

Determination of the Authority to Adjudicate Child Adoption for Muslims in Indonesia

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Abstract

This article seeks to raise legal issues regarding child adoption, because adoption of children in the customary law system and Islamic law in Indonesia brings different legal consequences in family law. The focus of this study is to discuss the implications of the adoption of children in district courts and religious courts and the determination of the competence of the court in the adoption of children. This study uses normative research with a conceptual approach and legislation with the main data in the form of laws and regulations and the law of adoption. Based on the analysis, The Religious Judiciary uses the concept and legal basis of Islamic Law, while the General Judiciary uses the concept and legal basis in the form of Customary Law. Customary Law, adopted children have the same position, including in bequeathing, with the biological child, while in Islamic law does not know the concept of adopted children, but nevertheless for the benefit of the Compilation of Islamic Law gives the opportunity to the community to perform the adoption of the child.

Keywords: adoption, customary law, Islamic law

Abstrak

Artikel ini berupaya mengangkat permasalahan hukum mengenai pengangkatan anak, karena pengangkatan anak dalam sistem hukum adat dan hukum Islam di Indonesia membawa akibat hukum yang berbeda dalam hukum keluarga. Fokus penelitian ini adalah membahas implikasi pengangkatan anak di Pengadilan Negeri dan Peradilan Agama serta penentuan kompetensi pengadilan dalam pengangkatan anak. Penelitian ini menggunakan penelitian normatif dengan pendekatan konseptual dan perundang-undangan dengan data utama berupa peraturan perundang-undangan dan hukum adopsi. Berdasarkan hasil analisis, Peradilan Agama menggunakan konsep dan landasan hukum Hukum Islam, sedangkan Peradilan Umum menggunakan konsep dan landasan hukum berupa Hukum Adat. Dalam hukum adat, anak angkat mempunyai kedudukan yang sama, termasuk dalam mewariskan, dengan anak kandung, sedangkan dalam hukum Islam tidak mengenal konsep anak angkat, namun demikian untuk kepentingan anak, Kompilasi Hukum Islam memberikan kesempatan kepada masyarakat untuk melakukan pengangkatan anak.

Kata kunci: pengangkatan anak, hukum adat, hukum Islam

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Introduction

Social justice gets an important point in the foundation of the Republic of Indonesia, as stated in the 5th Sila Pancasila "Social justice for all Indonesians". The word "fair" even gets a large portion in the foundation structure of the State. Term "fair" which is a term in law, so that it seems that the law gets more attention to realize the social order in the country in order to realize Indonesia as a developed and dignified country. It is certainly

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understandable, that the law in the concept of state law is an important element, because in the state of law all devices of the state, even the public must be subject to the law. There is no power higher than the law, there is a "supremacy of law".

Justice can only be realized when the law has been properly enforced. When the law cannot be enforced, then social justice is just nonsense, even looking at the deterioration of the law, Hatta (Prastyo, 2013) in 1975 openly questioning "Is the Republic of Indonesia still based on Pancasila?". Then what is the law? The discourse on what is legal has taken a long time, with a wide range of views with a charge of philosophical value. Among those raised is the law that Dworkin (1977) proposed which is a criticism of H.L.A. Hart's views on the law. Hart, a legal thinker who is often considered neo positivism, argued that the law should be in the form of rules, both from the State and from society, but, Dworkin disagreed with Hart. According to Dworkin, the law is not only a form of "rule" but also covers principles, policies, or other types of standards that are not essentially some kind of rule.

The embodiment of justice and social justice in the State of law is the main, fundamental, as well as the most complex, broad, structural and abstract element (Purwanto, 2017). The principle of "social justice" was then breakdown into various propositions in the country's constitution, the Constitution of the Republic of Indonesia 1945, one of part in the constitution was about Chapter XIV of the National Economy and Social Welfare, all of them were breakdown in the legislation as its implementer.

One aspect of social welfare is the protection of child welfare that has been regulated in various laws, one of which is Law No. 35 of 2014 on Amendment to Law No. 23 of 2002 on Child Protection. The child as the next generation must get enough legal protection to be able to enjoy his life as a child. In some cases, children's rights should get serious attention from policymakers, such as in the case of divorce victims' children, children left behind by their parents, abandoned children, and so on in this case then the state makes room for the community to be able to participate in providing protection and providing children's rights through the mechanism of child adoption.

The appointment of children has been regulated in a government regulation, namely Government Regulation No. 54 of 2007 concerning the Implementation of Child Adoption (herein after abbreviated as PP No. 54 of 2007). The adoption of a child is a legal act that transfers a child from the environment of parental power, a legal guardian, or another person responsible for the care, education and raising of the child, into the family environment of the adoptive parent (Article 1 section 2 PP No. 57 of 2007). The appointment of children is in the best interest of the child in order to realize child welfare and child protection, which is carried out based on local customs and laws and regulations (Article 2 PP No. 57 of 2007).

The adoption of a child, however, is faced with two different legal systems, namely the Islamic legal system and the non-Islamic legal system. both legal systems have different legal implications/consequences on the position of the child in family law. The concept of adopted children in Islamic law has existed since Islamic law existed. At the

time of the Prophet Muhammad, he even adopted Zaid bin Harithah ra until then Rasulullah SAW reminded by Allah The Almighty through his words:

{وَمَا جَعَلَ أَدْعِيَاءَكُمْ أَبْنَاءَكُمْ ذَلِكَ قَوْلُكُمْ بِأَفْوَاهِكُمْ وَاللَّهُ يَقُولُ الْحَقَّ وَهُوَ يَهْدِي السَّبِيلَ}

“Allah does not place two hearts in any person’s chest. Nor does He regard your wives as (unlawful for you like) your real mothers, (even) if you say they are.¹ Nor does He regard your adopted children as your real children.² These are only your baseless assertions. But Allah declares the truth, and He (alone) guides to the (Right) Way.” (QS al-Ahzab: 4).

{مَا كَانَ مُحَمَّدٌ أَبَا أَحَدٍ مِنْ رِجَالِكُمْ وَلَكِنْ رَسُولَ اللَّهِ وَخَاتَمَ النَّبِيِّينَ وَكَانَ اللَّهُ بِكُلِّ شَيْءٍ عَلِيمًا}

“Muhammad is not the father of any of your men,¹ but is the Messenger of Allah and the seal of the prophets. And Allah has (perfect) knowledge of all things.” (QS al-Ahzab: 40)”

This provision contains a rule that there is a prohibition on adopting children other than their biological father, thus the adopted child is not entitled to inheritance from his adoptive parents. This distinguishes the concept of adoption between Islamic and non-Islamic law. The appointment of children so as not to be haphazard must then be done through the courts, as the perpetrators of judicial power in Indonesia. This is intended to provide legal protection to the child. Problems arise when faced with the competence of the court.

Judicial power in Indonesia is exercised by two institutions, namely the Constitutional Court and the Supreme Court and the judiciary under it, including the General Judiciary, Religious Justice, State Administrative Court and Military Judiciary, each of which has different competencies to examine and adjudicate certain cases. Two justices that tend to have conflicts of competence to prosecute are between the General Judiciary and the Religious Judiciary, for example it is about the adoption of children, because each of these trials has the competence to examine and adjudicate them.

The competence of the Religious Judiciary has undergone revolutionary changes since 2006 through Law No. 3 of 2006 on Amendments to Law No. 7 of 1989 on Religious Court. competence is to examine and adjudicate cases for justice seekers for people who are Muslims, even non-Muslims (specifically for sharia economic matters), to be resolved fundamentally in Islamic law (Bintoro, 2017). Thus it can be interpreted, that the Religious Judiciary has the competence to examine and adjudicate the adoption of children for legal subjects who are Muslims.

The District Court as one of the courts under the jurisdiction of the General Judiciary also has the competence to examine and adjudicate cases of child adoption. However, in practice, the adoption of children who are Muslims, even carried out by prospective parents who are Muslims, tends to be done in the district court which is in fact part of the General Judicial environment.

This is the interest of researchers to raise legal issues about the adoption of children, because the adoption of children in the two legal systems brings different legal consequences in family law. It is not uncommon for the adoption of this child, in the future it tends to cause problems in family law. The focus of this study is to discuss the implications of the adoption of children in district courts and religious courts and the determination of the competence of the court in the adoption of children.

In order to answer the legal issue regarding the competence of the court in examining and adjudicating the case of child adoption, legal research will be conducted. In order for researchers to get a comprehensive picture, then to discuss it is used three approaches, namely the approach of legislation, conceptual approach and case approach, with objects in the form of legislation, legal theory, which is then analyzed qualitatively using interpretation methods.

Discussion

Competence of Religious Court and General Court

The establishment of religious court as it is today can not be separated from the historical process of dispute resolution or cases that emerged in society in the early days of Islam developed in Indonesia. The history of the Religious Court Institute in Indonesia as one of the executors of judicial power has been quite a long time, as long as Islam itself exists in Indonesia (Suma, 2004). It is said that Islam is a legal religion in the sense of the word, "A rule that governs man with The One True God (*habluminallah*) that can be fully implemented by the Muslims personally (person), also contains rules governing human relations with other human beings (*habluminannas*) and is in the life of people who need the help of state violators to carry it out in full (Suma, 2004).

Islam and Islamic Law always go hand in hand (Ali, 1990). This is because Islamic law is a living and inherent law in the lives of Muslims (Shomad, 2010; 2011; and 2011). The existence of religious court institutions is a manifestation of the increasing acceptance of religious teachings by mankind. The position of judge in the Islamic judiciary is the completeness of the implementation of Islamic shari'a, while the judiciary itself is a collective soul (*fardlu kifayah*), which is something that can exist and must be done under any circumstances (Noeh and Adnan, 1983).

The existence of the Islamic Judiciary has experienced ups and downs until now (Sutomo et.al., 2016). Its naturalistic development is towards the Islamic Court as it applies in the past to matters that are still relevant and or the ideal Islamic Court in the future in accordance with the ideals of Islam as a religion of revelation, as well as in the framework of its development efforts in the context of the development of National law. The existence of the Islamic Judiciary began with a simple institutional according to the needs of the community at that time which then developed in accordance with the needs of the law in society. The Islamic judiciary in its long history is carried out not only by special court judges, but also by the government as the executive ruler (Ahmad R., 2015).

The Islamic judiciary in Indonesia is one of the very old Islamic institutions that has experienced ups and downs (Matrais, 2008). At first the Islamic Judiciary was organized simply, then became one of the executors of government power in the form and authority of a variety. It undergoes rapid development in its structure, power and procedures. Its position is increasingly important, especially in carrying out its function to uphold the law and justice (Bisri, 1997).

The Islamic judiciary existed long before Indonesia became independent (Hamuyuddin, 2016). The Islamic judiciary known later as the Religious Judiciary existed along with the development of society at that time, then obtained perfect forms of state regulation in the Islamic kingdoms. This is because Muslims as members of the community always want *kaffah* in carrying out their religious teachings (Nadwi, 1982).

The dynamics of the Religious Judiciary in Indonesia can be qualified into 5, namely the Islamic kingdom period, the colonial period, the old order period and the new order period and the reform period until now. In those five periods, the development of Religious Justice competence experienced ups and downs. During the Islamic kingdom, the Religious Judiciary basically existed long before Indonesia became independent, some even mentioned in the seventh or eighth century AD (Ahmad R, 2015), in accordance with its level and form as determined by Islamic Law. The implementation of Islamic teachings, at first has not been formed as an orderly and systematic society, but then because of the need for the development of teachings and implementation in society, then the order develops as Islamic society as it is today. The competence of the Religious Judiciary at this time is to cover all aspects of human life. The Islamic judiciary was originally in the form of *Tahkim*, which is, a submission to a *Muhakam* in order to bring down a law on a dispute (Indasari, 1979). Appointment was directly by the parties in dispute. The establishment and appointment are carried out in deliberation through *ba'it Ahlul Hilli wa Aqqli*, i.e. the appointment of a person who is trusted by the assembly or a group of prominent people in the community such as the chief of the tribe or the traditional figure and others. Further development, Islam as a religion and law is increasingly entrenched and dominant coloring the entire life of most Indonesians (Matrais, 2008). This fact came into force since Islam was established as an official religion in the Demak Kingdom around the fifteenth century.

During the colonial period, the competence of the Religious Judiciary began to diminish. The competence of the Religious Judiciary covers only the field of family law, namely marriage and the giving of suggestions or considerations on Islamic religious issues to the government if requested. This happened as a result of the implementation of *receptie* theory in the Dutch colonial era and almost unchanged during the Japanese colonial era. Institutional structuring of the Religious Judiciary began to be carried out since Indonesia became independent with the issuance of Emergency Law No. 1 of 1951 on Temporary Measures to Organize The Unity of Composition, Power and Events at the Civil Court. The Adat and Swapraja courts, in such laws, are abolished. Based on Article 1 paragraph (2) and (4) of Emergency Law No. 1 of 1951, for religious courts within the Adat

and Swapraja Judiciary, if it is a separate part of the judiciary (Adat and Swapraja) is not dissolved, and as a continuation will be regulated by Government Regulation, for example government Regulation No. 45 of 1957 on Regulations on Religious Courts Outside Java-Madura. This Government Regulation provides a strong legal basis for the existence of Religious Justice in areas outside Java and Madura as well as parts of South Kalimantan. Based on the Government Regulation, the Minister of Religious Affairs issued its Determination No. 58 of 1957 on the Establishment of 54 Religious Courts/Mahkamah Syariah and 4 Courts of Religion/Mahkamah Syariah Province for the region of Sumatra. Then followed by the establishment of the Court of Religion/Mahkamah Syariah in Eastern Indonesia with the Court of Religion/Provincial Sharia Court in Banjarmasin and Ujung Pandang (Makassar) (Matrais, 2008).

The existence of the Religious Judiciary during the new order was stronger with the establishment of Law No. 7 of 1989 on Religious Justice. The competence of the Religious Judiciary is added not only in the field of marriage, but also inheritance, wills, and grants made under Islamic law, as well as *waqaf* and *shadaqah*. The existence of the Religious Judiciary during the reform period until now began from 1998 until now. In 2009, as an effort to establish judicial power and realize an integrated justice system, the Law No. 4 of 2004 on The Power of Justice as the basis for the administration of judicial power needs to be replaced, so that in 2009 enacted Law No. 48 of 2009 on The Power of Justice in replacement of Law No. 4 of 2004. The enactment of Law No. 48 of 2009 has implications for the renewal of Law No. 7 of 1989 on Religious Justice which was later amended by Law No. 3 of 2006 and a second amendment in 2009 through Law No. 50 of 2009. The reform is carried out to realize the implementation of independent judicial power, and a clean and authoritative judiciary, which is carried out through the structuring of an integrated justice system, especially the Religious Judiciary is constitutionally a judicial body under the Supreme Court. At this time, not only the existence of the Religious Judiciary as a perpetrator of judicial power is strengthened, but its competence is also expanded. The religious judiciary has the competence to examine, adjudicate and resolve cases in the field of marriage, inheritance, wills, grants, *waqf*, *zakat*, *infaq*, *shadaqah* and Sharia economy (Bintoro, 2018).

Based on the five times of development of the Religious Judiciary, it is clear that the Religious judiciary is indeed devoted to those who are Muslims. The specificity of Muslims is inseparable from the influence of Islamic teachings and law itself in Indonesia. Islamic law prevailing in Indonesia, not only formally applicable, i.e., becomes a positive law based on or because it is appointed by legislation. Islamic law in Indonesia itself, has become a living law in the community, because Islamic law is a religious entity embraced by the majority of the population to date, and in its *amaliah* dimension in some areas it has become part of the tradition (custom) of the community that is sometimes considered sacred.

The development of religious justice competence is directly proportional to the problem of Muslim life, because it becomes its *sui generis*. However, since Indonesia is not

an Islamic state, the authority of the Religious Judiciary does not concern all muslim issues, but only related to the issue of family law (*ahwal al-syakhsiyah*) plus a little *muamalah* issue (as stipulated in Article 49 of Law No. 3 of 2006).

The addition of the competence of the Religious Judiciary, is in accordance with the development of the law and the legal needs of the community, especially the Muslim community. Positive laws will only be effective when aligned with the laws that live in society. All that is the competence of the Religious Judiciary, whether it concerns marriage, inheritance, waqf, zakat, to the problem of Sharia economy, is something that has been attached to the Muslim community. The expansion of the competence of the Religious Judiciary, thus is an inevitability, considering there must be a symmetrical continuity between the development of society and the legal arrangement, so that there is no gap between the problem by means and solving location.

There is always a relationship between people who are Muslims and the teachings of Islam and the enforcement of Islamic Law which later becomes the competence of the Religious Judiciary, therefore, there is an inevitability that the legal relationship between people who are Muslims must be resolved based on Islamic law.

The historical journey of the Religious Judiciary is longer in its retroactive than its tidal wave. This opinion can be justified, given the development of the Religious Judiciary in Indonesia, historically based on the explanation above, has its own characteristics, that it is continuously characterized by a struggle between politics and Islamic legal institutions, which sometimes favors and benefits the continuity of this institution and not infrequently weakens its existence. A favorable history in the development of The Religious Judiciary in Indonesia can be found during the Islamic kingdoms in the archipelago, then receded when the wave of colonialism came to power, including at the beginning of independence, although there was a re-strengthening of the existence of the Religious Judiciary. During the new order and the current reforms, the position and competence of the Religious Judiciary has become stronger.

Law No. 3 of 2006 which is a revision of Law No. 7 of 1989 on Religious Justice. The Religious Judiciary, through this law, is the perpetrator of the judicial power to enforce law and justice for the people seeking justice in certain cases between people who are Muslims as stipulated in Article 49. The provisions of Article 49 govern that:

“The court of religion is tasked and authorized to examine, decide, and resolve cases in the first degree between people who are Muslims in the field; marriage, inheritance, wills, grants, endowments, *zakat*, *infaq*, *shadaqah* and sharia economy”.

While in the explanation of Article 49 mentioned that:

“What is meant by "sharia economy" is an act or business activity carried out according to sharia principles, among others include sharia banks, sharia microfinance institutions, sharia insurance, sharia reinsurance, sharia mutual funds, sharia bonds and sharia medium-term securities, sharia securities, sharia financing, sharia banks, sharia financial institutions pension funds”.

The affirmation of competence provides legal basis to religious courts in resolving certain cases including violations of the Marriage Law and its implementing regulations, as well as strengthening the legal basis of the Sharia Court to carry out its competence in the field of jinayah based on qanun. The competence of religious courts, even expanded in the field of sharia economic disputes, the choice of law (option) in inheritance is declared removed. In addition, within the Religious Judiciary can be held special courts regulated by law, namely Islamic sharia courts that are regulated separately by the law namely the Sharia Court in NAD Province formed by the Special Autonomy Law.

Property disputes or other civil disputes between people who are Muslims under the provisions of Law No. 3 of 2006 can be directly decided by a religious court. Other competencies are in the case of wills, endowments, zakat and infaq, and new competencies in the field of marriage in the form of the determination of the adoption of children. Religious courts can also give testimony and can provide information, consideration, and advice on Islamic law to government agencies. Meanwhile, to strengthen competence in the islamic economy, Law No. 21 of 2008 on Sharia Banking dated July 16, 2008, which regulates sharia economic disputes becomes the absolute competence of religious courts.

In contrast to the Religious Judiciary, whose existence has its ups and downs because it is ruled by Islamic law as a law embraced by the majority of Indonesian society and power, the General Judiciary has a duty to examine, decide and adjudicate civil cases and criminal cases conducted by district courts domiciled in the district/municipality.

At the time of the Dutch East Indies Government carried out the establishment of regulations in the field of justice until finally on May 1, 1848 was determined Reglement on the composition of the court and the discretion of the judiciary 1848 (*Reglement Ordonantie/RO*). In the R.O. there are differences in the application of the court between the Indonesian nation and the Europeans diama in Article 1 RO mentioned there are 6 kinds of courts: First, *districtsgerecht*, which has the competence to adjudicate civil cases with native Indonesians as defendants with a price value below f20-. Second, *Regenschapgerecht*, which has the competence to adjudicate civil cases for native Indonesians at a price of f.20-f.50 and as an appeals court for *districtsgerecht* decisions. Third, *Landraad*, which is a normal day-to-day trial for native Indonesians and with the exception of civil cases of the Chinese – people who likened the law to the Indonesians, as well as in cases where they were withdrawn by Europeans or Chinese in addition *landraad* also served as an appeals court for cases decided by *regenschapgerecht* as long as appeals were possible. Fourth, *Rechtbank van omgang* was converted in 1901 into *residentiegerecht* and in 1914 became a *landgerecht* that has the competence to prosecute in the first and last level by not distinguishing any nation that becomes a defendant. Fifth, *raad van justisie*, which is located in Jakarta, Semarang and Surabaya that applies to all nations in accordance with the provisions. Sixth, *Hooggerechtshof*, which is the highest level court and is in Jakarta to oversee the course of the judiciary throughout Indonesia.

During the Japanese reign in Indonesia, it began on March 8, 1942 with the surrender of General Ter Poorten (Mertokusumo, 1983), Japan temporarily passed the

Japanese Army Law on March 8, No.1, which states that all laws and regulations of the Dutch East Indies government used to be in force as long as they did not conflict with the rules of the Japanese Army. For the Japanese judicial process establishes Law No. 14 of the Dai-Nippon Army Government Court Regulation, under which the Law is established the courts are actually a continuation of the existing courts: First, Gun Hoon, is the Kawedanan Court, a continuation of the *districtsgerecht*. Second, Ken Hooiin, District Court, is a follow-up to *regenschapsgerecht*. Third, *Keizai Hooiin*, a police court, is a follow-up to *Dati Landgerecht*. Fourth, Tihoo Hooiin, which is the District Court, is a continuation of *Lanraad*. Fifth, Kooto Hooiin, which is the High Court, is a continuation of *Raad van Justisie*. Sixth, Saikoo Hooiin, Supreme Court, is a continuation of *hooggerechtshof*. This Japanese reign abolished dualism in the judiciary with Osamu Seirei 1944 No.2 stipulated that Tihoo Hooiin was a court for all groups of the population, using the HIR event law.

During the Independence of the Republic of Indonesia, the period 1945-1949. Provision of Article II of the Transitional Rules of the Constitution⁴⁵ stipulates that: all existing state bodies and regulations are still effective as long as a new one has not been held according to this Constitution. This means that all applicable court board provisions will remain in effect as long as no changes have been made. With the Dutch Occupation Government in parts of Indonesia, the Dutch issued a regulation on judicial power, namely *Verordening No. 11 of 1945* which stipulates judicial power in the general judicial environment carried out by *Landgerecht* and *Appelraad* by using HIR as the law of the event. At this time also issued Law No. 19 of 1948 on the National Judiciary which was never implemented from 1949 to 1950, the provisions of Article 192 of the RIS Constitution stipulated that *Landgerecht* be converted into a District Court and *Appelraad* amended to the High Court (Mertokusumo, 1983). In the period, 1950-1959, the Emergency Law No.1 of 1951 held the unification of the composition, power, and events of all District Courts and all High Courts in Indonesia and also abolished several courts including *swapraja* courts and customary courts. In the period 1959 until the issuance of Law No. 14 of 1970 on the Power of Justice, there are several special courts within the District court, namely the Economic Justice (Emergency Law No. 7 of 1955), land reform (Law No. 21 of 1964). Then in 1970 the Law No. 14 of 1970 which in Article 10 stipulates that there are 4 judicial environments namely: general judiciary, religious judiciary, military judiciary and state administrative court.

The general judiciary was then strengthened institutionally through Law No. 2 of 1986 on the General Judiciary, and has been amended twice through Law No. 8 of 2004 and Law No. 49 of 2009. Article 50 provisions govern that the District Court is tasked and authorized to examine, adjudicate, decide, and resolve criminal and civil cases in the first level. Article 51 paragraph (1) regulates that the High Court is in charge and authorized to adjudicate criminal and civil cases at the appeal level. The authority of the District Court in criminal cases covers all forms of criminal acts, except military crimes that are the authority of the military judiciary. While in civil cases, the District Court is authorized to

file civil cases in general, except certain civil cases that are the authority of the Religious Court.

Based on this explanation, it can be identified temporarily that the Court of Religion exists as a result of the existence of Islamic law, while the General Judiciary is a court that examines civil cases except what is the competence of the Religious Judiciary and also examines criminal cases. Thus, the competence of the Religious Judiciary and the General Judiciary is different.

Implications of Child Adoption

Family is a noble joint consisting of father, mother, and son. The presence of a child is something that is awaited by married couples. The desire to have children is a human and natural instinct, but sometimes that instinct is struck by the fate of God where the will to have children is not achieved. For married couples who do not have children, of course want to feel the warmth of the family with children, so that in turn there is a condition in which a child is fostered by a person who is not his biological parents. On the other hand, the condition and position of the child is also obtained legal protection by the state. In the condition that a set of rules is required to give a family the opportunity to raise a child, while paying attention to the legal protection of the child.

The appointment of a child is a civil case, so against it is examined in the district court within the scope of the General Judiciary or religious courts within the scope of the Religious Judiciary. The legal basis for the adoption of children is Law No. 35 of 2014 concerning Amendment to Law No. 23 of 2002 on Child Protection; Government Regulation No. 54/2007 on The Implementation of Child Adoption; Regulation of the Minister of Social Affairs of the Republic of Indonesia Number 110/HUK/2009 concerning Child Adoption Requirements; Regulation of the General of Social Rehabilitation No. 02 of 2012 concerning Technical Guidelines for Child Adoption Procedures. All legal sources the adoption of children can only be done in the best interests of the child and carried out based on local customs and applicable laws and regulations. Thus the adoption of children is allowed as long as it is for the sake of welfare. The appointment of children is qualified into two, namely the adoption of children between Indonesian citizens; and the adoption of children between Indonesian citizens and foreign nationals.

Regardless of the procedure of adoption of the child, it should be noted here that against the adoption of the child there is a dualism of the rule of law, namely customary law and Islamic law, while the state only provides rules related to the procedure of adoption of children that are more administrative.

The source of the law of adoption of children according to customary law is the customary law of each customary region, each customary region has its purposes, conditions and. The procedures for the adoption of children are thus different, but nevertheless have the same purpose of continuing offspring or for the benefit of adoptive parents such as examples in central Java society when the adoption of children is carried out by people who do not have children under the pretext of "fishing" so that adoptive

parents after adopting the child has their own offspring. As for the indigenous people of Lampung in generally raised children carried out by families who do not have sons with the aim that someone can take care of the bodies of their adoptive parents if they later die. The purpose of the adoption of children in Bali is related to the belief that who can take care of the bodies of parents perfectly (perform *ngaben* ceremony) according to Hindu teachings is a boy (Aminah, 2018).

The requirements for both adoptive and prospective adoptive parents of each customary law are also different. for example, the requirements of adopted children in various traditional areas, among others, children who are adopted in Cikajang are infants up to the age of 3 years, in Perindu (West Kalimantan) that is the child after release, in Pontianak the child from the age of 49 to 5 years, in Kendari the child is 1 year to 5 years old, in Aceh the child should not be less than 20 years old , but in Central Lombok there are called *akon* children (children who are recognized even *akon* children can be done to married children (Aminah, 2018).

Regarding the rule of customary law regarding age difference is not only found in Aceh, but can also be found in other areas, among others (Aminah, 2018): in Garut the difference between the age of 15 years between prospective adoptive children and prospective adoptive parents and in Sambas the difference must be appropriate/appropriate between the child and the parents in general. In general, the adoption of children according to customary law is carried out using their own customary procedures (sometimes performed with certain traditional ceremonies) and required approval from parents or families of prospective adoptive children and required witnesses from each family both from the family of the prospective adoptive child and the family of the prospective adoptive parents.

The adoption of a child has a legal effect that is the result of the law in the legal relationship between the adopted child and the adoptive parent, which is to create a new legal relationship. In certain customary communities, namely in Bali, the emergence of new legal relationships between adopted children and adoptive parents causes a breakup of legal relations between adopted children and their biological parents. In contrast to Balinese customary law, Javanese customary law has caused new legal relationships between adopted children and adoptive parents, but does not break the legal relationship between adoptive children and their biological parents (Aminah, 2018). So the two legal relationships are the same still going along with the existence of their respective rights and obligations on a reciprocal basis. The rights and legal obligations of a child reciprocally with his parents in the right of alimentation. The emergence of alimentation rights is also a result of the law arising from the adoption of children, namely when the child is a child is the obligation of parents to maintain, prosper, provide a living, shelter and a good education for the child, after the parents are *uzur* and can not afford both socially and economically the child has an obligation to always respect, maintain, provide shelter even if the parents have no income in the old days.

Another legal effect is the emergence of inheritance between adopted children and adoptive parents. In general, in indigenous communities with the adoption of children, it raises the right to bequeath each other between adopted children and adoptive parents, especially according to Balinese custom where the adoption of a child creates a new legal relationship that is adoptive with adoptive parents and severs the legal relationship between the adopted child and the biological parent (the adoption of the child *plena*), then the adopted child and adoptive parents bequeath each other.

Unlike Javanese society, there are two legal relationships between adoptive children and adoptive parents and biological parents, the adoptive child is entitled to inheritance from both adoptive parents and biological parents (adoptive children get two sources), but the inheritance of the adoptive parents is limited to the property of the child is not like the inheritance of the biological parents who cover the property of *gono gini* or the original property.

The legal system used in devolution, other than customary law is Islamic law. However, Islamic law does not recognize the concept of adoption, because there is a prohibition on even the adopted child to his adoptive parents, which will ultimately equate the adopted child with the biological child. This is as stipulated in the QS. Al-Ahzab verse 4 which means:

“Allah does not place two hearts in any person’s chest. Nor does He regard your wives as (unlawful for you like) your real mothers, (even) if you say they are.¹ Nor does He regard your adopted children as your real children.² These are only your baseless assertions. But Allah declares the truth, and He (alone) guides to the (Right) Way.”.

Based on this verse, the concept of child adoption carried out by people of Islamic faith has no legal consequences in Islam, in other words a Muslim when raising a child only for the purpose of raising and the interests of the child is not only making the adopted child as his biological child. The adopted child does not have the same rights as the biological child, i.e. the adopted child is not entitled to include the name of the adoptive father as the name Bin/Binti in front of his name, the adopted child is not entitled to bequeath to his adoptive parents and the adopted child remains not a mahram of his adoptive parents.

The rights and obligations that exist are only social, namely adoptive parents can make efforts to choose and protect their adopted children for the benefit and welfare of their children and it can be done with the intention of helping by asking *ridho* and reward from Allah SWT, while the adopted child should respect and appreciate and even pay attention and help the adoptive parents especially if the adoptive parents are old and unable.

In the compilation of Islamic law Article 209 which regulates the provision of compulsory wills that are wills given to adopted children or adoptive parents based on the principle of justice, balance and benefit of obtaining a share should not exceed 1/3 (one-third) of the inheritance of the Heir. Based on this KHI, then the adopted children, in the

Islamic Law system only has the right of compulsory will that is a maximum of 1/3 of the inheritance.

The two legal systems in the adoption of the child have different legal consequences. In the customary legal system, adopted children have the same position as the biological child, including in the case of bequeathing, while in the Islamic legal system, the adopted child has no right to bequeath.

Competence of the Court on the case of Child Adoption

Two courts that have the competence to examine cases of child adoption are district courts that belong to the jurisdiction of the General Judiciary and religious courts that belong to the jurisdiction of the Religious Judiciary. This is because the adoption of children is included in the field of civil affairs, and the two courts have the competence to adjudicate civil cases.

At the time of the enactment of Law No. 7 of 1989 on Religious Justice, this law still provides a forum for the resolution of civil disputes, either through the General Judiciary or Religious Justice, as stipulated in Article 50 and Article 86. Disputes of ownership in the Law on Religious Justice into the competence of the General Judiciary are included in the dispute of inheritance ownership, because the competence of the Religious Judiciary in the field of inheritance only covers the determination of who is the heirs, the determination of the inheritance, the determination of the share of each heir, and the distribution of the inheritance.

Law No. 7 of 1989 was a changed in 2006 through Law No. 3 of 2006 on Amendments to Law No. 7 of 1989 on Religious Justice. In Law No. 3 of 2006 concerning legal options as mentioned in the general explanation of Law No. 7 of 1989 which states that the parties before litigants may consider choosing what laws to use in the division of inheritance have been declared invalid by the general explanation of Law No. 3 of 2006.

Article 50 also received attention by legislators in order to strengthen the competence of the Religious Judiciary. Article 50 of Law No. 7 of 1989 formulates:

In the event of a dispute concerning property or other civil rights in the cases referred to in Article 49, then specifically regarding the object of the dispute must be decided first by the Court within the General Judiciary.

While Article 50 was amended by Law No. 3 of 2006 to:

- (1) In the event of a property dispute or other dispute in the case as referred to in Article 49, specifically concerning the object of the dispute shall be decided first by the court within the General Judiciary.
- (2) If there is a dispute of property as referred to in section (1) whose legal subject is between people who are Muslims, the object of the dispute shall be decided by the court of religion together with the case as referred to in Article 49.

Initially the Religious Judiciary did not have the competence to examine an inheritance case when there was a property dispute. Such property rights must be settled in the district courts which are the jurisdiction of the General Judiciary. This provision is

then declared invalid by Law No. 3 of 2006 on Article 50. This provision authorizes religious courts to simultaneously decide on property or other civil disputes related to the object of disputes set forth in Article 49 if the subject of disputes between people of Muslim faith. This avoids trying to slow down or stall dispute resolution because the reason for the dispute of property or other civility is often made by parties who feel harmed by a lawsuit in a religious court.

Conversely, if the subject who disputes property or other civil rights is not the subject of dispute in the religious court, the dispute in the religious court is postponed pending the verdict of the lawsuit filed with the General court. The suspension is only made if the objecting party has submitted evidence to the religious court that it has registered a lawsuit in the district court against the object of the dispute similar to the dispute in the religious court. In the case of the object of dispute of more than one object and that is not related to the object of the dispute submitted by the objection, the religious court does not need to award the verdict, against the object of the dispute that is not related in question.

Article 49 of Law No. 3 of 2006 has also expanded the competence of the General Judiciary through the formulation of:

The religious court is tasked and authorized to examine, decide, and resolve cases in the first degree among people who are Muslims in the field of:

- a. marriage;
- b. heirs;
- c. testament;
- d. grants;
- e. waqf;
- f. zakat;
- g. infaq;
- h. shadaqah; Dan
- i. sharia economy.

The explanation of Article 49 states that the marriage cases examined by the Religious Judiciary include: the license of more than one wife; Permission to enter into marriage for a person who is not yet 21 (twenty-one) years old, in the case of a guardian's parent, or family in a straight line there is a difference of opinion; mating dispensation; prevention of mating; refusal of marriage by the Registrar of Marriage; annulment of marriage; claims of negligence for the obligations of husband and wife; divorce from divorce; divorce lawsuit; settlement of shared property; mastery of children; the mother may bear the cost of maintaining and educating the child if the father who should be responsible does not comply with it; but if you are in need of you, ask them from there is no difficulty in determining the cost of livelihood for the ex-wife. a verdict on the valid of a child's indement; a ruling on the revocation of parental power; revocation of guardian power; the appointment of another person as guardian by the court in the case that a wall's power is revoked; the appointment of a wall in the case of a child who is not old enough to be 18 (eighteen) years old left by his parents; the burden of indemnity obligations on

the property of children under his authority; determination of the origin of a child and the determination of the adoption of a child under Islamic law; a decision on the refusal of information to perform a mixed marriage; statement on the validity of marriage that occurred before Law No. 1 of 1974 on Marriage and carried out according to other regulations. In the field of inheritance, the Religious Judiciary has the competence to determine who is the heir, the determination of the inheritance, the determination of the share of each heir, and the distribution of property

And the inheritance, as well as the determination of the court at the request of a person on the determination of who is the heir, the determination of the share of each heir. In the will of competence of the Religious Judiciary includes: the act of a person giving an object or benefit to another person or institution/legal entity, which applies after the giver dies. In the field of competency grants Religious Justice includes: Giving an object voluntarily and without reward from a person or legal entity to another person or legal entity to own. In the field of waqf, the competence of the Religious Judiciary includes: the actions of a person or a group of people (wakif) to separate and/or hand over some of his property parts to be used forever or for a certain period of time in accordance with his interests for the purposes of worship and/or general welfare according to sharia. Competence of the Religious Judiciary includes in the field of zakat, namely property that must be set aside by a Muslim or a legal entity owned by a Muslim in accordance with the provisions of sharia to be given to those who are entitled to receive it. The competence of the Religious Judiciary in the field of infaq, namely the act of a person giving something to others in order to cover the needs, whether in the form of food, drink, donating, giving sustenance (gifts), or giving something to others based on sincerity, and because Allah Subhanahu Wata'ala. In addition, the Religious Judiciary also has competence in the field of shadaqah, namely the act of someone giving something to another person or institution/legal entity spontaneously and voluntarily without being limited by a certain amount of time and amount in the hope of god's pleasure Subhanahu Wata'ala and reward alone. The last judicial competence is the field of sharia economy, namely acts or business activities carried out according to sharia principles, including: sharia banks; sharia microfinance institutions; sharia insurance; sharia reinsurance; sharia mutual funds; sharia bonds and sharia medium-term securities; sharia securities; sharia financing; sharia pawnshops; pension funds of sharia financial institutions; and sharia business.

Based on this explanation, it can be interpreted that religious courts have a broader competence, almost enc covers all aspects of human civility, with the basis of Article 1 number 1 of Law No. 50 of 2009 on the Second Amendment to Law No. 7 of 1989 on Religious Justice which regulates that the Religious Judiciary is a judiciary for people who are Muslims. The provision of article 1 is reaffirmed in Article 2 of Law No. 3 of 2006, that "The Religious Judiciary is one of the perpetrators of judicial power for people seeking justice who are Muslims on certain matters as referred to in this Law." Certain cases referred to in Article 2 include all competencies as stipulated in Article 49 that have been described previously.

Based on the provisions of Article 1 and Article 2 of the Religious Justice Law, it confirms that the Religious Judiciary is an Islamic Judiciary that applies to Muslims in the field of marriage; heirs; testament; grants; waqf; zakat; infaq; shadaqah; and sharia economy. For people who are Muslims apply Islamic law and become the competence of the Religious Judiciary. This is what is then referred to as the Principle of Islamic personality. Those who submit and can be subjugated to power within the Religious Judiciary are those who are "Muslims". Islam is the basis of the competence of the court in the religious judiciary regardless of the degree of faith. The concept of Islamic personality is what applies to the competence of the Religious Judiciary before the enactment of Law No. 3 of 2006.

Provision of Article 2 of Law No. 3 of 2006, stipulates that the Religious Judiciary is one of the perpetrators of judicial power for people seeking justice who are Muslims on certain matters as referred to in this Law. This regulation indicates that the Religious Judiciary is a trial for people who are Muslims against certain matters. Certain cases are stipulated in Article 49 of Law No. 3 of 2006 which has given limits on what types of cases are competence, including the field of marriage, inheritance, wills, grants, waqf, zakat, infaq, shadaqah and Sharia Economy. Sharia economy according to the explanation of letter (i) Article 49 is an act or business activity carried out according to sharia principles, among others include: Sharia banks, sharia microfinance institutions, sharia insurance, sharia reinsurance, sharia mutual funds, sharia bonds and sharia medium-term securities, Shariah securities, sharia financing, sharia pawnshops, pension funds of Islamic financial institutions, sharia businesses.

Both arrangements, have identified the subject and object of the competence of the Religious Judiciary. The subject is a person, however it is necessary to understand that the subject of law as a stakeholder of rights and obligations in law can be qualified to be a person and a legal entity. Therefore, it can be interpreted that the subject in this case includes not only people, but also legal entities.

Islamic phrase, according to the explanation of Article 49 of Law No. 3 of 2006 is to include people or legal entities who themselves subject themselves voluntarily to Islamic law on matters that become the authority of the Religious Judiciary in accordance with the provisions of this article. This provision affirms that Muslims are not only attached to the subject of law in the form of people, but also legal entities. In addition, this provision emphasizes the existence of Islamic law as the basis of legal relations that occur between the subject of the law. It should be emphasized here, that the foundation of human activity in the world is the Qur'an and As-Sunnah which is a system that brings mankind on a path that is guided by Allah SWT. This system is based on Islam, because Islam as "*rahmatan lil alamin*" is a mercy for the universe. This means that Islam is not only for Muslims, but also for all his creatures that exist on the earth. Islamic phrase, thus it can be interpreted that non-Muslims can also litigate in religious courts, as long as it is subject to Islamic law or with other understandings as long as the legal relationship is

carried out based on Islamic law, then against it becomes the competence of the Religious Judiciary.

The explanation can be drawn a temporary conclusion that the legal subject of the case that becomes the competence of the Religious Judiciary is *first*, people who are Muslims; *second*, a non-Muslim person, but he is subject to Islamic law through the use of sharia principles at the time of his legal relationship; *third*, the Islamic Legal Entity; and *fourth*, a non-Islamic legal entity, but he subjected himself to Islamic law. The four criteria of the subject of law, can litigate in the Religious Judiciary in the case as stated in Article 49 of Law No. 3 of 2006.

The use of Islamic law by the subject of law that is the competence of the Religious Judiciary is what is referred to as the principle of Islamic Personality. The use of Islamic law is indicated by the use of sharia principles in its legal relations. Sharia principles in the banking world according to Article 1 number 12 of Law No. 21 of 2008 are defined as the principle of Islamic law in banking activities based on fatwas issued by institutions that have authority in the determination of fatwas in the sharia sector. However, sharia economy is not only related to the banking world. Sharia economy, as explained in the previous subsection, covers all activities to meet the needs of the human economy whose implementation must pay attention to the principles of Sharia economy as contained in its legal source. Thus, the principle of Islamic personality, specifically on sharia economic disputes that form the basis of the absolute competence of the Religious Judiciary, is determined only by one condition, namely its legal relationship based on sharia principles.

The principle of Islamic personality, as the basis of the competence of the Religious judiciary, in Law No. 3 of 2006 there is an expansion of meaning unlike in the period before the enactment of Law No. 3 of 2006. Islamic personality is not only attached to people who are Muslims, but also other legal subjects as long as the legal relationship is carried out by basing on Islamic law and specifically for matters in the field of Sharia economy, only requires the use of sharia principles in its legal relationships.

The application of Islamic personality principles is used to determine whether a dispute becomes the competence of the Religious Judiciary or not. The application of this principle is not easy, because there are still other rule of law that has not been adjusted to the reforms that have been made to the competence of the Religious Judiciary. This is about the adoption of the child.

The dualism of the adoption of children in district courts and religious courts is a legal uncertainty. This is because, for a child who is Muslim or of a Muslim descent, he can be appointed through a district court or religious court, when the legal consequences of the adoption of this child are different. The adoption of the child through the district court uses the basis of customary law, so that the adopted child has the right to bequeath as well as the biological child, while the adoption of the child through the court of religion uses Islamic Law as the basis and the adopted child has a different position to the biological child in terms of bequeathing. In Islamic law, adopted children are not entitled

to bequeath and only have the right to a compulsory will whose amount cannot be more than $\frac{1}{3}$ of the inheritance.

This uncertainty can actually be solved by paying attention to the principle of Islamic personality that is the benchmark of competence of the Religious Judiciary, namely the religion embraced by prospective adopted children or the religion of the parents of prospective adopted children. By basing on the principle of Islamic personality, towards the adoption of children who are Muslims, it becomes the competence of the Religious Judiciary.

The appointment of a Muslim child in the district court will only cause legal uncertainty that will ultimately cause problems in family law, especially in terms of inheritance. Islamic law only entitles compulsory wills to adoptees, not heirs as well as biological children, while the determination of the adoption of a child in the district court results in the position of the adopted child as the biological child in the event of bequeathing.

Conclusion

Based on the analysis that has been done, the Religious Justice and The General Judiciary each have the competence to examine and adjudicate civil cases, including the case of child adoption. The Religious Judiciary uses the concept and legal basis of Islamic Law, while the General Judiciary uses the concept and legal basis in the form of Customary Law. Both have different legal consequences, in Customary Law, adopted children have the same position, including in bequeathing, with the biological child, while in Islamic law does not know the concept of adopted children, but nevertheless for the benefit of the Compilation of Islamic Law gives the opportunity to the community to perform the adoption of the child. However, the adopted child does not have the right to bequeath, he only has the right to a compulsory will of no more than $\frac{1}{3}$ of the inheritance. The dualism of the competence of the court creates legal uncertainty, especially in the case of the adoption of children who are Muslims or from the descendants of people who are Muslims. Based on the principle of Islamic personality, the case should be the competence of the Religious Judiciary. The researchers proposed that, the General Judiciary, in this case a district court judge, should dare to reject the case of the appointment of a child who is Muslim or from the descendants of people who are Muslims, on the basis that the case is not his competence. This needs to be done so as not to cause legal problems in the future for the adopted child.

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