

Legal Protection of Child Adoption without Trial by Human Rights Perspective

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Abstract:

This research aims to describe and analyze legal protection issues as regards child adoption without trial from a human rights perspective. It is descriptive-qualitative empirical research. It applies a socio-legal approach and case approach. Results demonstrate that child adoption without trial may breed the following legal consequences: misunderstanding what is permissible and what is not from an Islamic point of view, interfering with family relationships and their rights, and fueling disputes between family members. These legal consequences happen as adoptive parent candidates are not well educated attributed to procedures for child adoption. Child adoption is also mentioned in the Law of the Republic of Indonesia Number 39 of 1999. The government, state, parents, and society shall not neglect and are obliged to concern about children's rights by endeavoring to make the legality of the child's identity status in the form of a birth certificate citation document.

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Introduction

Children's rights are one of the international top human rights issues, including in Indonesia, and thereby deserving specific attention from both the Indonesian government and society. We need an ideal condition to protect Indonesian children's rights, but that condition is unachievable because of the incapability of the state, i.e., the government of the Republic of Indonesia, to embody it.

Different attempts have been made to protect children's rights, one of which is child adoption. Child adoption keeps getting resistance yet are foreseeable to protect children concerned on the other side.

Taking care of, nurturing, and raising children are parents' duties towards children. Children own rights of being directed and guiding for their life by parents or guardians until they attain adulthood. Legal protections for the rights are actualized by legal norms and principles applicable in this state.

All children are entitled to legal protections from mental violence, abandonment, poor treatments, including abusing abuse when they are taken care of by their parents or guardians, or any party responsible for them. Since children are still living in their mothers' womb, they have possessed human rights which shall acquire legal protections. It is aligned with Nashriana, that:

“Protections of children within a society of any nation and country constitutes a benchmark for the civilization of the nation so meaningful efforts based on the government capability shall be made. The implementation of child protection is a legal action which may bring about other legal corollaries.” (Nashriana 2012)

Children, granted by God, are the most significant blessing for human beings. However, such blessing may not be given to all families. There are multiple factors causing it, with medical factors are the most preeminent, besides the age factor of both husbands and wives. Those with no children usually decide to adopt children.

Law-based child adoption is universally transferring a parenting process to adoptive from biological parents with manners predicated on local regulations to

validate it. Referring to the definition, the responsibility to take care of the child is transferred to parents who adopt his/her. However, it should be highlighted that biological parents still have a blood relation which has no boundary, and what is transferred here is only the responsibility. It is also aligned with Islamic legal principles, which justify and acknowledge child adoption and require that it shall engender any legal changes in the aspect of nasab, wali-mawali, and legacy. Islamic laws confirm that child adoption is permissible when it is not intended to interfere with blood relations between biological parents and their biological child. In other words, according to an Islamic viewpoint, child adoption only requires adoptive parents to take care of and give affection and proper education to the child adopted.

Problem Statement

Legal norms, as referred to in Government Regulation Number 54/2007 Article 1 Paragraph (2) on Implementation of Child Adoption, emphasize that:

“There are varied legal actions, one of which is child adoption, which transferring a child from his/her biological parents or a legal guardian or any party which owns the responsibility for nurturing, educating, and raising to adoptive parents.”

Child adoption is expected to cater to overlooked children’s rights, as referred to in Article 52 Paragraph (1) of Law Number 39 of 1999 on Human rights, that all children have the right to protection by parents, family, society, and state. So that is aims to describe and examine legal protection issues as regards child adoption without trial from a human rights perspective.

Method

This is descriptive-qualitative empirical research. “Research which orients the researcher to explore or define a situation thoroughly and deeply investigated is a descriptive one.” This research employs a socio-legal approach and case approach.

Discussion

1. A. Legal Consequences of Child Adoption without Trial from a Human Rights Perspective

Child adoption shall be carried out through a legal process and court order. If laws function as an order reinforcer and as social engineering, child adoption which shall be conducted through court order constitutes progress towards curbing the practice of adoption law that lives in the society, that child adoption will finally have legal certainty, for either the child adopted or adoptive parents.

Results exhibit several reasons why biological parents decide their children be adopted, and most reasons are dominated by economic factors. They cannot financially afford their children's needs because of non-permanent jobs. Meanwhile, from the adoptive parents' side, having no children from marriage drives them to adopt children. That child adoption is executed without a decision by the court institution.

Results also indicate that at least eight families from Mootilango Gorontalo District have adopted children without the process by the court institution. To observe the backdrop of child adoption without trial in Mootilango more clearly, we make a survey through interviews, whose answers are manifested in Table 1.

Table 1. Social Aspects of Child Adoption Without Trial

No.	Research Time	Child's Name	Adoptive Parents	Biological Parents	Reasons of Adopting a Child
1	January 3 rd , 2019	Rafasyah Mahmud	Habri Mahmud - Siska Moha	-	<ul style="list-style-type: none"> • Having no children after years of marriage • Having financial abilities to adopt children
2	January 3 rd , 2019	Khoirul Azka Paramata	Samsudin Paramata - Indra Kadir	-	<ul style="list-style-type: none"> • Having no sons • Sympathizing the child after knowing his biological parents' financial state
3	January 3 rd , 2019	Amel Harun	Erwin Harun -	-	<ul style="list-style-type: none"> • Having no daughters

			Atin Mayang		<ul style="list-style-type: none"> • Having financial abilities to adopt children
4	January 6th, 2019	Moh. Nurafli Pajili	Nurdin Pajili - Hani Mahajani	-	<ul style="list-style-type: none"> • Following a Javanese old saying, that to have children after years of marriage, one shall adopt children
5	January 6th, 2019	Aulia Rahman	Mijan Rahman - Erlina Mobiliu	-	<ul style="list-style-type: none"> • Fulfilling the child's biological parents' wish to adopt their children for the sake of a family relationship
6	January 7 th , 2019	Alif Ahmad Dalango	Nasir Dalango - Fatra Hanapi	Siska Pakaya	<ul style="list-style-type: none"> • Sympathizing the child's biological parents who are financially incapable of supporting him/her
7	January 9 th , 2019	Rahmatiyo Pateda	Yasid Pateda - Nina Mahajani	Arisa Bilondatu	<ul style="list-style-type: none"> • Having no children after years of marriage • Desiring to keep in touch with the husband's family
8	January 9 th , 2019	Muh. Taufiq Biqi	Mahmud Biqi - Asika Nunu	-	<ul style="list-style-type: none"> • Completing the family • Having no children after years of marriage

As demonstrated in Table 1, different reasons underlie child the adoption phenomenon in Mootilango. Among the reasons is having no children, which then encourages parents to adopt children. Meanwhile, other adoptive parents are willing to financially support the child adopted as his/her biological parents cannot afford the expense to raise a child. From the elucidation, child adoption in Mootilango is carried

out incorrectly because the people adopt a child without trial. This violates the adopted children's rights. Adoptive parents are only required to visit the local Department of Population and Civil Registration and submit several documents, i.e., a letter of statement written by the local government, stating that the child will be adopted and another letter of statement by the local police, amplifying the first one. Additionally, a statement letter with a stamp should also be submitted. On the letter, it is defined the originality of the child to be adopted. The local Department of Population and Civil Registration will proceed with the documents and make a letter of statement and a family card.

That child adoption process is regarded legitimate by adoptive parents and in the future, when unexpected problems concerning the adoption occur, they can exhibit those documents. However, this violates Law which governs that child adoption must be proceeded through the court order, as referred to in Article 20 of Government Regulation Number 54/2007. Germane to this negligence, adoptive parents' accountability is questioned. How can they assure the public in regard to their accountability as adoptive parents, who shall act as protectors of the child adopted when procedures they take to adopt the child concerned violate the law? Some legal consequences of adopting children without correct legal procedures as the result of adoptive parents who are not willing to be bothered by bureaucracy are:

- 1) The misconception of what is permissible and what is not from an Islamic point of view. For instance, adopting a child means making him/her as a *mahram*, and hence it is forbidden for the child concerned to marry a man/woman who s/he can marry before being adopted, and s/he is allowed to see *aurat* of men/women whose *aurat* is forbidden for them to see before being adopted.
- 2) Interfered family relationship and rights concerned. Child adoption may cause interfered rights and responsibilities of the families concerned. This legal act brings about a legal consequence which breaks the legal relationship between biological parents and their biological child and makes a new one, which is

between adoptive parents and the adopted child. For example, when an adopted daughter is about to marry, if she is a Moslem, she must be represented by her guardian. Those who shall be her guardian are her biological father or siblings, while her adopted father is prohibited.

- 3) Family disputes between family members. Adopting a child may bring on family disputes, e.g., legacy affairs. Adopted children will also be granted legacy, which can be formerly the rights of biological children, who may feel to be unjustly treated.

2. Protection of Adopted Children without Trial by the Laws and Human Rights Perspectives

Human rights issues are not new as Magna Charta, issued in England in 1215 and the Universal Declaration of Human Rights, issued by the United Nations on December 10th, 1948, have addressed them. Other related issuances are the International Covenant concerning Social and Political Rights and the Covenant concerning Economic, Social, and Cultural Rights (Matuankota 2011). As a nation which upholds its population's rights, Indonesia mentions human rights issues in the Preamble to the 1945 Constitution of Indonesia, specifically in Paragraph 4, and elaborates it into articles, namely Article 27-31, 33, and 34.

As human beings, children also have human rights after born, and other human beings or parties must not abandon the fact. Children's rights have gained universal acknowledgment, as referred to in the Charter of the United Nations and the Universal Declaration of United Nations in 1948 concerning Human Rights, the International Labor Organization (ILO) Declaration in Philadelphia in 1944, ILO Constitution, Universal Declaration of United Nations in 1959 concerning Children's Rights, United Nations Convention in 1966 concerning Economic, Social, and Cultural Rights, United Nations Convention in 1989 concerning Children's Rights, and ILO Convention Number 182/1999 on Violations and All Actions for the

Elimination of the Worst Forms of Child Labor (approved at the 87th International Labor Conference on June 17th, 1999 in Geneva). (Matuankota 2011) Every child shall be given protection but they must also be given opportunities for participating in older people's responsibilities, particularly those in relation to their lives.

Article 52 Paragraph (2) of Law of the Republic of Indonesia Number 39 of 1999 states:

“Children's rights are human rights which in the children's interests are recognized and protected before the law at the time of conception.”

Article 53 Paragraph (1) and (2) of Law of the Republic of Indonesia Number 39 of 1999 also states:

“(1) From conception, every child has the right to life, to maintain life, and to improve his standard of living; (2) From birth, every child has the right to a name and nationality.”

Referring to the two articles, the government, state, parents, and society must not disregard and must concern about children's rights, by making attempts in manifesting children's legalized identity status in the form of citation of birth certificates. However, how do we treat children regarded as neglected ones, children raised by poor families, or children raised in childcare institutions? In general, those children are considerably susceptible to the problem of clarity of legal status, especially in terms of identity (name, date of birth, originality, and citizenship), which shall be proven through the possession of a birth certificate document.

Article 2 of Presidential Decree Number 36/1990 on Convention on the Rights of the Child regulates children's rights for having protections from discriminative actions. Article 19 of Presidential Decree Number 36/1990 on Convention on the Rights of the Child states:

“The State will protect children from all forms of violence, abuse, neglect, and exploitation while they are under the care of their parents in implementing prevention and care programs.”

As referred to in Law Year 1999 on Human Rights, child protection is governed in Article 52-66. Article 56 states:

“(1) Every child has the right to know who his parents are and to be brought up and cared for by his own parents; (2) Should the parents of a child not be able to bring up and care for their child adequately and in accordance with the provision set forth in this Act, the child concerned may be fostered and/or adopted by another person, based on and in accordance with procedures laid down in prevailing legislation.”

Law of the Republic of Indonesia Number 35 of 2014 on Amendments to Law of the Republic of Indonesia Number 23 of 2002 on Child Protection, particularly Article 14, states:

“Every child has the right to be cared for by his own parents unless there is a valid reason and/or law indicating that separation is in the best interest of the child and is the last consideration.”

Article 16 Paragraph (1) states:

“Every child has the right to receive protection from being subjected to abuse, torture, or the imposition of inhuman sentences.”

Article 16 Paragraph (3) states:

“The arrest, detention, or child imprisonment is only carried out if it is in accordance with the prevailing law and can only be done as a last resort.”

Law Number 1 of 1974 on Marriage defines children as:

“A legal child is a child born in or as a result of a legal marriage.”

A legal child must receive full protection from his/her parents. *Burgerlijk wetboek* Chapter XII Section 1 on Legal Children Article 250 states:

“The husband shall be deemed to be the father of a child born out of or conceived during the marriage.”

Based on the definitions, hence, a legal child is a child born out of a legal marriage between his/her father and mother. It is possible that the child will reside with his/her biological parents, or s/he may reside with his/her biological father or mother only. (Endang and Chandra n.d.)

Conclusion

Child adoption is proceeded through an incorrect process, i.e., without trial. This has violated the adopted children's rights. Adoptive parents are only requested to visit the local Department of Population and Civil Registration and file several documents to bring a family card home. Adoptive parents regard this process as legitimate when in fact, it has violated laws and provisions, as referred to in Article 20 of Government Regulation Number 54/2007. Legal consequences of child adoption without trial are, e.g., misunderstanding what is permissible and what is not from an Islamic point of view, interfering with family relationships and their rights, and fueling disputes between family members. Another consequence may interfere with the rights and responsibilities of each party, specifically the parties of adoptive parents and their adopted child. The rights and responsibilities are absent as there are no legal documents which govern them so no one cannot sue both parties concerned to the court when an unexpected case or condition which needs legal perspectives occurs. Child protection is regulated by Laws of the Republic of Indonesia, such as Law of the Republic of Indonesia Number 39 of 1999, Presidential Decree Number 36/1990 on Children's Right Convention, and Law of the Republic of Indonesia Number 35 of 2014 on Amendments to Law of the Republic of Indonesia Number 23 of 2002 on Child Protection. The government, state, parents, and society shall not neglect and are obliged to concern about children's rights by endeavoring to make the legality of the child's identity status in the form of a birth certificate citation document.

Recommendation

All political parties should apply the principles of transparency in managing financial assistance from the regional budget in Gorontalo District, enabling the community to access the information germane to the plan and realization of the use

of regional financial assistance, which is published through media, either mass media, printed media, ballyhoos/banners, and others.

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