



Child Adoption and Conflicts of Jurisdiction: A Comparative Analysis of the Public Court and the Islamic Court of Surakarta

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Abstract

The adoption of Muslim children is one of the familial issues in Indonesia. At the law level, the Indonesian law authorizes two judicial institutions, namely Islamic and public courts, to handle the case. Here, conflicts of jurisdiction occur obviously and, as a consequence, the parties have the choice to decide which court to request based on their wishes. This article answers the question of why and what the consequences of conflicts of jurisdiction are in the case of the adoption of Muslim children? This qualitative research uses library and field studies by conducting interviews with judges in both religious and general courts. The interviews delve into the factors considered by judges in making their decisions. The study found that two judicial institutions both accepted and examined cases of the adoption of Muslim children. However, there is a difference in the legal consequences. If the adopted child is to be treated as a biological child and can inherit, the application is filed to a public court. On the contrary, if the child is to be maintained, it is an Islamic court that judges. In the case of family lineage (*nasab*), both the courts do not break the ties of the adopted child with his/her biological parents, including the right of guardianship.

Keywords: Child Adoption, Conflicts of Jurisdiction, Family Lineage, Guardianship.

Abstrak

Adopsi anak muslim adalah salah satu masalah keluarga di Indonesia. Pada tingkat hukum, hukum Indonesia mengesahkan dua lembaga peradilan, yaitu pengadilan agama dan pengadilan umum, untuk menangani kasus ini. Di sini, konflik yurisdiksi terjadi secara jelas dan, sebagai konsekuensinya, para pihak memiliki pilihan untuk memutuskan pengadilan mana yang akan diminta berdasarkan keinginan mereka. Artikel ini menjawab pertanyaan mengapa dan apa konsekuensi dari konflik yurisdiksi dalam kasus adopsi anak Muslim. Penelitian kualitatif ini menggunakan studi kepustakaan dan studi lapangan dengan melakukan interview kepada para hakim di pengadilan agama dan umum. Wawancara dilakukann untuk mendalami faktor-faktor pertimbangan hakim dalam memberikan keputusan. Penelitian menemukan bahwa kedua lembaga peradilan tersebut menerima dan memeriksa kasus adopsi anak Muslim. Namun, ada perbedaan dalam konsekuensi hukum. Jika anak angkat diperlakukan sebagai anak kandung dan dapat mewarisi, maka permohonan diajukan ke pengadilan umum. Sebaliknya, jika anak hanya untuk dipelihara, maka pengadilan agama yang memutuskan. Dalam hal garis keturunan keluarga (*nasab*), kedua pengadilan tidak memutuskan hubungan anak angkat dengan orang tua kandungnya, termasuk hak perwalian.

Kata Kunci: Adopsi Anak, Konflik Yurisdiksi, Nasab, Perwalian.



Introduction

The Indonesian state gives an opportunity for married couples who are not blessed with a child in their households to carry out the adoption of a child. Provisions regarding the adoption of a child for married couples are regulated in Law 8 of 2004 on the Amendments to Law 2 of 1986 on Public courts. Article 50 of the Law states that “The public court has the duty and authority to examine, decide, and resolve criminal cases and civil cases in the first level including in child adoption cases.”¹

In addition, there are also other regulations on the issue, i.e. Law 23 of 2002 concerning Child Protection, Government Regulation 54 of 2007 on the Implementation of Child Adoption, and the Supreme Court Circular 6 of 1983 concerning the Improvement of the Supreme Court Circular 2 of 1979 on the Examination of Applications for Ratification or Adoption of Children. The Circular Letter of the Supreme Court 6 of 1983 regulates the adoption of children between Indonesian citizens. It stipulates the appointment directly carried out between the biological parents and the foster parents (private adoption) and it is about the adoption of children that can be done by an Indonesian citizen who is not bound in a legal or unmarried marriage (single parent adoption).²

In judicial practice, there have been two judicial institutions that deal with the adoption of children, namely the Islamic court and the public court. In Law 8 of 2004 concerning Public courts, all criminal and civil cases basically become the authority of the public court. Related to the adoption of children, only the public court has the authority to give its consideration. Islamic courts did not have the jurisdiction to examine and decide cases of child adoption applications, even though the applicants and prospective children to be appointed are Muslims.

However, the situation has changed. Law 3 of 2006 concerning the Amendments to Law 7 of 1989 on Islamic courts, article 49 letter a 20 in the explanatory section, grants the authority to the Islamic court to provide decision to the adoption of children for Muslim. The article and explanation read in full as follows:³

Article 49

Islamic courts have the duty and authority to examine, decide, and resolve cases in the first instance between persons of the Muslim faith, in the areas of:

- a. marriage
- b. Etc....

Explanation of Article 49 Letter a (20)

What is meant by “marriage” is regulated in or based on the applicable law regarding marriage carried out according to Sharia, including:

20. the determination of the origin of a child and the determination of the adoption of a child based on Islamic law;
21. Etc....

The enactment of Law 3 of 2006 emphasizes the competence and the jurisdiction of Islamic courts to adjudicate cases of child adoption for Muslims. In this situation, we may

¹ Law 8 of 2004 concerning the Amendments to Law 2 of 1986 concerning the General Judiciary (Statute Book of the Republic of Indonesia of 2004 34 Supplement to the Statute Book of the Republic of Indonesia 4379).

² Budi Susanto, “Adopsi Anak Bagi Orang Beragama Islam Kewenangan Peradilan Agama (Analisis Putusan 126/Pdt.P/2007/PN.JKT.BAR.)”, *Thesis* UIN Syarif Hidayatullah, Jakarta, 2009, p. 3.

³ Law 3 of 2006 concerning Amendments to Law 7 of 1989 concerning Religious Justice (Statute Book of the Republic of Indonesia of 2006 22 Supplement to the Statute Book of the Republic of Indonesia 4611).

relate it to a legal principle *Lex specialist derogate legi generalis*. It means a more specific provision overrides a provision of a general nature. Based on this principle, Law 3 of 2006 provides a strict limit on the authority of the court in examining cases of child adoption. If the applicant and the child are of a religion other than Islam, it becomes the authority of the public court, while if the applicant and the prospective child to be appointed are Muslims, it becomes the authority of the Islamic court.

In other words, the Islamic court has the authority to adjudicate cases of the adoption of Muslim children. Thus, no other courts have the authority to hear and decide the case.⁴ Although absolute competence on the issue of child adoption for Muslims has been very firmly restricted, there is still, in judicial practice, a dualism of competence. This is found in the decision of the application for the adoption of children in the Surakarta Public Court where the legal subjects are Muslims, in the decisions 391/Pdt.P/2019/PN.Skt and 31/Pdt.P/2017/PN.Skt.

Verdict 31/Pdt.P/2017/PN.Skt is a judgment on the case of the application for the adoption of a child which was decided on February 22, 2017. The ruling explained that a married couple named Dadan Erwan and Ani Afriati, in which case the couple is Muslim, will raise a daughter from the Yayasan Maintenance of Children and Babies Permata Hati named Ainayya Ruthena Putri Ayudea. Another case is 391/Pdt.P/2019/PN.Skt which was decided on October 29, 2019. It explained that a Muslim married couple named Indro Catur Haryono and Ipa Monalili wanted to appoint a daughter whose name was Afiqah Syalia Nur Zahra. From the two, it is very clear that the subject of the law is Muslim.⁵⁶

The legal basis used in these decisions is:

The Court held that the Application had fulfilled the requirements specified in Law 35 of 2014 concerning Amendments to Law 23 of 2002 concerning Child Protection Jo Government Regulation 54 of 2007 concerning the Adoption of Children Jo Regulation of the Minister of Social Affairs R.I. 110/HUK/2009 concerning Requirements for The Adoption of Children and also fulfilled the requirements specified in the Circular Letter of the Supreme Court of R.I. 6 of the year 1983 On The Refinement of R.I. Supreme Court Circular 2 of 1979 and R.I. Supreme Court Circular 3 of 2005.⁷

This article discusses the gap between normative rules and practices in court. There has been a conflict of authority between the public court and the Islamic court. Thus, justice seekers have a choice of jurisdiction that creates legal uncertainty. The question to be answered is what are the legal reasonings used by judges of the Surakarta Public Court in accepting cases of child adoption performed by Muslims? How is the verdict different from the case at the Surakarta Islamic Court? What benefits does the party who applied for it get?

Ningrum concluded that the adoption of children among Muslim community in Sleman was not in accordance with Government Regulation 54 of 2007 concerning the Implementation

⁴ R. Soeroso, R. Soeroso, *Praktik Hukum Acara Perdata: Tata Cara dan Proses Persidangan* (Jakarta: Sinar Grafika, 1994), p. 6.

⁵ Verdict of the Surakarta District Court 31/Pdt.P/2017/PN.Skt regarding the Application for the Adoption of Children of Applicant I and Applicant II, February 22, 2017.

⁶ Verdict of the Surakarta District Court 391/Pdt.P/2019/PN.Skt regarding the Application for The Adoption of The Child of Applicant I and Applicant II, October 29, 2019.

⁷ *Ibid*: 13.

of Child Adoption. They filed their case to the Islamic court and the public court.⁸ In addition, Munandar questioned the practice of appointing a child according to the Law, especially among foreign citizens.⁹ Gerhastuti discusses the authority of the Mungkid Public Court and the Mungkid Islamic Court in the adoption of children carried out by people who are Muslims using the theory of the legal consequences approach.¹⁰

Method

This study examines the application for the adoption of children for Muslims which was decided by the Surakarta Public Court.¹¹ In addition to examining legal considerations in decision 391/Pdt.P/2019/PN.Skt and 31/Pdt.P/2017/PN.Skt, we conducted interviews with judges within the Surakarta Islamic Court and the Surakarta Public Court who decided cases of applications for the adoption of children for Muslims.¹² By so doing, this research applied both library research and fieldwork. This research questions why the judges of the Surakarta Public Court accepted and decided the child adoption case filed by a Muslim and what the difference and the legal consequences of decisions of both courts.

Adoption of children

Child adoption is a legal term that develops in Indonesia as a translation of the Dutch *adoptie* or English adoption. In the Indonesian dictionary, adoption has the meaning of raising another child to be treated as his own child.¹³ While according to Arabic, the adoption of a child is a translation of the term *tabannī* which means to take a child. What is meant by taking a child is the activity of a person who raises someone else's child as a child and behaves towards all legal provisions applicable to the biological child of the foster parent.¹⁴

The definition of child adoption in Indonesian law is stated in Law 23 of 2002 on Child Protection article 1, Law 23 of 2006 on Population Administration article 47 point (1) and Government Regulation 54 of 2007 on the Implementation of Child Adoption article 1 point (1). The last regulation clearly denotes that an intention to adopt a child is a legal act to transfer the rights of the child from the power of the parent, legal guardian, or other person responsible for the care, and education into the family of the foster parents based on a decision or court determination.¹⁵

In addition to the explanation of the law in general, there is also an interpretation of the adoption of children based on Islamic law, as that found in the Compilation of Islamic Law article 171 point (h), which states that an adopted child is a child whose the care of his daily

⁸ Tuti Ningrum, *Praktik Pengangkatan Anak di Kalangan Masyarakat Muslim: Kajian Pengadilan Agama dan Pengadilan Negeri Sleman*, Thesis UIN Sunan Kalijaga, Yogyakarta, 2019.

⁹ Aris Munandar, "Pengangkatan Anak menurut UU 3 Tahun 2006 Tentang Perubahan Atas UU 7 Tahun 1989 Tentang Peradilan Agama (Studi Kasus Penetapan Pengadilan Negeri Makassar No: 01/Pdt.P/2009/PN.Mks)", Thesis UIN Alauddin, Makassar, 2016.

¹⁰ Kharisma Galu Gerhastuti, "Kewenangan Pengadilan Negeri dan Pengadilan Agama dalam Pengangkatan Anak yang Dilakukan oleh Orang-Orang yang Beragama Islam", *Journal of Diponegoro Law* (Semarang) Vol. 6 Nomor 2, 2017.

¹¹ Zainuddin Ali, *Metode Penelitian Hukum* (Jakarta: Sinar Grafika, 2016), p.107.

¹² Sofyan, *Metode Penelitian Hukum Islam Penuntun Praktis untuk Penulisan Skripsi dan Tesis* (Yogyakarta: Mitra Pustaka, 2013), p.167.

¹³ R. Soeroso, *Perbandingan Hukum Perdata* (Jakarta: Sinar Grafika, 2003), p. 174.

¹⁴ Andi Syamsu Alam, *Hukum Pengangkatan Anak Perspektif Islam* (Jakarta: Kencana, 2008), p. 19.

¹⁵ Government Regulation of the Republic of Indonesia 54 of 2007 concerning the Implementation of Child Adoption (Statute Book of the Republic of Indonesia of 2007 123 Supplement to the State Gazette of the Republic of Indonesia 4768).

life and education costs moves from responsibilities of the original (biological) parent to the foster parents based on the court's decision.¹⁶

From the existing laws and regulations, there are several principles that underline the nature of the adoption of children in Indonesia. They are:¹⁷

1. The adoption of a child is a legal act.

The process of raising a child gives rise to the legal consequences desired by the parties involved, ranging from foster parents, biological parents or legal guardians, as well as the adopted child himself.

2. Adoption of a child is a legal institution to protect the interests of the child.

The role of the child adoption institution is not to serve the interests of prospective foster parents or people who want to raise children, but rather a way to protect the interests of children, so that with this institution there is an possibility that their interests are more protected or guaranteed in terms of the maintenance and welfare of the child, so that the rights of the child can be fulfilled as they should be. For this reason, domestic adoption takes precedence in the process of child cultivation over intercountry adoption because the conditions imposed for intercountry adoption are more difficult to carry out, so it can only be done as a last resort.

Based on the fatwa of the Indonesian Ulama Council (MUI) through the National Working Deliberation held in March 1984, it is stated that the bonding of Indonesian children by foreign citizens can only be done as a last resort because it not only contradicts the 1945 Constitution of the Republic of Indonesia Article 34 but also degrades the dignity of the nation.

3. The adoption of the child must maintain the similarity of the religion professed by the prospective adopted child and the future adoptive parent.

Indonesian laws and regulations on children establish policies to protect the rights of children in carrying out worship according to their religion and in line with that, the religion of the prospective foster parents must be the same as the religion adopted by the adopted child. If the child's religion is unknown or the child's origin is unknown then the child's religion is adjusted to the religion that is mostly adhered to by the local. Thus, raising children whose religion is different from the religion of prospective foster parents is not allowed in accordance with Law 23 of 2002 on Child Protection article 39 paragraph (3).

4. The adoption of the child does not break the blood relationship between the child and his biological parents.

The principle that the adoption of a child does not sever the blood relationship between the child and his biological parents is in accordance with the rules of sharia law relating to the adoption of a child, namely those listed in the Qur'an Surah Al-Ahzab verse 4 and verse 5.

5. Open obligations to the adopted child about his origins and parents of origin.

Although this obligation is formally not accompanied by a criminal threat for its violation by the Child Protection Act, the Act recognizes that every child has the right to know the parents and their origins. This right is granted by the Act to the child in order to avoid the breakdown of the pedigree and blood relationship between the child and his biological parents.

¹⁶ Perpustakaan Nasional Republik Indonesia, *Himpunan Peraturan Perundang-undangan Yang Berkaitan Dengan Kompilasi Hukum Islam Dengan Pengertian Dalam Pembahasannya* (Jakarta: Mahkamah Agung RI, 2011), p. 107.

¹⁷ Rusli Pandika, *Hukum Pengangkatan Anak* (Jakarta: Sinar Grafika, 2012), pp. 107-111.

6. The implementation of the adoption of a child by obtaining the decision of courts, except the adoption of the child based on local customs.

The law hereby affirms the role of the Court to authorize the adoption of children in the form of a decision, which with this affirmation will provide more legal certainty about the validity of child adoption in Indonesia. The existence of evidence of a court decision is a requirement for Indonesian immigration officials to be able to issue a passport for a child of an Indonesian citizen appointed by a foreign citizen.

In addition, the laws and regulations also continue to provide a place and respect the principles and customary rules that apply in the adoption of children carried out among Indonesian citizens where prospective foster parents and prospective adopted children live in one community environment that still carries out local customs. The adoption of a child based on this customary custom is determined by such customs and customs, but the appointment may be submitted to a court whose jurisdiction includes the residence of the prospective adopted child.

7. Guidance and supervision by the government and society

The adoption of a child is not just a matter of personal interest that raises and the future adopted child and his biological parents, but is in the interest of society and the state. In addition to parents, according to the Child Protection Law, the state and society bear the responsibility to protect children so that all their rights are fulfilled.

Laws governing the adoption of children in Indonesia can be put forward as the following:

1. *Staatsblad* 1917 129, Chapter II on the Adoption of Children for Chinese People

This *staatsblaad* provides the adoption of children for Chinese people which allows the adoption of children by marital-bound couples and for those who have been maritally bound (widowers or widows). For a widow whose husband has died and the husband leaves a will whose contents do not want the adoption of a child, the widow cannot do so. The adoption of a child according to the *Staatblaad* is only possible for boys and can only be done by a Notarial Deed (Article 10). However, jurisprudence (Jakarta Special Public Court Decision) dated May 29, 1963, has allowed the adoption of girls. Furthermore, the provisions regarding the conditions for the adoption of children are contained in Article 8 and the matter regarding exceptions to the legal consequences caused by this legislation is contained in Article 14.¹⁸

2. Law 4 of 1979 concerning Child Welfare

Regarding the adoption of children in Law 4 of 1979 concerning Child Welfare, Article 12 states that the adoption of children according to customs and customs is carried out by prioritizing the interests of child welfare. The adoption of children carried out outside the customs is carried out based on laws and regulations. Based on Article 10 of Law 4 of 1979 concerning Child Welfare, it is stated that parents are the most important party responsible for the welfare of children. Yet, sometimes parents are unable to fulfil their obligations, so the adoption of children is the path hinted by laws and regulations.¹⁹

¹⁸ Ahmad Kamil (ed.), *Hukum Perlindungan Dan Pengangkatan Anak Di Indonesia* (Jakarta: Raja Grafindo Persada, 2008), pp. 23-24.

¹⁹ Law 4 of 1979 concerning child welfare (Statute Book of the Republic of Indonesia of 1982 32 Supplement to the Statute Book of the Republic of Indonesia 3143).

3. The Supreme Court Circular 6 of 1983 concerning the Refinement of Supreme Court Circular 2 of 1979 regarding the Adoption of Children jo. The Supreme Court Circular 4 of 1989 on the Adoption of Children.

The Supreme Court Circular Letter 6 of 1983 regulates the adoption of children between Indonesian citizens. The content is about the adoption carried out between biological parents and foster parents (private adoption). It is also about the adoption of children that can be done by an Indonesian citizen who is not bound in a legally unmarried marriage (single parent adoption). Thus, if a person who is unmarried or decides not to marry and wants adopts a child, this provision is gives the possibility to carry out the adoption of the child.²⁰

4. The Compilation of Islamic Law

In the Compilation of Islamic Law, the decision of the adoption of children is carried out based on Islamic law, based on Article 171 letter (h). The Compilation of Islamic Law stipulates that the adopted child is one who is in the care for his own life, the cost of education and so on transfers his and the original parent's responsibility to the foster parents based on the decision of the court.

The adoption of children completed by the Islamic law does not change the family lineage (*nasab*) relationship. It does not break the *nasab* relationship between the adopted child and the original parents, siblings, and others. They continue to inherit each other as regulated in articles 176 to 193 of the Compilation of Islamic Law.²¹

5. The Supreme Court Circular Letter 3 of 2005 concerning the Adoption of Children

Technically, the appointment of children based on the Supreme Court Circular Letter 3 of 2005 is an appeal to judges of public court throughout Indonesia to pay attention to the applicable provisions.²²

6. Law 3 of 2006 concerning the Amendments to Law 7 of 1989 on Islamic courts

The adoption of children under Islamic law is the authority of the Islamic court. The legal basis for the competence of Islamic Courts to determine adopted children based on Islamic law is Law 7 of 1989 concerning Islamic Courts which has been amended by Law 3 of 2006 concerning the Amendments to Law 7 of 1989 on Islamic Courts.

Article 49 of Law 3 of 2006 states that Islamic courts have the duty and authority to examine, decide, and resolve cases in the first level between people who are Muslims, one of which is in the field of marriage. In the explanation in Article 49 Letter (a) of Law 3 of 2006, it is explained that what is meant by marriage is regulated based on the Law regarding marriages that apply Sharia. This also includes the determination of the origin of a child and the determination of the adoption of children based on Islamic law.²³

7. Law 35 of 2014 concerning changes to Law 23 of 2002 on Child Protection

Chapter VIII of Law 35 of 2014 on Child Protection provides an explanation of the increase in children. The adoption of a child can only be done in the best interests of the child and

²⁰ Supreme Court Circular Letter 6 of 1983 concerning the Improvement of Circular 2 of 1979 concerning the Examination of Applications for Ratification of The Adoption of Children.

²¹ Perpustakaan Nasional Republik Indonesia, *Himpunan Peraturan Perundang-undangan Yang Berkaitan Dengan Kompilasi Hukum Islam Dengan Pengertian Dalam Pembahasannya* (Jakarta: Mahkamah Agung RI, 2011), pp. 108-112.

²² Supreme Court Circular Letter 3 of 2005 on child adoption.

²³ Law 3 of 2006 concerning Amendments to Law 7 of 1989 concerning Religious Justice (Statute Book of the Republic of Indonesia of 2006 22 Supplement to the Statute Book of the Republic of Indonesia 4611).

is carried out in the best interests of the child and is carried out based on local customs and the provisions of applicable laws and regulations.

The adoption of the child should not sever the relationship between a child and his biological parents. This is expressly regulated in Article 39 paragraph (2) which states that the adoption of a child does not sever the blood relationship between the child adopted from his biological parents. One of the requirements for the adoption of children contained in Law 35 of 2014 concerning Child Protection is that prospective foster parents must be in line with the religion adopted by the prospective adopted child which is strictly regulated in Article 39 paragraph (3). In the case that the origin of the child is unknown, then the religion of the child is adapted to the religion of the majority of the local population. The adoption of a child by a foreign state can only be done as a last resort.²⁴

Absolute authority of justice and conflict of jurisdiction

Absolute authority is defined as the power of the courts relating to what cases can be tried in the courts concerned, as well as at which level the case is filed,²⁵ including Islamic courts, public courts, military courts or other judicial institutions, either at the first level, high level or at the Supreme Court. Each of these judicial institutions has different authorities as stipulated in article 25 of Law 48 of 2009 on Judicial power in which the Islamic court is authorized to examine, adjudicate, and decide and resolve cases between people who are Muslim in accordance with the provisions of the laws and regulations.²⁶ The laws and regulations referred to in the article are Law 50 of 2009 concerning the second Amendment to Law 7 of 1989 concerning Religious Court, Law 1 of 1974 concerning Marriage, Compilation of Islamic Law (KHI) and other rules.²⁷

In Law 50 of 2009, it has clearly given authority to Islamic courts to examine, adjudicate, and decide and resolve cases between people who are Muslims such as cases regarding Marriage, Inheritance, Wills, Grants, Waqf, Zakat, Infaq, Shadaqah and Sharia Economics. The authority of the Islamic Court is coupled with the case of Zakat, Infak and Sharia Economics.²⁸ Furthermore, in the explanation of Article 49 letter a of Law 3 of 2006 the First Amendment to Law 7 of 1989 on Islamic courts has detailed what cases are meant by marriage and in letter a (20) there are additional cases of adoption of children based on Islamic law.

The absolute authority of the judiciary is closely related to conflicts of jurisdiction and the concept of choice of jurisdiction. In the case of child adoption here, the parties do not choose a court forum that is considered competent on two or more canyons as in the definition in the international civil law case but rather chooses a court forum that is considered authorized between the Islamic court or the to settle the case of child adoption committed by Muslims.²⁹ This issue of choice of jurisdiction occurs when the subject of law is given legal breadth (based on laws and regulations) to choose a court that resolves his case and will

²⁴ Law 35 of 2014 concerning the Amendments to Law 23 of 2002 concerning Child Protection (Statute Book of the Republic of Indonesia of 2014 297 Supplement to the Statute Book of the Republic of Indonesia 5606).

²⁵ M. Natsir Asnawi, *Hukum Acara Perdata Teori, Praktik, dan Permasalahannya di Peradilan Umum dan Peradilan Agama* (Yogyakarta: UII Press, 2016), p. 46.

²⁶ Law 48 of 2009 concerning Judicial Power (Statute Book of the Republic of Indonesia of 2009 157 Supplement to the Statute Book of the Republic of Indonesia 5076).

²⁷ Sabri Fataruba, "Kompetensi Absolut Pengadilan Agama dan Kekhususan Beracaranya Pasca Amandemen Undang-Undang Nomor 7 Tahun 1989 tentang Peradilan Agama", *Jurnal Sasi* (Ambon) Vol. 21 Nomor 2, 2016. p. 64.

²⁸ Law 50 of 2009 About the Second Amandment on Law 7 of 1989 concerning Islamic courts.

²⁹ M.Yahya Harahap, *Hukum Acara Perdata* (Jakarta: Sinar Grafika, 2008), p. 203.

automatically also be subject to the law applied to the court of his choice both formally and materially.

Prior to the birth of Law 3 of 2006, Islamic courts did not have a firm competence to examine and decide cases of child adoption applications, even though the applicants and prospective children were Muslims. After the birth of such a law, the competence is occupied by the Islamic court. Article 49 letter a (20) states the following:

Islamic courts have the duty and authority to examine, decide, and resolve cases at the first level between people who are Muslim, one of which is in the field of marriage including the determination of the origin of a child and the determination of the adoption of a child based on Islamic law.³⁰

Article 49 along with the explanation in Law 3 of 2006 firmly gives the authority to apply for the adoption of children with the subject of Muslims to the Islamic court. This law was born with the main reason, namely the Islamic court as regulated in Law 7 of 1989 is no longer in accordance with the development of the legal needs of the community and constitutional life according to the Constitution of the Republic of Indonesia of 1945.

Verdicts of the Surakarta Public Court

In this section, an analysis of the two verdicts issued by the Surakarta Public Court will be carried out, namely decision 31/Pdt.P/2017/PN.Skt February 22, 2017 and decision 391/Pdt.P/2019/PN.Skt October 29, 2019.

C.1. Verdict 31/Rev.P/2017/PN.Skt

This application was filed by the Petitioner who are a married couple who are Muslim named Dadan Erwan and Ani Afriati. The applicant applied for the endorsement of the adoption of the child on the following grounds.³¹ That the petitioners are a legal married couple as mentioned in the citation of marriage certificate 203/70/II/2005 dated February 27, 2005 issued by the Office of Religious Affairs of Banjarsari Surakarta. Furthermore, the petitioners have agreed to raise a daughter named Ainayya Ruthena Putri Ayudea born in Sukoharjo on January 12, 2016. They carried out the adoption of children through the Child and Infant Maintenance Foundation Permata Hati Surakarta as stated in the Minutes of Handover of Children 031 / YPAB. PH/VI/2016 dated June 11, 2016. The adopted child is now being cared for and guided by applicants as is their own biological son. In order to certify the child and in order to ensure the welfare of the child in the future, the petitioners filed a case of child expropriation to the local public court.

In examining the case, the judges considered that the petitioners' application was based on Child Surrender Letter No: 031/YPAB. PH/VI/2016 by Mrs Hj Darytai. Based on the authentic evidence, the court argued that the application had met the requirements specified in Law 35 of 2014 concerning Amendments to Law 23 of 2002 concerning Child Protection jo. Government Regulation 54 of 2007 concerning The Appointment of Children Jo Regulation of the Minister of Social Affairs R.I 110 / HUK / 2009 concerning Requirements for The Adoption of Children and other Laws and Regulations that relating to this matter. The petition was

³⁰ Law 3 of 2006 concerning the Amendments to Law 7 of 1989 concerning Religious Justice (Statute Book of the Republic of Indonesia of 2006 22 Supplement to the Statute Book of the Republic of Indonesia 4611).

³¹ Verdict of the Surakarta Public Court 31/Pdt.P/2017/PN.Skt regarding the Application for the Adoption of Children of Applicant I and Applicant II, February 22, 2017.

granted. The Surakarta Public Court granted the application and declared it valid according to law.

C.2. Verdict 391/Rev.P/2019/PN.Skt

This application was submitted by a Muslim married couple named Indro Catur Haryono and Ipa Monalili in October 2017. They agreed to raise a daughter, named Afiqah Syalia Nur Zahra who was born in Pontianak on May 2, 2014, the daughter of a husband and wife named Dwi Romadona dan Neneng Rohwati. The adoption of the child received permission from the Social Service Office of Central Java Province. The judges ruled that based on authentic evidence as well as witness accounts, a daughter had been adopted by the couple.

The judge referred to the Supreme Court Circular Letter on the Adoption of Children which reminded the judges to pay attention to the provisions in article 39 of Law 23 of 2002 on Child Protection which *inter alia* stated "That the adoption of a child can only be done in the best interests of the child. The judge finally ruled that para petitioners had qualified as a potential parent. In addition, the judges also referred to the circular letter of the Supreme Court of R.I. 6 of 1983 which stated that the child's exhumation must not exceed the age limit of the child. The judge cited the provisions of article 17, article 3 and article 47 of Law 23 of 2006 concerning Population Administration, The Surakarta Public Court granted the application and declared it valid according to law.

Conflict of authority

Judges of the Surakarta Public Court, whom the author interviewed, argued that the public court still has authority over the case of child removal applications for people who are Muslim based on the Guidelines for the Implementation of Duties and Administration of Courts in the nature of the Four Judicial Environments of the Supreme Court of the Republic of Indonesia year 2009 and supported by the knowing desire of the parties filing their application subject to the general civil code. Their opinions differ from those expressed by the Surakarta Islamic Court's judges. They argued that the application for the adoption of a child for a person of the Muslim faith became the absolute authority of the Islamic court.

Judges of the Surakarta Public Court accepted and dismissed the application for the adoption of a child by a Muslim with several considerations. These considerations are in the form of legal considerations in accordance with laws and regulations and non-judicial considerations. In the case of the adoption of a child submitted, the judge uses the basis stated in Law 48 of 2009 concerning Judicial Power article 10, namely:³²

Article 10³³

- 1) The court is prohibited from refusing to examine, adjudicate, and decide a case filed on the pretext that the law does not exist or is less clear, but is obliged to examine and adjudicate it.
- 2) The provisions referred to in paragraph (1) do not close the effort to resolve civil cases by peace.

This is in line with the principle of *Ius Curia Novit* which means that the judge is considered to know all the laws so that the court must not refuse to examine and adjudicate

³² Hasanur Rachmansyah Arif, Judge of the Surakarta District Court, *Personal Interviews*, Wednesday, April 13, 2022.

³³ Law 48 of 2009 concerning Judicial Power (Statute Book of the Republic of Indonesia of 2009 157 Supplement to the Statute Book of the Republic of Indonesia 5076).

incoming cases. Therefore, The Surakarta Public Court must provide services to every justice seeker regardless it is a Muslim or non-Muslim. In terms of examining and adjudicating cases of child adoption, judges use Law 8 of 2004 concerning Amendments to Law 2 of 1986 concerning the General Judiciary which in article 50 states that “the Public Court has the duty and authority to examine, decide, and resolve criminal cases and civil cases in the first instance including in cases of child adoption.”³⁴ The law is not in line with Law 3 of 2006 concerning Amendments to Law 7 of 1989 on Islamic Courts which has given authority to Islamic Courts to provide determinations for the adoption of children for people of the Muslim faith.

A child adoption case is an application case (*volunter*), not a lawsuit (*contentious*). According to Law 35 of 1999, there are amendments to Law 4 of 1970 on the Basic Provisions of Judicial Power jo. Law 4 of 2004 on Judicial Power, stating that judicial bodies are only authorized to receive, examine, adjudicate and resolve lawsuit cases, while application cases not being the authority of the judicial bodies, unless prescribed by the Act to be the authority of the judicial body. Thus, that authority must be explicitly mentioned in the legislation. Thus, referring to the provisions of the Law, the explanation of article 49 letter a (20) of Law 3 of 2006 concerning Islamic courts, has given authority to the Islamic court to resolve cases for the adoption of children.³⁵

Unfortunately, the authority to raise children for Muslims is only included in the explanation of article 49 of Law 3 of 2006 concerning the elaboration of the field of marriage. Judges at the Surakarta Public Court argued that the provisions contained in the explanation of article 49 were considered less powerful to change the existing authority so that the practice of raising children for Muslim applicants in the public court could still take place.

The legal consequences of the adoption of children through court determinations are not clearly stated. The adoption of Muslim children through the Islamic court decree bases its provisions on Islamic law in which Islam does not allow the adoption of children to be used as biological children. The status the child must remain the child of his biological parents and the family lineage (*nasab*) will not be able to be changed by anything and whoever it is. *Nasab* is a tie that connects family and other blood relationships. Similarly, the child’s agreement passed in the public court must also not terminate the legal or *nasab* relationship of the adopted child with his biological parents. In the public court’s verdicts, status the adopted child is taken the same as a biological child thus obtaining an inheritance from his foster parents. This means that the adoption of a Muslim child filed to the public court may give rise to inheritance rights for the adopted child and his foster parents because the foster parents can treat the child like their biological child.

In a decision issued by the Islamic Court, a parent should not make an adopted child a biological child where the child has the same rights as the biological child. This is in accordance with the rules of sharia law relating to the adoption of children, namely those listed in the Qur'an Surah Al-Ahzab verse 4 and paragraph 5. Based on this verse, Islam only allows the maintenance of adopted children who do not inherit from each other with their foster parents and remain in the status of another person, so there is no right to guardianship. Unlike the case with the judgment issued by the Public Court, which is where the adoption of the child is to make the adopted child as the biological child himself in treating him, so that the adopted child can obtain inheritance rights from his foster parents. In the case that the *nasab* will not

³⁴ Law 8 of 2004 concerning the Amendments to Law 2 of 1986 concerning the General Judiciary (Statute Book of the Republic of Indonesia of 2004 34 Supplement to the Statute Book of the Republic of Indonesia 4379).

³⁵ Arif Puji Haryono, Judge of the Surakarta Islamic Court, *Personal Interviews*, Tuesday 05 April 2022.

be able to be changed by anything and whoever it is, so the judgment issued by the public court also does not break the legal relationship or relationship of the adopted child with his biological parents, including the right to be the guardian of the marriage.

In the judgment issued by the Islamic court, a son and the foster parents do not inherit each other. They only had a civil relationship because the position of the adopted child is not a biological child. An adopted child whose parents are not clear is considered like a relative. The amount of the inheritance is as much as 1/3 of the estate of the foster parents.³⁶ On the other hand, in the decisions issued by the public court, the adopted child can obtain inheritance rights equal to the inheritance rights of the biological child, because the status of the adopted child is equivalent to that of the biological child so as to obtain inheritance from the foster parents.

The knowledge and legal awareness of the adoption of a child should have been known at the time of filing the petitioner's application. The petitioners in the child adoption case could correctly choose which court would give decision. According to judges at the Surakarta Public Court and at the Surakarta Islamic Court, an advantage is obtained by the party if the adoption of the child is done by the public court, the applicant will get a copy of the decision of the public court to be taken to the Civil Registration Office. The birth certificate states that the child has been adopted and the name of the petitioner as his foster parent is also mentioned.

Meanwhile, the children who are validated by the Islamic court do not all obtain a copy to be brought to the Civil Registration Office. Only does an orphan could get it. However, the party who submits his application to the Islamic court has the advantage of not attaching a child adoption permit from the head of the provincial social welfare service. If a party submits its application to the public court, a certificate of permission for the adoption of the child is required.

Conclusion

Based on the above explanation, some points can be taken to the following conclusion. Considerations of judges at the Surakarta Public Court in accepting and deciding applications for the adoption of children by people who are Muslims refer to the Manual for the Implementation of Duties and Administration of Courts in Four Judicial Environments, Book II 2007 Edition on Public Courts, Publication of the Supreme Court of the Republic of Indonesia in 2009 in paragraph 2 concerning Court Technicalities. It states that the public court is authorized to settle cases of child adoption requests by Muslims if they want to treat the adopted child as a biological child and can inherit. Meanwhile, if it is intended to be maintained, then the application is submitted to the Islamic court.

The content of Book II 2007 Edition of the Public Judiciary cannot make a basis for reaching the division of inheritance because the adoption of a child according to Government Regulation 54 of 2007 on the implementation of the adoption of a child is a legal act that diverts a child from the sphere of power of the parent, legal guardian, or other person responsible for the care, education and rearing of the child, into the family environment of the foster parents. From this definition, the adoption of a child in court does not reach the mechanism of division of inheritance. The presence or absence of inheritance rights is a consequence of the adoption of children, and it has its own legal provisions.

Law 3 of 2006 in article 49 in the explanation of letter a (20) has given the authority to the Islamic court to provide a determination of the adoption of children for Muslims. Judges

³⁶ Arif Puji Haryono, Judge of the Surakarta Islamic Court, *Personal Interviews*, Tuesday 05 April 2022.

of the Surakarta Public Court argued that the provisions contained in the explanation were considered not strong enough to change the existing authority. Hence, the practice of adopting children for Muslim petitioners in public court is still possible. It is realized that the explanation makes there a conflict of norms, namely Law 3 of 2006 which states that the case of an application for the adoption of a child for a Muslim is the authority of the Islamic court, while the legal norm in Book II of the 2007 Edition states that the application can be submitted to the public court.

The difference in the judge's decision in the child adoption case in the Surakarta Public Court and the Surakarta Islamic Court can be seen from a legal debate that arises. In the decisions issued by the Islamic court, the foster parents only exercise the right of adopting as long as it does not make the adopted child a biological child. Here, there is no right to inherit from each other with the foster parents. Unlike the case in the public court, the adoption of the child in order to make the child as the biological child himself. However, in the case nasab, the judgment issued by both the public court and the Islamic court do not cut the relationship between an adopted child and his biological parents, including the right of guardian. With an explanation of the legal consequences arising from the judgment issued by the public court and the Islamic court, if there is a dispute problem in the division of inheritance, then it is only the Islamic court who has the jurisdiction to examine, adjudicate, and decide the dispute.

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