

Rights and Position of Adopted Children According to KHI and Common LAW

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ABSTRACT

In Indonesia, three inheritance law systems apply namely civil, Islamic, and customary inheritance law. These three legal systems are implemented because there is no national inheritance law that can regulate all Indonesian people. This study aims to explain the position and inheritance rights of adopted children in the view of the Compilation of Islamic Law (KHI) and customary law. This research is descriptive normative legal research. Considering that the object of this study is the issue of the position and inheritance rights of adopted children as seen from Islamic inheritance law and customary law (jurisprudence), this type of research uses a normative juridical approach with a library research pattern. The research results showed that according to KHI, adopted children are not recognized as heirs of their adoptive parents, because the main principle of Islamic inheritance is a blood relationship. Meanwhile, according to Supreme Court jurisprudence, adopted children are equated with biological children and are considered capable of inheriting the assets of their adoptive parents.

Keywords: Adoption, Inheritance, Customary Law, Compilation Of Islamic Law.

INTRODUCTION

Indonesian law recognizes the words adoption or adoption (adoption, adoption, or adoption) as a legal institution, where in the sense of adopting a child the consequences have juridical value (Saksono & Widyastuti, 2023). Adoption of a child is a legal institution that is needed in people's lives, including in Indonesian society.

Adoption of children has long been known in Indonesian society, whether carried out traditionally or formally according to statutory regulations (Muzakir, 2022). Even though jurisprudence expands the application of the definition of child adoption (adoption), which is limited to only men now being able to adopt girls with this jurisprudence, there is no substantive change in the status and legal consequences of adopting children who are the same as biological children. It is possible that the population, which is predominantly Muslim, has adopted many children based on the concept of adoption according to Staatsblad 1917 Number 129 which states that adopted children have the same rights as biological children. (Ahmad, 2004)

Adoption of children in Indonesia between Indonesian citizens and Indonesian citizens can be done in two ways, namely based on customary law and based on statutory regulations. According to Bushar Muhammad, in general the procedures for adopting a child according to custom are carried out clearly and in cash. What is meant by clear is a principle of legality, which means that the act was announced and carried out in front of many people with the aim of letting the general public know that a child was adopted. Meanwhile, cash means that the action is completed immediately and cannot be withdrawn (Saraswati, 2022).

According to customary law, adoption is an act of taking another person's child into one's own family in such a way that between the person who adopts the child and the child being adopted, the same family relationship arises, as exists between parents and their own biological child (Meliala, 2016). The purpose of adopting a child, if seen from the perspective of customary law, is that the emphasis is on (potential adoptive parents') concerns about extinction, so

prospective adoptive parents take the child from their circle of relatives, and have the status of being the biological child of the same mother and father. raised him, regardless of his original family members (Bakri & Sukirno, 2017).

Compilation of Islamic Law as a material legal guideline for religious courts recognizes the existence of child adoption institutions by regulating adopted children in the formulation of Article 171 letter (h) and Article 209 (Putra & Tanawijaya, 2022; Umar et al., 2023). Religious Courts as one of the actors of judicial power for people seeking justice who are Muslims consistently monitor the implementation of the law so that it has a positive effect on the awareness of the Muslim community to adopt children based on Islamic law (Rosen, 2000; Zubaida, 2003).

In the decision of the Supreme Court of the Republic of Indonesia Number 1182/K/Pdt/1988, which provides the results of the decision regarding adopted children, the decision determines that adopted children become heirs and receive a share. According to the author, the decision of the Supreme Court of the Republic of Indonesia is contrary to actual Islamic inheritance law. And in the considerations of the Judge who decides the case there are also irregularities in exploring the law or establishing the law.

Since the MARI Decision Number 1182/K/Pdt/1988, adopted children have become absolutely considered biological children. And this decision is contrary to Islamic inheritance law which states that adopted children are never heirs. However, adopted children in Islam only provide guarantees for education and living expenses, meaning they only provide welfare for the child.

RESEARCH METHOD

This research is descriptive normative legal research. Considering that the object of this research study is the issue of the position and inheritance rights of adopted children as seen from Islamic Inheritance Law and customary law (Jurisprudence), this type of research uses a normative juridical approach with a literature pattern (Library Research). Those who descriptively examine Islamic inheritance and then Islamic inheritance review the inheritance contained in the decision. By using a qualitative approach which aims to explore and build a proposition or to explain the meaning behind reality. Because in this research the author will explore the theories and concepts of inheritance from various legal products, then the author will review the inheritance laws of Islamic law.

RESULTS AND DISCUSSION

1. Position case:

During Mr. Jayadikarta's life with his wife Ny. Enot Sawinah has no descendants. Then they raised two children, a boy and a girl who are the children of Mrs. Enot Sawinah. (IKAHI, 1995)

Mr. Jayadikarta and his wife treated the adopted child the same as their own biological child. Because they apply local customary law. From the law on child adoption carried out by Mr. Jayadikarta, it gave birth to legal consequences that equate adopted children with biological children. In terms of inheritance, adopted children receive a share and become legal heirs of their adoptive parents. (IKAHI, 1995)

2. Position and Division of Adopted Children according to the Decision of the Supreme Court of the Republic of Indonesia

The determination of an adopted child in Indonesia is included in the category of Declaratory Decision, namely a decision that merely states or confirms a legal situation. a declaratory or declarative decision (declaratoir vonnis) is the judge's statement contained in the decision he handed down. This statement is an explanation or determination of a right, title or status. And this statement is included in the ruling or dictum of the decision, with this statement, the decision has

determined with certainty who has the right or who has position on the disputed issue. A "declaratory" decision, namely one that declares a situation to be valid according to law (Balaati, 2013).

Adoption of a child based on local customary law means that it is subject to the norms of customary law that apply in that area. Customary law has a different form from the form of law made by the state. The word written in customary law has been replaced with the word recorded because several parts of customary law in Indonesia were recorded on palm leaves or king's books. Customary law is the values that live and develop in the society of a region. Even though most of the Customary Laws are not written, they have a strong binding force in society (Saleh, 2013).

There are some areas without any ceremony, then there are those who just report to the traditional head, there are also those who only do a greeting ceremony attended by neighbors, relatives, and in many areas the appointment ceremony must be witnessed and attended by the traditional head and other leaders. custom. However, in general, adoptions carried out based on customary law are carried out clearly and in cash. Explicit and cash adoption, meaning that the adoption of the child is carried out openly, attended by the entire family, traditional leaders/customary officials (clear meaning) and immediately the customary money is paid (cash meaning) (Ardiyati, 2014).

In the Decision of the Supreme Court of the Republic of Indonesia Number 1182/K/Pdt/1988 dated 22 December 1994 it was determined that the couple Mr. Jayadikarta and Mrs. Enot Sawinah was not blessed with children. The couple raised two children, a boy and a girl, namely a boy named Kosim Atmajaya, and a daughter named Aah. Aah, who was adopted at the age of 2 years, is actually the biological child of Onah, Mrs. Enot Sawinah. In fact, this decision also makes adopted children like their own biological children. In the Supreme Court's decision, it refers to customary law that applies in the local area.

This is as stated in one of the legal considerations which reads as follows:

Whereas according to the permanent jurisprudence of the Supreme Court regarding adopted children in P. Java, it is sufficient to prove that it is publicly known that the person concerned is actually living as an adoptive parent and carrying out his/her obligations as a child;

Whereas further according to the permanent jurisprudence of the Supreme Court, customary law in the Bandung area regarding child adoption procedures is: a person can be declared an adopted child of his two adoptive parents if he has been raised, circumcised, married, lives together, has received a gift from both parents. lift it; (IKAHI, 1995)

In the Decision of the Supreme Court of the Republic of Indonesia Number 1182/K/Pdt/1988 dated 22 December 1994, it was determined that adopted children are the heirs of their deceased adoptive parents and therefore have the right to receive their inheritance. And each of the two adopted children gets half of the inheritance left behind.

From the results of the author's research, the Supreme Court Decision No. 1182 K/Pdt/1988 decided that the position of the adopted child was as the heir of Mrs. Enot and received more than 1/3 of the assets of his adoptive parents. And the position of the adopted child in this decision is the sibling of the closed heir.

3. Views of Islamic Inheritance Law on the Decision of the Supreme Court of the Republic of Indonesia No. 1182/K/Pdt/1988 concerning the inheritance of adopted children

Islamic law does not recognize the institution of adopted children or what is known as adoption in the sense of releasing an adopted child from the kinship of his original parents and moving into the kinship of his adoptive parents. Islam only recognizes and even recommends adopting other people's children in the sense of maintenance. In this case, the child still has a kinship relationship with his original parents and remains outside the circle of kinship of the parents who adopted him, in all legal consequences.

In practice, adopted children in Indonesia are the same as those in the Arab Jahiliyah community, treated as their own children. And on the pretext that the child has contributed a lot to looking after his adoptive parents, this legal fiction is used, then he is given a portion of the inheritance from the inheritance. On the other hand, in District Court decisions, adopted children are the same as their own children, on the basis of customary law; even though all parties are Muslim. In this case, there has been a prolonged "touch point" in resolving inheritance disputes for adopted children between the District Court and the Religious Court.

Based on the description above, it is clear that the provisions on the inheritance rights of adopted children according to those contained in the Decision of the Supreme Court of the Republic of Indonesia are very contradictory to the provisions found in Islamic inheritance law. Because it has been briefly explained regarding the inheritance of adopted children's inheritance according to Islamic law that an adopted child is not among the heirs of his adoptive parents and therefore has no rights at all to his inheritance.

Therefore, the existence of an adopted child by itself has no effect on the heirs. In contrast, the provisions regarding the rights of adopted children to the inheritance of their adoptive parents in the decision refer to the provisions of customary law.

4. The Position of Adopted Children in Indonesia

Before 2006, there were several religious courts that served applications for adoption, because the applicant (prospective adoptive parents) wanted adoption on the basis of Islamic law. This is a reality in society, that the custom of adopting children has become institutionalized, but they have realized that adopting children based on pure custom is the same as treating adopted children as equals to biological children.

As for the adoption of children based on Islamic law (a product of religious courts) it does not equate an adopted child with a biological child, cannot break the blood family relationship with the parents of his biological siblings, does not have the right to be an heir, and so on.

On the other hand, adopted children based on pure custom, if the adoptive parents die, without leaving any biological children, then the adopted child inherits the entire inheritance, if there are biological children, then the adopted child gets the same share as the biological child, or in other words: the same as is the custom of the Jahiliyah Arabs, equating adopted children with their own biological children. This habit received a response and tolerance from Indonesian Ulama, by giving a portion of the obligatory will of a maximum of 1/3 of the adoptive parents' assets or vice versa, as regulated in Article 209 KHI which reads:

The inherited assets of adopted children are divided based on Articles 176 to 193 above, while adoptive parents who do not receive a will are given a mandatory will of up to 1/3 of their adopted child's inherited assets.

Adopted children who do not receive a will are given a mandatory will of up to 1/3 of their adoptive parents' inheritance.

The position of adopted children increasingly exists because it has been confirmed in legislation, namely: in the explanation of Article 49 of Law Number 3 of 2006 concerning Amendments to Law Number 7 of 1989 concerning Religious Courts which reads:

Letter a: What is meant by "marriage" is matters regulated in or based on applicable laws regarding marriages conducted according to sharia, including: 1 to 19.

Meanwhile, Article 20 states that determining the origin of children and determining adopted children is based on Islamic law. (Supreme Court, n.d.)

In reality, there have been many decisions regarding the adoption of children as a result of religious courts, a legal breakthrough because when they received, examined and adjudicated the application for adoption there was no legal umbrella/basic authority for the Religious Courts, therefore it was inserted in the explanation of the article above. This was inserted because it was

impossible to propose new articles or add explanations to articles, because the Draft Bill which was sent with the president's introductory note did not exist from the start.

After the bill is passed into law, the adoption of the child officially falls under the authority of the religious court. The quote from the agreement of tafsir and fiqh scholars above regarding adopted children is "permitted" only to the extent of care, protection and education; and "prohibited" from giving status as a biological child.

There are two forms of child adoption that are understood from the perspective of Islamic law, namely: First, the form of child adoption (*tabanny*) which is prohibited as *tabanny* is practiced by jahiliyah communities and secular civil law, which makes adopted children as biological children, with all the rights as biological child, and severing legal relations with his original parents, then assigning his biological father to his adoptive father; Second, the recommended adoption (*tabanny*) is the adoption of a child who is driven by the motivation to worship Allah SWT by paying for daily living, education costs, maintenance, etc. without having to sever relations with his biological parents, without having to put pressure on his parents. adopted him, not making him his own biological child, with all his rights. (Ahmad Kamil, 2010)

5. Analysis

Referring to the Supreme Court's decision, according to the author's observations, the Panel of Judges appears to have used the basic considerations of the first judge, including:

Considering, that according to the permanent jurisprudence of the Supreme Court regarding adopted children on the island of Java, it is sufficient to prove that it is publicly known that the person concerned is actually living as an adoptive parent and carrying out his/her obligations as a child;

Considering, furthermore, according to the permanent jurisprudence of the Supreme Court, customary law in the Bandung area regarding child adoption procedures is: a person can be declared an adopted child of both adoptive parents if he has been raised, circumcised, married, lives together, has received a gift from both her adoptive parents, then based on the permanent jurisprudence of the Supreme Court mentioned above, Mrs. Aah and Kosim Atmajaya were considered legally adopted children and heirs of the deceased heir.

Considering that the granting of absolute goods to his adopted child strengthens the presumption that the recipient of the gift is the adopted child of the grantor,

Considering, that husband and wife who do not have children during their lifetime are free to do as they please with their wealth, because it is a fact that is difficult to deny that those who receive the rights are usually the ones who take care of their livelihood;

Considering, that based on the considerations above, Plaintiff II and the Defendant are proven to be the adopted children of Mrs. Enot Sawinah and Mr. Jayadikarta; Considering, that because the disputed goods are mutual goods, the inheritance rights of the heirs' siblings are closed by the presence of adopted children.

Based on the considerations in the decision above, according to the author's observations, the Panel of Judges needs to review the rules of *ushul fiqh*, namely:

“Laa *qārura* wa laa *qīrora*” is not *maqārat-kan* and *maqārat-kan*.

In this decision, other heirs, such as the heir's siblings, become closed because of the existence of an adopted child. This has injured the other heirs or harmed the heirs and is even prohibited according to these rules. And in Islamic inheritance, giving a share to adopted children is not discussed, even by many *fuqaha* and contemporary scholars. When giving a law, do not harm or harm other people by the existence of this law, meaning that it is forbidden to injure the rights of other heirs by the existence of other heirs.

such as Yusuf Qardlawi stated that giving shares to adopted children is contrary to the text of the Koran. Because in Islam adopted children are only "permitted" to the extent of nurturing,

nurturing, and providing education, living expenses, and it is "prohibited" to make adopted children like their own biological children. Islamic law also states that adopting children only increases our worship of Allah SWT because it provides welfare to people who are weak and incapable.

The rights of the obligatory will for adopted children always invite controversy and differences of opinion among the judges at the Religious Court. And it is even more special in this example, that not only the adoptive parents have treated their two adopted children like their own children, by strengthening it by naming his name with the name of his adoptive father and giving the entire inheritance to his two adopted children and the biological siblings of the heirs become closed, leading to the level of marriage; but the goodness resulted in disaster for the biological relatives of the heirs, so that there was a complaint to the court. The two adopted children filed a claim to give an appropriate share, meaning that the two adopted children wanted to get $\frac{1}{2}$ each of the inherited property, then the claim was granted.

Most legal experts see that the decision to grant inheritance to adopted children has been obsessed with the term "legal reform", which has been trying to form a national law that unites Islamic law, customary law and western law, either through the National Legal Development Agency, or through seminars. -seminar.

In this regard, the author is of the opinion that adopted children are not heirs, but they receive inheritance generally through gifts, obligatory wills, or a sign of love called concord, because of their services to their adoptive parents. Thus, giving property to adopted children is not an inheritance right like inheritance rights to heirs, but only as an ordinary gift (gift). However, it cannot be denied that in reality customary practice in Indonesia, adopted children are included by KHI legislators as parties who receive inherited assets by means of a mandatory will in accordance with article 209 paragraph (2), namely a maximum of $\frac{1}{3}$ of the inherited assets.

Through the results of the author's research, the reality of decisions on the division of inheritance of adopted children by judges at the Supreme Court proves the following:

On the one hand, the judge followed the customary law that existed in the area, on the one hand, there were some opinions which stated that giving inheritance property to adopted children was considered not contrary to Islamic law because the case was submitted to the District Court at that time. And because of consideration of the principles of legality and humanity, which is a reward for services given to adopted children for taking care of their adoptive parents during their lifetime, and providing inheritance as a form of love for their adopted children.

However, the author is of the opinion that implementing inheritance law is part of Islamic religious worship, and falls within the realm of worship. So giving the inheritance of a deceased person to someone, such as an adoptive parent to an adopted child, should not conflict with Islamic inheritance law which is clearly regulated in the text.

Another solution that can be taken by the judge is to determine a legal decision regarding the implementation of inheritance distribution in a peaceful manner with the aim of benefit. Although normatively, the results of the division of inheritance through peace do not comply with the provisions of the science of *fraidh*, it is considered relevant to customary law which in terms of *uṣūl fiqh* is known as the *al-'urf* method, namely a method that uses actions or habits that are already familiar to the people. a community or region because it has become a habit and is integrated into their lives (Satria Effendi, 2005).

The provisions of Article 209 are a new idea based on the fact that adopting a child is a phenomenon that exists in the life of Islamic society, even though this does not automatically result in a legal relationship between an adopted child and his or her adoptive parents. Adopted children still have a legal relationship with their biological parents. From the social relationship between adopted children and adoptive parents, provisions regarding mandatory wills are born.

In accordance with Islamic law, an adopted child is not an heir, an adopted child is not entitled to a share like a biological child, and cannot even be a member of any heir (Karim, 2010).

CONCLUSION

Adopted children have the right to receive a share of their adoptive parents' inheritance as well as the rights of biological children. Based on this position, the siblings of the adoptive parents are closed. According to Islamic law, adopted children do not have the same inheritance status as biological children. Therefore, adopted children are not included as heirs who receive a share of the inheritance from their adoptive parents.

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