

## LEGAL RECONSTRUCTION ON ADOPTION OF CHILDREN BASED ON JUSTICE VALUES

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### ABSTRACT

*Adoption regulations in Indonesia such as adoptive parents not registering their adopted child on the birth certificate, changing the identity of the adopted child by the adoptive parents and illegal adoption. Therefore, this regulation on child adoption needs to be reconstructed. The aims of this study are: To analyze the legal weaknesses of the regulation of child adoption in Indonesia, and to find a legal reconstruction of the regulation of child adoption in Indonesia so that it is based on the value of justice. The theory used in this study has 3 theoretical frameworks, namely Theory of Justice as Grand Theory, Theory of Legal Protection as Middle Theory and Progressive Legal Theory as Applied Theory. The research method used is: this type of research is normative juridical, while the nature of the research is descriptive analysis. The paradigm used is the paradigm of positivism. There are 4 (four) kinds of research approaches, namely (1) the statutory approach, (2) the conceptual approach, (3) the historical approach, and (4) the case approach. ). The data sources used are primary legal materials, secondary legal materials and tertiary legal materials. The data analysis technique is descriptive qualitative. The results of this study indicate that Law Number 35 of 2014 concerning Child Protection which regulates adoption of children, and its implementing regulations still have weaknesses, namely: it is found in the community of adoptive parents who do not register their adopted child on the birth certificate; adoptive parents who change the initial identity of the adopted child; and illegal adoption of children. To overcome this problem, the regulations for adopting children need to be reconstructed, namely: First, adding new norms, namely Article 89A paragraphs (1), (2) and (3) containing legal sanctions for adoptive parents who do not register their adopted child on the birth certificate and or change the identity of the adopted child. The second is the addition of a new norm in Article 89B paragraphs (1) and (2) which contains sanctions for adoptive parents who adopt a child illegally or adopt a child without going through a court order.*

**Keywords:** Reconstruction, Regulation of Adopted Children, Value of Justice

### INTRODUCTION

Juridically, the issue of adopted children already has legal standing ranging from constitution to government regulations. The aim of adoption of this child really protects the interests of the child, such as the right to live properly and the right to get an education.

According to Law Number 35 of 2014 Amendments to Law Number 23 of 2002 concerning Child Protection, it is stated that adoption can only be carried out in the best interests of the child and is carried out based on local customs and statutory provisions. Adoption of a child does not break the blood relationship between the adopted child and his biological parents. Adoption of a child must also be registered in the birth certificate, without losing the child's initial identity.<sup>1</sup> For more details, see Article 39 paragraph (2a) which reads as follows:

"The adoption of the child as referred to in paragraph (1) must be registered in the birth certificate, without losing the child's initial identity".

The issue of adoption is not a new problem, including in Indonesia. Since ancient times, adoption of children has been carried out in different ways and with different motivations, in accordance with the legal system and legal feelings that developed in the area concerned. Adoption includes trying to get the child to get love from his parents and the people around him and to enjoy his rights without questioning race, color, nationality or social status. In the case of adoption (adoption), the interests of the parents who adopted him with a number of motives behind it can be fulfilled properly, while on the other hand the interests of the adopted child have a better future and must be guaranteed more certainty. In addition, the honor of his own biological parents with certain objectives of the surrender of his child must be fulfilled.<sup>2</sup>

Among the Indonesian people, adoption of children is usually carried out in different ways according to local customary law. If a person does not get a child, even though he has been married for years and he wants to have a child, then in such a situation he adopts someone else's child to be his own child, either by severing the child's relationship with his biological parents or not.<sup>3</sup> Some parents believe that by adopting other people's children, they will have biological children. Therefore, adoption is considered as an inducement for the birth of a biological child.<sup>4</sup>

Indeed, adoption has become a community need and is part of the family law system, because it involves the interests of individuals in the family. Therefore, the adoption agency, which has become a community culture, will follow the development of situations and conditions in line with the level of intelligence and the development of the community itself. Due to the fact that the institution of adoption is part of the law that lives in society, the Dutch East Indies government that was in power at that time tried to make a separate rule regarding the adoption, namely the birth of Staatsblad Number 129 of 1917, which regulates the adoption

<sup>1</sup> Article 39 of Law Number 35 of 2014 concerning Child Protection.

<sup>2</sup> Handar Subhandi Bakhtiar, Yustiana, Legal Arrangements Regarding the Adoption of Children in Indonesia, International Journal of Humanities and Social Science Invention, Volume 6, Issue 2, February, 2017, pp.34-44.

<sup>3</sup> Adoption of children places more emphasis on concern for prospective adoptive parents of extinction, then prospective adoptive parents (families that do not have children) will take children from their kinship power environment which is carried out by kinship, then the child will occupy the entire position of the biological child of the mother and father. who raised him and he will be separated from the class of his original relatives. See Ahmad Kamil, 2008, Law for the Protection and Adoption of Children in Indonesia, Rajawali Pers, Jakarta, p.34.

<sup>4</sup> Bastian Tafal, 1985, Pengangkatan Anak Menurut Hukum Adat, Jakarta, Rajawali Press, p.44.

of children. At first it was only applied specifically to groups of people of Chinese descent, but in its development it turned out that many people had also submitted to the Staatsblad.<sup>5</sup>

In line with the development of time, adoption of children experienced a shift. The adoption of a child was initially primarily intended for the benefit of the person who adopted the child, but for now the issue of child adoption is aimed at the benefit of the adopted child. However, in the practice of adopting a child, various problems are found, such as in the community, adoptive parents do not register their adopted child on the birth certificate, adoptive parents change the identity of the adopted child, adoption is carried out without proper procedures, falsification of data, and so on. So that to implement the provisions regarding child adoption as regulated in the Child Protection Act, the Government stipulates Government Regulation Number 54 of 2007 concerning the Implementation of Child Adoption.

The State and the Government of Indonesia are obliged and responsible for the orderliness of the practice of adopting children, both in terms of administration and legal certainty, so several policies are issued through laws and regulations and jurisprudence that regulate and handle child adoption issues, including: Circular of the Supreme Court RI Number 2 of 1979 concerning Adoption of Children, Law Number 4 of 1979 concerning Child Welfare, Circular Letter of the Supreme Court of the Republic of Indonesia Number 6 of 1983 concerning Completion of Circular Letter of the Supreme Court of the Republic of Indonesia Number 2 of 1979, Circular Letter of the Chief Justice of the Supreme Court of the Republic of Indonesia Number 4 of 1989 concerning Child Adoption. Several articles in Law Number 23 of 2002 concerning Child Protection and Circular Letter of the Chief Justice of the Supreme Court of the Republic of Indonesia Number 3 of 2005 concerning Child Adoption. To implement the provisions regarding child adoption in Articles 39 to 41 of Law Number 23 of 2002, the government issued Government Regulation Number 54 of 2007 concerning the Implementation of Child Adoption.<sup>6</sup>

The enactment of the Government Regulation is intended so that the adoption of children is carried out in accordance with statutory regulations so that irregularities that occur in society in the implementation of child adoption can be prevented, such as adoption of children without proper procedures, falsification of data, and so on. Prevention of this deviation can ultimately protect and improve the welfare of the child, for the sake of the future and the best interest of the child. However, in reality, in the city of Palangka Raya and in other cities, there are still various problems in the practice of adopting children, both from procedures, data, legality and legitimacy, conflicts of interest, as well as legal consequences in adopting children, both for the child himself and others. who raised the child.

One example is when the author's initial observations in the city of Palangka Raya, the author found several problems regarding the adoption of this child, namely:

First, adoptive parents did not register their adopted child on the birth certificate.

Second, there are community members who adopt other people's children and adopt them from birth then when making a birth certificate, the name of the child's parents is included on the birth certificate. Practices like this include identity fraud and are against adoption laws.

Third, there are still found illegal adoptions, namely the adoption of children not through a court order. This illegal adoption is the first step that can lead to other deviations related to child adoption.

Fourth, there is a married couple who have been married for a long time but have no children, finally he asked the child to be adopted as an adopted child with the aim of provoking him so that he could have children. However, after she was able to get pregnant and have a biological child, the provoked child who had been adopted as a child was ignored. Adopted children are abused, such as when they buy clothes for their biological children to buy better types, while adopted children are bought from cheap ones, as well as other things.<sup>7</sup>

Fifth, married couples who have many children and whose economy is below the poverty line so that it is difficult to pay for their children, as a result, their children are given to other people in the hope that their children can live properly and be protected. But later on, after his economy improved and he wanted to take back the child he had given him, problems arose.<sup>8</sup>

Sixth, a married couple who gave their child to someone else once missed their child and wanted to meet him, but his adoptive parents prevented or did not provide access to meet the biological parents with their child.<sup>9</sup>

The various problems above can occur because the legal rules regarding child adoption are no longer able to bridge them, because they are no longer in accordance with current developments in Indonesia. Therefore, the rule of law regarding the adoption of this child needs to be reconstructed so that there are no problems in the future. So moving on from this, the researcher seeks to examine the problem in accordance with the background of the problems mentioned above, namely as follows: Why the regulation of child adoption in Indonesia is not based on the value of justice, How are the legal weaknesses of regulating child adoption in Indonesia, and How is the legal reconstruction of child adoption arrangements in Indonesia? Indonesia to be based on the value of justice.

<sup>5</sup> Ahmad Kamil dan M. Fauzan, 2008, *Hukum Perlindungan dan Pengangkatan anak di Indonesia*, Jakarta, PT RajaGrafindo Persada, p. ix.

<sup>6</sup> Glad Maurainal, Angel Pratiwi, Dian Purnama, Child Adoption By Unmarried Person In The Indonesian Civil Law System Fakultas Hukum, Universitas Lampung, Bandar Lampung, Lampung, Indonesia, Cepalo Volume 5, Number 2, July-December 2021, pp. 141-154.

<sup>7</sup> Results of an interview with Ms. Zuraidah Khatimah, senior judge of the Religious Court of Palangka Raya City on January 5, 2021.

<sup>8</sup> The results of the interview with Mrs. Helwina Handayani, Special Staff for the Legal and Complaints Subdivision at the Indonesian Child Protection Commission (KPA) on 11-10-2020.

<sup>9</sup> *Ibid.*

## RESEARCH METHOD

The research method used is: this type of research is normative juridical, while the nature of the research is descriptive analysis<sup>10</sup>. The paradigm used is the paradigm of positivism. There are 4 (four) kinds of research approaches, namely (1) the statutory approach, (2) the conceptual approach, (3) the historical approach, and (4) the case approach. The data sources used are primary legal materials, secondary legal materials and tertiary legal materials.<sup>11</sup> The data analysis technique is descriptive qualitative.<sup>12</sup>

## RESEARCH RESULTS AND DISCUSSION

Children are a mandate as well as a gift from God Almighty, even children are considered the most valuable assets compared to other assets. Thus, the child as a mandate from God must always be guarded and protected because in the child there is inherent value, dignity, and rights as a human being that must be upheld.<sup>13</sup> Viewed from the side of the life of the nation and state, children are heirs and portraits of the future of the nation, the next generation of the nation's ideals, so that every child has the right to survive, grow and develop, participate and have the right to protection from acts of violence and discrimination as well as civil rights and other freedoms.<sup>14</sup>

Children's rights are part of human rights as stated in the United Nations Convention on the Rights of the Child, and Indonesia as a legal state has provided protection for children's rights which are explicitly contained in the 1945 Constitution Article 28B Paragraph (1) which reads "every child has the right to survive, grow and develop and has the right to protection from violence and discrimination".

Children for the sake of their welfare as a whole should grow and develop in a happy family environment, full of love and understanding. However, not a few children are neglected due to several factors, one of which is economic factors such as poverty. Parents who feel unable to fulfill their children's rights are willing to give their biological children to an orphanage and some even have the heart to abandon their children.

On the other hand, there are families who can really expect the birth of a child. But what power God wills otherwise by not giving the family offspring in the form of children. So to get offspring they have to adopt a child.

There are several reasons why people adopt children, which are as follows:<sup>15</sup>

1. Compassion for abandoned children or children whose parents are unable to take care of them;
2. Do not have children and want to have children to look after and care for them in old age;
3. There is a belief that with children at home, they will be able to have their own children;
4. To get a friend for his existing child;
5. To add or get manpower;
6. To maintain marital ties / family happiness.

Another opinion is that according to Djaja S. Meliala in his book entitled "Adoption of Children in Indonesia" that the background to the adoption of children is as follows:<sup>16</sup>

- a. Compassion for abandoned children or children whose parents are unable to take care of them or for humanitarian reasons.
- b. Not having children and the desire of children to look after and care for later in life.
- c. There is a belief that if you have children at home, you will have children of your own.
- d. To get a friend for his existing child.
- e. To add or get a workforce.
- f. To maintain marital ties or family happiness.

Meanwhile, M. Budiarto in his book entitled "Adoption of Children from a Legal Point of View" stated that the factors or backgrounds for adopting a child are:

- a. The desire to have children, for couples who do not have children;
- b. There is hope and trust in getting a child after adopting a child or as a "cook".
- c. Still want to add another type of child from the child they already have.
- d. As compassion for abandoned children, poor, orphans and so on.

While the reasons for adopting children according to customary law there are 14 kinds, namely as follows:<sup>17</sup>

- a. Have no children even though they have been married for a long time. This is a general reason because the only way for those who do not or do not have children is to adopt children as a complement to happiness and completeness and to brighten up the household.
- b. The compassion for the children is due to the child's parents being unable to provide for him. This is a very positive reason because helping children also helps the burden of the child's biological parents as long as it is based on a sincere agreement between the adoptive parents and the biological parents.

<sup>10</sup> Anis Mashdurohatun, Adhi Budi Susilo, Bambang Tri Bawono Copyright Protection Towards The Society 5.0, Journal Of Southwest Jiaotong University / Vol.56 No.2 Apr. 2021

<sup>11</sup>Daniyalsyah, Anis Mashdurohatun, Reconstruction of Mediation in Environmental Disputes Settlement Based on Pancasila Justice, Journal Of Law And Political Sciences, Volume 24, Issue 3, 2020,pp.123-138.

<sup>12</sup> Haris Budiman, Anis Mashdurohatun, Eman Suparman, A Comparative Study Of Spatial Policy In Indonesia And The Netherlands, Jurnal Dinamika Hukum, Volume 18, Issue 3. 2018,pp.295-300.

<sup>13</sup> Ahmad Kamil dan M. Fauzan, 2008, *Hukum Perlindungan dan Pengangkatan anak di Indonesia*, Jakarta, PT RajaGrafindo Persada, p.vii.

<sup>14</sup> *Ibid.*, p. vii

<sup>15</sup> Sukardi, 2018, Adoption of Children in Islamic Law, Raheema, Journal of Gender and Child Studies, Vol. 5, No. 2, p. 180.

<sup>16</sup>Djaja S.Meliala, 2015, Perkembangan Hukum Perdata tentang Orang dan Hukum Keluarga, Penerbit Nuansa Aulia, 2015. p.4. see too Suyatno, Comparison of Child Adoption from Perspective of Islamic Law, Western Law, and Customary Law, Journal of Law, Policy and Globalization, Vol.84, 2019,pp.78-84.

<sup>17</sup> Zaini Mudaris, 1992, *Adopsi Suatu Tinjauan dari Tiga Sistem Hukum*, Jakarta, Sinar Grafika, p. 61.

- c. Pity because the child has no parents. This is a moral obligation for those who are capable of serving as a humanitarian mission.
- d. If you only have a son, you will have a daughter or vice versa. This is a logical reason because people generally want to have a daughter and a son.
- e. As an angler for those who do not have children, to be able to have biological children. This reason is closely related to the trust that exists in some members of the community.
- f. To increase the number of families. This is because his adoptive parents have a lot of wealth.
- g. With the intention that the adopted child gets a good education. This reason is closely related to the humanitarian mission.
- h. wealth factor. In this case, besides being an angler to be able to have biological children, this child is also often adopted in order to take blessings for both his adoptive parents and the adopted child for the sake of improving his life.
- i. To continue the lineage and get heirs for those who do not have biological children.
- j. There is a family relationship so that the child's biological parents ask a family to make the child adopted. It also contains a humanitarian mission.
- k. It is hoped that children can help in old age and connect offspring for those who do not have children. From this there is a reciprocal reason between the interests of the child and the guarantee of old age for his adoptive parents.
- l. There is a feeling of pity for the fate of children who are not taken care of. The notion of being neglected can mean that the parents are still alive but unable or irresponsible so that their child becomes adrift. In addition, it can be applied to children whose parents have died.
- m. To strengthen family ties. Here there is a mission to strengthen family ties with the adopted child's parents.
- n. The biological child is sick or dies, so to save the child, the child is given to family or other people who have not or do not have children with the hope that the child concerned will always be healthy and live a long life.

Initially, adoption was carried out solely to continue and maintain the lineage in a family that was intact from a family that was not blessed with a child. In addition, to maintain the integrity of a marriage. However, with the development of an increasingly advanced society, the motivation for adopting children also develops. The issue of adoption is not a new problem, including in Indonesia. Since ancient times, adoption of children has been carried out in different ways and with different motivations. Some of the community's motivations include:<sup>18</sup>

- a. For not having children;
- b. Out of compassion for the child because the child's parents are unable to provide for him;
- c. Out of compassion, because the child in question has no parents (orphan);
- d. Because they only have a son, then a daughter is adopted or vice versa;
- e. As an angler for those who do not have children to be able to have biological children;
- f. To increase energy in the family;
- g. With the intention that the adopted child gets a proper education;
- h. Because of the element of trust;
- i. To continue offspring and get regeneration for those who do not have biological children;
- j. The existence of a family relationship, besides having no children, then the biological parents of the child are asked to a family, so that their child is adopted as an adopted child;
- k. It is hoped that the adopted child can help in old age and continue the offspring for those who do not have children;
- l. There is also a feeling of pity for the fate of the child who seems neglected;
- m. To strengthen family relations;
- n. Children used to often get sick or often die, then the newborn child is handed over to the family or other people for adoption, with the hope that the child concerned will always be healthy and live a long life.

Based on these reasons, people often adopt children either directly or indirectly through a court decision process. Direct adoption of children can be carried out by the community where usually the prospective adopted child still has family relationships with the prospective adoptive parents. The process or method of adoptive parents in adopting children directly varies, some are directly related to biological parents or through intermediaries.

Adoption of children has become a community need and is part of the family law system, because it involves the interests of individuals in the family. Therefore, the adoption agency, which has become a culture in society, will follow the development of situations and conditions in line with the level of intelligence and the development of the community itself. Due to the fact that the institution of adoption is part of the law that lives in society, so in the past the Dutch East Indies government tried to make a separate rule regarding the adoption, namely by issuing Staatsblad Number 129 of 1917, which regulates child adoption. At first this Staatsblad was only applied specifically to groups of people of Chinese descent, but in its development it turned out that many people had also submitted to the Staatsblad.<sup>19</sup>

In line with its development, it is factually acknowledged that child adoption has also become part of the customs of the Muslim community in Indonesia and has penetrated into practice through the religious judiciary, so prior to the formation of the law that specifically regulates it, the government has issued Presidential Instruction No. 1991 concerning the Dissemination of the Compilation of Islamic Law (KHI) which in several articles contains regulations regarding child adoption.

In the Civil Code, adoption (adoption) is not possible because the Civil Code views marriage as a form of living together, not for procreation. Because adoption among the Chinese is a common practice, the issue of adoption is subject to its own regulation as regulated in the Staatsblad of 1917 Number 129 Chapter II.

The research team in the field of Islamic law in the development of national law in the 1980/1981 legal review evaluation seminar in Jakarta once proposed the main ideas as material for drafting a bill on Adopted Children from the point of view of Islamic law, namely as follows:

<sup>18</sup> Muderis Zaini, 1999, *Adopsi, Suatu Tinjauan dari Tiga Sistem Hukum*, Jakarta, Sinar Grafika, p. 15.

<sup>19</sup> Ahmad Kamil dan M. Fauzan, *Op.Cit.*, pg. ix.

1. Institutions of child adoption are not prohibited in Islamic law, even Islamic teachings justify and encourage adoption for the welfare of the child and the happiness of the parents.
2. Provisions regarding child adoption need to be regulated by adequate laws.
3. The terms used should be unified in the words "adoption" by trying to combine other terms.
4. Adoption of a child does not cause the severance of the blood relationship of the adopted child with the parents and biological family of the child concerned.

So the provisions governing child adoption currently in force in Indonesia are: 1. Positive law, 2. Customary law; 3. Islamic law; Article 24 paragraph (2) of the 1945 Constitution of the Republic of Indonesia states that judicial power is exercised by a Supreme Court and judicial bodies below it in the general court environment, the religious court environment, the military court environment, the state administrative court environment, and by a court of law. Constitution.

The composition, position, membership, and procedural law of the Supreme Court and the judicial bodies below it are regulated by law, as stated in Article 24 A Paragraph (3) of the 1945 Constitution of the Republic of Indonesia. RI No. 7 of 1989 concerning the Religious Courts which was later amended by Law of the Republic of Indonesia No. 3 of 2006 concerning Amendments to the Law of the Republic of Indonesia No. 7 of 1989 concerning Religious Courts.

Article 49 of the law states, namely: "The Religious Courts have the duty and authority to examine, decide, and settle cases at the first level between people who are Muslim in the fields of: marriage, inheritance, wills, grants, endowments, infaq, alms and economics. sharia." This authority increases in number when compared to the authority of the Religious Courts based on Law No. RI. 7 of 1989 which only covers 6 (six) fields, namely marriage, inheritance, wills, grants, waqf, and alms. Furthermore, there are the addition of 3 (three) areas of authority, namely zakat, infaq, and sharia economics. The authority of the religious courts in the field of marriage as regulated in the Elucidation of Article 49 Letter a of RI Law no. 3 of 2006 states:

As for what is meant by marriage, there are matters regulated in or based on the applicable law regarding marriage which is carried out according to sharia, including:

1. Permission to have more than one wife;
2. Permission to enter into marriage for persons who are not yet 21 years of age, in the event that the parents, guardians or family in a straight line there are differences of opinion;
3. Marriage dispensation;
4. Prevention of marriage;
5. Marriage refusal by Marriage Registrar Employees;
6. Annulment of marriage;
7. Claims for negligence on the obligations of husband and wife;
8. Divorce by talaq;
9. Divorce lawsuit;
10. Settlement of joint assets;
11. Mastery of children;
12. The mother can bear the costs of child care and education if the father who should be responsible does not comply;
13. Determination of the obligation to provide living expenses by the husband to the ex-wife or the determination of an obligation for the ex-wife;
14. Judgment on whether or not a child is legal;
15. Decision on the revocation of parental power;
16. Revocation of the powers of the guardian;
17. Appointment of another person as guardian by the court in the event that the power of a guardian is revoked;
18. Appointment of a guardian in the case of a child who is not yet 18 years of age who is abandoned by both parents;
19. Imposition of the obligation to indemnify the child's property under his control;
20. Determination of the origin of the child and the determination of adoption based on Islamic law;
21. Decision on the refusal to provide information for mixed marriages;
22. Statements regarding the validity of marriages that occurred prior to Law no. 1 of 1974 concerning marriage and carried out according to other regulations.

There is one additional authority in the sub-field of marriage, namely the determination of adoption based on Islamic law as stated in the Elucidation of Article 49 Letter a number 20. This authority is not stated in Law RI Number 7 of 1989. Provisions of Article 49 of Law of the Republic of Indonesia Number 3 of 2006 emphasizes the principle of Islamic personality. Such provisions are also contained in Article 49 Paragraph (1) of Law No. 7 of 1989, which further developed an opinion that child adoption is the authority of religious courts, although the articles in Law No. 7 of 1989 do not explicitly regulate it.

The National Working Meeting of the Supreme Court of the Republic of Indonesia also tends to lead to the opinion that as long as it fulfills the principles of Islamic personality, the adoption of children is the authority of the religious court. Prior to the enactment of Law no. 3 of 2006 several religious courts have granted child adoption applications, including the Bantul Religious Court and the Bengkulu Religious Court.<sup>20</sup>

There are 2 views that can be put forward regarding the authority of the religious court to determine the adoption of children before the birth of Law no. 3 of 2006. Each of these views can be explained as follows:

First, they view that religious courts are not authorized to adjudicate child adoption. According to RI Law No. 14 of 1970 in conjunction with the Law of the Republic of Indonesia No. 35 of 1999 and the last amended by Law of the Republic of Indonesia No. 4 of 2004 concerning Judicial Powers, judicial bodies are only authorized to receive, examine, adjudicate and resolve any disputed cases (*contentiosa*), while petition cases (*volunteers*) are not the authority of judicial bodies, unless stipulated by law to be the authority judiciary.<sup>21</sup> Thus, this authority must be explicitly stated in the legislation.

<sup>20</sup> M. Fauzan, 2001, Application for Adoption of Children for Muslim Families is the Absolute Authority of the Religious Courts, in the pulpit of law, Al-Hikmah, Jakarta, p. 73.

<sup>21</sup> Article 2 of the Law of the Republic of Indonesia Number 14 of 1970.

Application for adoption is not determined by Law no. 7 of 1989 as the authority of the religious court. If the religious court gives a voluntary decision granting the application for adoption and it turns out that the decision is not within its authority as determined by law, then the decision is not based on law.<sup>22</sup> Such a view is in line with Asikin Kusuma Atmaja's view in the Supreme Court's Decision No. 3139 K/Pdt/1984 dated November 25, 1987 which states that the court's authority over voluntar jurisdiction is limited to matters determined by the relevant laws and regulations.<sup>23</sup>

The provisions for adopted children in the Compilation of Islamic Law are related to the field of inheritance in which there are adopted children who can be given a will or a mandatory will. The inheritance sector is the authority of the religious court. The basis of the authority to try cannot be based on the existence of the Compilation of Islamic Law, which is then implicitly interpreted that religious courts have the authority to hear applications for adoption. On the other hand, if the application is in the form of ratification of the adoption of a child that is proposed to have urgency with an inheritance case which is the authority of the religious court, then the religious court can issue a declarative decision regarding the adoption of a child.

Second, view that religious courts have the authority to adjudicate child adoption. The religious court as the implementing agency of judicial power for the people seeking justice who is Muslim is related to the basic principle of judicial power that the court may not reject the case brought to him on the pretext that the law does not exist or is unclear, but is obliged to examine and try it.<sup>24</sup> Therefore, judges are obliged to explore, follow, and understand the legal values and sense of justice that live in society,<sup>25</sup> so several jurisprudence on adoption of children in the context of mutual help and the spirit of Islamic law are born.

This last view is in accordance with the opinion of K. Wantjik Saleh regarding civil procedural law that the court in addition to giving decisions on civil cases also provides determinations on petition cases. The said application must be based on existing statutory regulations or a living unwritten law that requires such a determination.<sup>26</sup>

Differences in views regarding the authority of the religious courts on child adoption cases must end after the enactment of RI Law no. 3 of 2006 which in Article 49 and its explanations explicitly stipulates the authority to determine the adoption of children based on Islamic law is the authority of the religious court.

The adoption of laws and regulations, namely Law No. 35 of 2014 changes to Law No. 23 of 2002 concerning Child Protection. The adoption of children is regulated in articles 39 to 41. This law already includes provisions regarding sanctions, namely from articles 77 to 89 but it is not complete because there are no sanctions for violations of articles 39 to 41 so that the opportunity for violations can still occur. For example, it can be seen in Article 39 paragraph (2a) which reads as follows:

"The adoption of the child as referred to in paragraph (1) must be registered in the birth certificate, without losing the child's initial identity".

Violation of the above article has no sanctions, so that not a few adopted children have their identities changed, such as on the birth certificates of adopted children the names of the adopting parents are included. To overcome this problem, the author gives the opinion that this law needs to be reconstructed, namely by adding a new legal norm, namely the article on sanctions. The article that the author proposes is article 89 A, namely:

- (1) Anyone who intentionally does not register his adopted child in the birth certificate as referred to in Article 39 paragraph (2a) may be subject to civil sanctions in the form of an obligation to register his adopted child on the birth certificate in accordance with the provisions of the legislation;
- (2) Anyone who intentionally changes the initial identity of his adopted child on the birth certificate as regulated in Article 39 paragraph (2a) may be subject to civil sanctions in the form of an obligation for adoptive parents to correct the initial identity of his adopted child as appropriate;
- (3) Any person who is subject to a civil sanction for violating Article 89A paragraph (1) and or paragraph (2) as mentioned above, if within 1 (one) year from the court's decision he does not implement it, he may be subject to imprisonment. a maximum of 1 month and/or a maximum fine of Rp. 3,000,000 (three million rupiah), with the obligation to continue to carry out civil sanctions, namely registering the adopted child on the birth certificate and not changing the identity of the adopted child.

## CONCLISION

Law Number 35 of 2014 concerning Child Protection in which it regulates the adoption of children, and the implementing rules still have weaknesses, namely: found in the community of adoptive parents who do not register their adopted child on a birth certificate; adoptive parents who change the initial identity of the adopted child; and illegal adoption of children. To overcome this problem, the regulations for adopting children need to be reconstructed, namely: First, adding new norms, namely Article 89A paragraphs (1), (2) and (3) containing legal sanctions for adoptive parents who do not register their adopted child on the birth certificate and or change the identity of the adopted child. The second is the addition of a new norm in Article 89B paragraphs (1) and (2) which contains sanctions for adoptive parents who adopt a child illegally or adopt a child without going through a court order.

<sup>22</sup> Musthofa Sy, 2002, *Peradilan Agama di Indonesia*, Malang, Kencana, page. 10

<sup>23</sup> M. Yahya Harahap, 1990, *The Position of Authority and Procedures for the Religious Courts*, Jakarta, Pustaka Kartini, p. 32

<sup>24</sup> Article 16 Paragraph (1) RI Law No. 4 of 2004 concerning Judicial Power

<sup>25</sup> *Ibid.*, Article 28 Paragraph (1)

<sup>26</sup> K. Wantjik Saleh, 1981, *Hukum Acara Perdata Rbg/HIR*, Jakarta, Ghalia Indonesia, page. 96

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