the best physical, spiritual, and social needs for himself or herself, his or her family, and society by upholding human rights and human's responsibilities by the Pancasila.<sup>36</sup>

Moreover, the conception of the Constitution about social welfare adduced the thought of the necessity of increasing children's welfare. This has finally generated Constitution Number 4 of 1979, which is the first special law about children's welfare. Based on Law Number 4 Year 1979 about children's welfare, Article 1: "Children's welfare is an order of life and livelihood of children that can guarantee their proper growth and development physically, spiritually, and socially." This Constitution has opened a new era in the conception of child protection in Indonesia.<sup>37</sup>

The laws in Malaysia regulate it under the Islamic Family Law (Federal Territories) Act 1984: "It is the duty of a man to provide for the maintenance of his children, whether the child is under his care or under the care of someone else, whether by providing them with a place to live, clothing, food, medical care, and education as is reasonable considering his ability and standard of living, or by paying for their expenses."

The law explains that the father's obligation to provide financial support continues even if the child is no longer under his care, such as in cases of divorce where the child lives with the mother. This obligation includes housing, clothing, food, health, and education, taking into account the father's ability to provide and the child's needs.<sup>38</sup> The Islamic Family Law of Malaysia already has detailed regulations regarding child maintenance. However, of course, the law still has weaknesses, especially in the implementation of child support decisions when the father does not comply with the decision and neglects his obligations.

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<sup>34</sup> Nursshobah, "Konvensi Hak Anak Dan Implementasinya Di Indonesia."

<sup>35</sup> Ni Ketut Suriati, Ni Putu Rai Yuliantini, and Dewa Gede Sudika Mangku, "Perlindungan Hak-Hak Anak Dalam Aspek Hukum Internasional."

<sup>36</sup> I Wayan Sudirta, "Haluan Negara Dalam Sistem Ketatanegaraan Indonesia" 7, no. 2 (2020): 258–78.

<sup>37</sup> Constitutional Guarantee, O F Children, and S Human Rights, "International Journal Of Social Service And Research Constitutional Guarantee Of Children ' S Human Rights Protection," 2021.

<sup>38</sup> Antara et al., "Fakultas Psikologi Universitas Islam Negeri Ar-Raniry Banda Aceh 2022 M / 1443 H."

This is certainly a significant issue because it has the potential to result in neglect of child support and will be a heavy burden for mothers who have custody of the children.<sup>39</sup>

### E. Child support rights

The implementation of Article 28B paragraph (2) of the 1945 Constitution of the Republic of Indonesia makes the state, government, and regional government responsible for ensuring the protection, maintenance, and welfare of children by observing the rights and responsibilities of parents, guardians, or other people who are legally responsible for a child. Besides being responsible for ensuring the protection, maintenance, and welfare of children, the state, government, and regional governments oversee the enforcement of child protection. The provisions of that article affirm that the case of child protection is not only the responsibility of parents but also of the state, government, and regional governments.<sup>40</sup>

The state is responsible for guaranteeing the welfare of its citizens, including providing legal protection for child support rights, which are part of human rights. Every child deserves viability, growth, and development, as well as protection from violence and discrimination, as mandated in the 1945 Constitution of the Republic of Indonesia. This implicitly shows that child support rights, although the phrase "support rights" is not explicitly stated, are one of the rights of a child. However, referring to the Convention of Children's Rights, it becomes the responsibility of the parents, and if both of the parents are not able to comply with the child support rights, then this case becomes the responsibility of the state.

The disobedience or neglect of the court's decision related to child support rights after divorce in Indonesia, there is a legal effort that can be taken, which is through the regulation of the applicable procedural law, in this case, the *Herzein Inlandsch Reglement* or HIR. This is caused by the law of the Religious Court that applies in Indonesia does not regulate the procedural law regarding the implementation of a decision or execution of the Religious Court's decision.

Indonesia has an independent institution that has the authority to protect children which is the Indonesian Child Protection Commission (KPAI). As the state institution, KPAI has a duty and authority as the supervisor, but not as the technical implementing agency for child protection. The main duty of KPAI, is that the main function is as a supervising institution towards the implementation of children's rights protection and fulfillment, however does not touch the cases of children, especially the child support rights. For that reason, KPAI should be given additional authority as the executor of children's rights protection and fulfillment, especially those related to child support rights.<sup>41</sup>

In Act 611, it is stated that the responsibility for a child is the responsibility of all parties. Each has duties and responsibilities, both morally and legally. And these duties are primarily assigned to the mother, father, or guardian of the children under their care. All legal duties and responsibilities to the mother, father, or guardian are outlined in this Act 611. All of this is aimed at ensuring that the mother, father, or guardian are more responsible in protecting the rights of children.<sup>42</sup> In the case of post-divorce child support, the core issue lies in the

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<sup>39</sup> Hanafi and Bin Mohamad, "Peran Bahagian Sokongan Keluarga Dalam Masalah Pemenuhan Nafkah Isteri Pasca Perceraian (Studi Kasus Di Mahkamah Tinggi Syariah Kedah, Malaysia)."

<sup>40</sup> Nursshobah, "Konvensi Hak Anak Dan Implementasinya Di Indonesia."

<sup>41</sup> Averin Dian Boruna Sidauruk, "Kedudukan Komisi Perlindungan Anak Indonesia Sebagai Lembaga Negara Independen Dalam Perlindungan Hak-Hak Anak Di Indonesia: Analisa Perbandingan Lembaga Negara Anak Di Tiongkok Dan Britania Raya," *Neoclassical Legal Review: Journal of Law and Contemporary Issues* 2, no. 1 (2023): 23-35, <https://doi.org/10.32734/nlr.v2i1.11386>.

<sup>42</sup> Antara et al., "Fakultas Psikologi Universitas Islam Negeri Ar-Raniry Banda Aceh 2022 M / 1443 H."



implementation of the court decision The implementation of child support will take a long time However, not all fathers are aware of their obligation to provide support willingly until the child reaches adulthood. There must be regulations that can compel fathers to always comply with child support decisions after divorce, so that post-divorce child support issues do not result in neglect of children's rights, which undermines the protection of children's fundamental rights. In Indonesia and Malaysia, the implementation of child support is a significant issue. Many children are abandoned as victims of divorce because they are not provided for by their father. However, in Malaysia, this issue is promptly addressed by establishing the Family Support Division (BSK), which is tasked with overseeing the fulfillment of child maintenance rights after divorce. BSK oversees alimony cases from reporting, mediation, litigation in court, to the execution of the court's decision, without exception. Since the BSK was officially established, the implementation issues regarding child maintenance decisions in Malaysia have gradually improved Many cases have been resolved by the BSK, and post-divorce child maintenance rights are now better protected.<sup>43</sup>

Meanwhile in Indonesia, the law has stipulated that the state must participate in protecting children's rights and providing facilities for child protection. However, the implementation of that law regarding child support is still very weak. No institution can ensure that child support is truly carried out by the father after the final legal decision. The protection of post-divorce child maintenance rights is still limited to the regulations stipulated in the law and has not been fully implemented yet. This still remains a significant issue for Indonesia.

Therefore, it can be concluded that the post-divorce child maintenance rulings in Malaysia are better than those in Indonesia, as the implementation of child maintenance rulings in Malaysia is monitored by the BSK, which is a part of the Court responsible for handling all matters related to maintenance. Meanwhile in Indonesia, Malaysian laws regarding post-divorce child maintenance are in accordance with the provisions in the Convention on the Rights of the Child. Even Malaysia closely monitors the court's decisions by establishing the Family Support Division.<sup>44</sup>

## CONCLUSION

Child support rights are a part of Human Rights as stated in the Convention of Children's Rights. It is by the fulfillment of children's development which is stated in the Constitution, UUD NRI 1945 Article 28B, and the principles of the Children Rights Convention that both of the parents hold a shared responsibility to raise and develop their children. However, with the implementation of Article 28 B paragraph (2) of the UUD NRI 1945 that placed the State, Government, and Regional Governments are obliged to ensure the protection, care, and welfare of the children by paying attention to the rights and obligations of the parents, guardians or other people who legally responsible to the children. The provision of that Article asserts that the problem of children's protection is not only the responsibility of their parents, but also has become the responsibility of the state, government, and regional government. Therefore, it can be concluded that the post-divorce child maintenance rulings in Malaysia are better than those in Indonesia, as the implementation of child maintenance rulings in Malaysia is monitored by the BSK, which is a part of the Court responsible for

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<sup>43</sup> Hanafi and Bin Mohamad, "Peran Bahagian Sokongan Keluarga Dalam Masalah Pemenuhan Nafkah Isteri Pasca Perceraian (Studi Kasus Di Mahkamah Tinggi Syariah Kedah, Malaysia)."

<sup>44</sup> Zulzaidi Mahmud, Ahmad Hidayat Buang, and Afifah Baharuddin, "Cabaran Penguatkuasaan Penghakiman Mahkamah Syariah : Kajian Peranan Bahagian Sokongan Keluarga Terhadap Hak Wanita Dan Kanak-Kanak Di Sarawak."

handling all matters related to maintenance. Meanwhile in Indonesia, Malaysian laws regarding post-divorce child maintenance are in accordance with the provisions in the Convention on the Rights of the Child. Even Malaysia closely monitors the court's decisions by establishing the Family Support Division.

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