



ADOPTION CHILDREN WITH DIFFERENCE RELIGION IN GUARANTEE OF RELIGIOUS FREEDOM PERSPECTIVE OF THE CONSTITUTION OF THE REPUBLIC OF INDONESIA 1945 AND ISLAMIC LAW

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Abstrak

Permasalahan adopsi anak seagama di Indonesia ini muncul karena adanya gugatan dengan registrasi perkara Nomor. 83/PUU-XX/2022. Perkara ini ditolak oleh mahkamah konstitusi dengan alasan tidak adanya kerugian konstitusional yang dialami oleh pemohon dalam permohonan tersebut. Oleh karena itu penulis ingin meneliti bagaimana pengaturan adopsi anak di Indonesia serta menganalisisnya dengan undang-undang dasar 1945 dan hukum islam. Metode penelitian yang digunakan penulis adalah normatif, dengan jenis penelitiannya adalah yuridis normatif. Dengan pendekatan penelitian yang penulis gunakan adalah pendekatan penelitian perundang-undangan (*statute approach*) dan pendekatan kasus (*case approach*). Hasil penelitian ini menunjukkan bahwa pengaturan adopsi anak ini sesuai dengan amanat yang termaktub dalam Pasal 28E ayat (1) dan (2) Undang-undang Dasar 1945. Hal ini dikarenakan terbukti dengan adanya pendapat bahwa setiap anak telah melekat hak dalam beragama dan dilindungi sepanjang hidupnya. Meski demikian ketentuan pembatasan dan larangan dalam kebebasan beragama berlaku agar ketertiban dan kesejahteraan umum dimasyarakat terlaksana. Sementara adopsi anak dalam hukum Islam hanya mengakui dan tidak merubah nasabnya. Bahkan hukum Islam juga menganjurkan untuk mengkat anak demi kesejahteraan anak. Adanya kalimat calon orang tua angkat harus menganut agama yang sama dengan

calon anak angkat, ini bukan maksud dari tujuan lain tetapi pengaruh agama orang tua angkat terhadap anak angkat hanya bersifat satu arah, dan jika hal ini terjadi akan sangat melukai hati nurani dan akidah anak angkat serta kedua orang tua kandungnya.

Kata Kunci: *Adopsi, Hukum Islam, Kebebasan beragama*

Abstract

The problem of adopting children in same religion in Indonesia arose because of a lawsuit with case registration Number. 83/PUU-XX/2022. This case was rejected by the constitutional court in cause that there was no constitutional loss experienced by applicant in the petition. Therefore, the author wants to research how child adoption is regulated in Indonesia and analyze it using the 1945 constitution and Islamic law. The research method used of author is normative, with the type of research being normative juridical. The research approach that the author uses statutory research approach and a case approach. The results of this research indicate that the regulation of child adoption accordance with mandate contained in Article 28E paragraphs (1) and (2) of the 1945 Constitution. This is proven by opinion that every child has the right to religion and protected throughout his life. However, the provisions regarding restrictions and prohibitions on freedom of religion apply to ensure order and general welfare in society. Meanwhile, adoption of a child in Islamic law only recognizes and does not change the lineage. Even Islamic law also recommends adopting children for children welfare. There is a sentence that prospective adoptive parents must adhere the same religion as the prospective adopted child, this is not intended for any other purpose but the influence of the adoptive parent's religion on the adopted child is only one way, and if this happens it will really hurt the conscience and faith of the adopted child as well as his biological parents.

Keywords: *Adoption, Islamic Law, Religious freedom*

INTRODUCTION

Backgroud of The Problem

The presence of children in family is a gift given by God Almighty ¹. The family that consisting of a husband, wife, and usually a child who is their offspring is the smallest social unit. In society, especially in Indonesia, the purpose of having children from marriage is to continue and inherit family wealth after

¹ Andi Syamsu Alam, M. Fauzan, *Hukum Pengangkatan Anak*, (Jakarta: Kencana, 2008), hml. 1

the parents die. However, not of all married couples are permitted by Allah SWT to have children for various reasons. The absence of children in a marriage sometimes has the potential cause disharmony between husband and wife, often resulting in divorce. As a result, many married couples feel lonely and want to adopt children who are not their biological descendants to become their successors or heirs after they die. There was many reasons for adopting a child, depending on things like a country's culture and politics as well as its economic and social climate². Adoption is recognized not only being based on civil law but also on local customary law and also Islamic law, or sharia³. Adoption is claiming a child as your own biological child. This will end the biological bond between parent of child and the adoptive parent is responsible for the children guardianship and inheritance⁴.

Currently adopting a child is not only for the benefit of adoptive parents but also for benefit of adopted child. According to Amir Martosedono as mentioned by Rusli Pandika, "an adopted child is a child who is taken by someone as his own, cared for, fed, given clothes, if got sick given medicine, so that he grows up, treated as his own child"⁵. Regarding child adoption in Indonesia, adopting a child means giving legal custody to biological parents of the adopted child. Based on this understanding, the Indonesian legal system is different from other legal systems in terms of purpose adopting a child, techniques and mechanisms for adopting a child, as well as the legal relationship that regulates inheritance between adopted children and their adoptive parents. Law Number 23 of 2002 is concerning Child Protection, explains that adoption can only be carried out in the best interests of the child⁶.

There are 106,409 children living in social welfare institutions (LKSA), according to data collected by the Indonesian Ministry of Social Affairs in 2020 through the Next Generation Social Welfare Information System (SIKS-NG), then 64,053 neglected children who need family-based protection and care, 8,507 toddlers are poor, undocumented, neglected, and need a

² M. Budiarto, *Pengangkatan Anak Ditinjau Dari Segi Hukum*, (Jakarta: Aka Press, 1991), hlm. 1-2

³ R. Soeroso, *Perbandingan Hukum Perdata*, (Jakarta: Sinar Grafika Offset, 2014), hlm. 197

⁴ Rosnidar Sembiring, *Hukum Keluarga*, (Medan:PT RajaGrafindo Persada, 2016), hlm.159.

⁵ Rusli Pandika, *Hukum Pengangkatan Anak*, (Jakarta: Sinar Grafika, 2012), hlm.105

⁶ Undang-Undang Nomor 23 Tahun 2002 tentang Perlindungan Anak.

replacement family. In addition, data for child cases from January to June 2022 shows that 8,226 Indonesian children need special protection. There are 371 toddlers who are abandoned and without parental care, 482 neglected children, and 39 children who are victims of human trafficking, making up the total number of children who need special protection.⁷

The government has stipulated Government Regulation Number 54 of 2007 concerning Implementation of Child Adoption to implement the provisions on child adoption as outlined in the Child Protection Law. This is intended that child adoptions are carried out in accordance with statutory provisions so that irregularities in the implementation of child adoptions that occur in society can be avoided, such as child adoptions carried out without correct procedures, falsification of data, and so on. This prevention can ultimately maintain and improve the children welfare, for children future and best interests.

In regulations relation regarding child adoption, there is one requirement aimed at prospective Adoptive Parents, those contained in Article 39 paragraph (3) of Law Number 3 of 2014 concerning amendments to Law Number 23 of 2002 concerning Child Protection which reads "Prospective parents must adhere the same religion as prospective adopted child."⁸ Then it is further regulated that event the children religion is not known, the children religion will be adjusted to majority religion in the surrounding environment. Beside that, the requirement for prospective parents adhere the same religion as prospective adopted child is also emphasized in Government Regulation Number 54 of 2007 and Minister of Social Affairs Regulation Number 110/HUK/2009.

The sentence "prospective adoptive parents must adhere the same religion of the prospective adopted child" in article 39 paragraph 3 of Law number 35 of 2014 concerning Child Protection has been "sued" to the Constitutional Court by Leonardo Siahaan and registered with case number. 83/PUU-XX/2022. Leonardo Siahaan, who has the status of applicant, feels that his constitutional rights have the potential to be harmed by the existence of this article. He views that Article 39 paragraph (3) of Law Number 3 of 2014 concerning amendments to Law Number 23 of 2002 concerning Child Protection is contrary to Article 28B and Article 28D paragraph (1) of the 1945

⁷ <https://kemensos.go.id>, diakses pada 10 November 2023, pukul 11.07

⁸ Pasal 39 ayat (3) Undang-undang Nomor 3 Tahun 2014 tentang perubahan atas Undang-undang Nomor 23 Tahun 2002 tentang Perlindungan Anak.

Constitution. (1) The 1945 Constitution reads "Everyone has the right to form a family and continue their offspring through a valid marriage" and Article 28D paragraph (1) of the 1945 Constitution reads "Everyone has the right to recognition, guarantee, protection and legal certainty fair and equal treatment before the law".

The Petitioner also dissected Article 3 paragraph (2) of Government Regulation Number. 54 of 2007 concerning the Implementation of Child Adoption, reads "In the children origins are unknown, the children religion is adjusted to religion majority of the local population." According to the applicant in this article, there is a violation of the constitutional right to choose one own religion. For these reasons, the applicant believes that religious differences between prospective adoptive parents and adopted children should not be a problem.

According to the applicant, Article 39 paragraph (3) of Law Number 3 of 2014 concerning amendments to Law Number 23 of 2002 concerning Child Protection has caused potential losses experienced if the applicant later has a family and if later he does not have children and wants to adopt a child, he will hindered by this regulation. However, in the ruling the Constitutional Court stated that applicant application was not accepted. This is because the applicant argument is completely unfounded according the law. The applicant also does not have legal standing to submit the application. Even though this is still a matter of pros and cons, it is clear that this article was created to avoid issues of religious coercion.

The understanding that freedom of religion in Indonesia begins with belief that the state was founded on basis of belief in one Almighty God, as stated in article 29 of the 1945 Constitution of the Republic of Indonesia. Beside that, the right to religion in Indonesia is also regulated in the provisions of Article 28E paragraph (1) and paragraph (2) of the 1945 Constitution of the Republic of Indonesia which states⁹:

- (1) Every person is free to embrace religion and worship according to his religion, choose education and teaching, employment, citizenship, a place of residence within the territory of the country and to leave it, and has the right to return.
- (2) Every person has the right to freedom of believe, express thoughts and attitudes, in accordance with his conscience.

⁹ Pasal 28E Undang-Undang Dasar Negara Republik Indonesia Tahun 1945

Research Methodology

The research method used by the author is normative, with the type of research being normative juridical. The research approach that the author uses is a statutory research approach and a case approach. This normative legal research uses primary data sources and secondary data sources. To conduct normative legal research, it is necessary to evaluate published legal writings available from various sources.¹⁰

DISCUSSION

The Concept of Child Adoption in Indonesia

The phrase "child adoption" is often used refer to the adoption or adoption of a child. In terms of language, the word adoption comes from English "adoption" which has the same meaning as adoption or collection¹¹. However, the definition of adoption according to the law is "the legal adoption (appointment) of another person child as own child¹². Adoption is the process of transferring a child from the family of the children legal parents, guardian, or other person responsible for his nurture, education and nurture, to the family of his adoptive parents, in accordance with the decision of the District Court¹³. In Arabic, child adoption according to Prof. Mahmud Yunus is called "tabanni", while in the Munjid dictionary it is translated as *ittikhadzahu ibnan* which means to make as child¹⁴.

Wahbah Al-Zuhaili defines adoption (tabanni) as taking a child by someone to a child whose lineage is clear, after which the child is handed over to him. Delegating children to people who are not from their lineage is clearly contrary to Islamic law, so this clause must be removed¹⁵.

In his work "al-Fatawa", Muhammad Syaltut distinguishes two meanings of the requirements "child adoption", that¹⁶:

¹⁰ Muhaimin,, berita *Metode Penelitian Hukum*, (Mataram:Mataram University Press,2020), hlm. 65.

¹¹ Mahjuddin, *Masailul Fiqhiyah: Berbagai Kasus yang Dihadapi Hukum Islam Masa Kini*, (Jakarta: Kalam Mulia, 2008), Hlm. 90.

¹² Sudarsono, *Kamus Hukum*, (Jakarta: Rineka Cipta, 2012), Hlm. 22

¹³ Erna Sofwan Sjukrie, *Lembaga Pengangkatan Anak*, (Mahkamah Agung RI, 2012), Hlm. 17

¹⁴ Muderis Zaini, *Adopsi Suatu Tinjauan Dari Tiga Sistem Hukum*, (Jakarta: sinar grafika, 2002),Hlm. 4.

¹⁵ Wahbah Al-Zuhaili, *Al-Fiqh Al-Islami Wa al-Adillatuhu*, Juz 9, (Beirut:Dar Al Fikr al Ma'ashir, 1997), Hlm. 271

¹⁶ Rachmadi Usman, *Hukum Kewarisan Islam*, (Bandung: Mandar Maju, 2009), Hlm. 177-178.

1. Someone adopts a child into their family even though they know the child is someone else child. He is not considered as his own child, but as a child in terms of love, fulfilling his needs in terms of livelihood, education and service;
2. As can be understood from the word "tabanni" is the adoption of a child. Tabanni is obliged by the Shari'a and human agreements to adopt a child whom he knows to be someone else child, who is not related to him as a legitimate child but is still entitled to legal protection as a child even though he is someone else child.

The definition of child adoption according to existing laws in Indonesia, including Child Protection Law No. 23 of 2002 as amended by Law No. 35 of 2014 concerning Child Protection and Government Regulation No. 54 of 2007 concerning Implementation of Child Adoption and Minister of Social Affairs Regulation no. 110 of 2009 concerning Requirements for Adoption of Children, that Adoption is an act of a person who transfers a child from sphere of authority parents, legal guardians, or other people who are responsible for the care, education and raising of the child, into the sphere of the parents family life. Adoptive parents are people who are given the authority to care for, educate and raise children based on statutory regulations and customs.¹⁷

A relationship between parents and children regulated by laws and regulations that is established through adoption. To obtain children for parents who do not have children, child adoption is used. Children are a gift given by God Almighty to parents to educated and cared until adulthood. Parents have an important role in a children life.

Child Adoption in Islamic Law

Before the arrival of Islam, adoption or adoption was widespread among Arabs. Adopting a child can be interpreted as the status of a biological child. As recorded in history, the Prophet Muhammad SAW before receiving apostolate had an adopted son named Zaid bin Haritsah in slave status as a gift from Khadijah bint Khuwailid.¹⁸

When referring to the word child adoption, this term is usually used refer to married couples or people who adopt a child in an effort to help the children biological parents or for married couples who do not or have not had

¹⁷ Peraturan Menteri Sosial Republik Indonesia No. 110 Tahun 2009 Pasal 1

¹⁸ Abdul Wahab Abd. *Muhaimin, Kajian Islam Aktual* (Cet. I; Jakarta: Gaung Persada Press), hlm. 144

children, so that they can send their adopted children to school, and hopefully that in the future the children will be independent and can improve their standard of living in the future. Moreover, adoptive parents had the thought that one day their adopted children would grow up to be devout people who would look after them in their time of need and pray for them in their final moments.

Adoption of a child in Islamic law, does not sever the children relationship with his biological parents and other blood relatives, likewise adoptive parents may not be guardians in the marriage of their adopted child, and also may not use their own name as the name of their adopted child in any way and the child adoptees are heirs of biological parents, not adoptive parents, and vice versa, adoptive parents are not heirs of adopted children¹⁹.

Adoption of a child is then seen as a legal act that can be recognized as a form of religious charity which is highly recommended by Islam. First, according to Mahmud Syaltut's definition, adoption of a child clearly does not conflict with the principles of Islamic law, it is even confirmed in the QS. al-Ma'idah (5): 32 as follows:

مَنْ أَجَلَ ذَلِكَ كَتَبْنَا عَلَى بَنِي إِسْرَائِيلَ أَنَّهُ مَنْ قَتَلَ نَفْسًا بِغَيْرِ نَفْسٍ أَوْ فَسَادٍ فِي الْأَرْضِ فَكَأَنَّمَا قَتَلَ النَّاسَ جَمِيعًا وَمَنْ أَحْيَاهَا فَكَأَنَّمَا أَحْيَا النَّاسَ جَمِيعًا وَلَقَدْ جَاءَتْهُمْ رُسُلُنَا بِالْبَيِّنَاتِ ثُمَّ إِنَّ كَثِيرًا مِّنْهُمْ بَعَدَ ذَلِكَ فِي الْأَرْضِ لَمُسْرِفُونَ

"Therefore We decreed (a law) for the Children of Israel, that whoever kills someone, not because that person killed another person, or not because he caused mischief on the earth, it is as if he had killed all humans. Whoever preserves the life of one human being, it is as if he has preserved the lives of all humans. Indeed, Our Messenger has come to them with (bringing) clear information. But then many of them after that went beyond the limits of the earth."

In this verse, it is explained that it is highly recommended to take care of children or other humans with the aim of doing good deeds and solely hoping for the pleasure of Allah SWT, so such good deeds in Islam are highly recommended. For further understanding, child adoption in Islam strictly prohibits this and considers it contrary to Islamic law²⁰. This is based on Allah's word in Q.S Al-Ahzab (33): 4-5 as follows:

مَا جَعَلَ اللَّهُ لِرَجُلٍ مِّنْ قَلْبَيْنِ فِيْ جَوْفِهِ وَمَا جَعَلَ أَرْوَاحَكُمْ الَّتِي تَظْهَرُونَ مِنْهُنَّ أَمْهَاتِكُمْ وَمَا جَعَلَ

¹⁹ *loc. cit.*, Hlm.54

²⁰ Andi Syamsu Alam, M. Fauzan, *Hukum Pengangkatan Anak Perspektif Islam*, (Jakarta: Kencana Prenada Media, 2008), h. 22

أَدْعِيَاءَكُمْ أَبْنَاءَكُمْ ذَلِكُمْ قَوْلُكُمْ بِأَفْوَاهِكُمْ وَاللَّهُ يَقُولُ الْحَقَّ وَهُوَ يَهْدِي السَّبِيلَ ۚ

“Allah did not make for a person two hearts in his sockets; and He did not make your wives whom you zihar your mothers, and He did not make your adopted children your (own) biological children. These are just words in your mouth. Allah tells the truth and He shows the (right) path.” (QS. Al-Ahzab [33]: 4).

أَدْعُوهُمْ لِأَبَائِهِمْ هُوَ أَقْسَطُ عِنْدَ اللَّهِ فَإِنْ لَمْ تَعْلَمُوا آبَاءَهُمْ فَاِخْوَانُكُمْ فِي الدِّينِ وَمَوَالِيكُمْ وَلَيْسَ عَلَيْكُمْ جُنَاحٌ فِيمَا أَخْطَأْتُمْ بِهِ وَلَكِنْ مَا تَعَمَّدَتْ قُلُوبُكُمْ وَكَانَ اللَّهُ غَفُورًا رَحِيمًا ۝

“Call them (the adopted children) by (using) the names of their fathers; that is just in the sight of Allah, and if you do not know their fathers, then (call them as) your brothers in religion and your maula-maula. And there is no sin on you if you make a mistake about that, but (there is sin) what your heart intends. Allah is Forgiving, Most Merciful.” (QS. Al-Ahzab [33]: 5).

QS. Al-Ahzab [33]: 4-5 above explains that:

1. Islam does not support the Jahiliyah era custom of adopting children, which treated adopted children the same as biological children. Islam also does not justify treating adopted children the same as biological children.
2. In other words, there is no kinship or inheritance from relatives or other people outside the child's immediate family. The relationship between the adopted child, the adopting parents, and the child's family remains the same as before the adoption.

In other words, there is no kinship or inheritance from relatives or other people outside the child's immediate family. The relationship between the adopted child, the adopting parents, and the child's family remains the same as before the adoption²¹. Islamic law allows adoption of children as long as they are not adopted as biological children.

The legal element of placing adopted children with their adoptive parents, or deciding their lineage with their parents and then incorporating them into their adoptive parents lineage, has received the most criticism from Islam because it is very contrary to Islamic principles. Apart from that, Al-Imam Al-Lausi said that it is haram for people who deliberately give birth to a child to someone who is not their father, as was done by the ignorant

²¹ Ibid, Hlm. 44

society at that time. As for calling my child "*ibni*" to express one love for the child being called, that is not prohibited²².

Beside that, the views of the Ulema Council as stated in letter Number U-335/MUI/VI/82 dated 18 Sha'ban 1402 H/10 June 1982 and signed by General K.H. M. Syukeri Ghazali, is as follows²³:

- a. Adoption is permitted in Islamic law for the purpose of caring, providing assistance, etc. for the benefit of the adopted child;
- b. Children who are Muslim should be adopted by prospective adoptive parents who are also Muslim, in order to ensure upholding of their Islam;
- c. The adoption of an adopted child will not result in family rights that are usually achieved through hereditary lineage. If want to offer something to adopted child that should do it while both still alive as an ordinary gift;
- d. Prohibited adoptions include:
 - 1) Adoption by people of different religions.
 - 2) Adoption of children by people from different countries.

Therefore, it is clear that adoption of a child is essentially legal (permissible) or permissible according to Islamic law. However, due to the deep flexibility of Islamic law, its position can be recommended or sunnah, or can be contrary and prohibited or haram, depending on the circumstances and conditions as well as the content of the adoption itself.²⁴

Guarantees of Religious Freedom in Indonesian Legislation

Indonesia is a Pancasila country, and according to the principle of the first principle of Pancasila, belief in the Almighty God is the foundation of the state. In other words, this means that every Indonesian citizen practices a religion or is a religious person. The importance of religion in Indonesia is such that atheists are not permitted to apply to become citizens of the country. Even though religion is not formally stated as the basis of the state, the Compilation of Policies and Legislation emphasizes that the state and religion are closely related at the constitutional, cultural, structural and functional levels. Both are also placed within a clear and firm constitutional

²² Al-Lausi, *Ruh Al-Ma'ani*, (Beirut: Dar Al-Fikr, Jilid 21), h. 148

²³ Muderis Zaini, *Adopsi Suatu Tinjauan Tiga Sistem Hukum*, (Jakarta: Sinar Grafika. 2002), Hlm.57.

²⁴ *Ibid*, Hlm.58.

framework. This indicates that Indonesia is not a secular country but also not a religious country in terms of law and constitution²⁵.

The basis for recognizing and protecting freedom of religion and belief in Indonesia is provided by the 1945 Constitution. Because the 1945 Constitution requires it, the issue of religious freedom is now unambiguous and no longer needs to be discussed. In other words, because freedom of religion is constitutionally guaranteed by the 1945 Constitution which is a human right, it is sufficient to regulate it in Law Number 39 of 1999 concerning Human Rights.

In the constitution, this topic is covered in two articles, namely, Article 28 E and Article 29 paragraph (2) of the 1945 Constitution which firmly states that the state guarantees freedom of religion and belief. In fact, Article 28 I paragraph (1) of the 1945 Constitution states that religious freedom cannot be reduced under any circumstances. These clauses show that the constitution upholds the legal principle of freedom of religion as a valid principle.

Until now, no law has been issued that specifically regulates religious freedom. Law Number 39 of 1999 concerning Human Rights (HAM) exclusively regulates freedom of religion, as stated in Article 22 paragraph (1) and paragraph (2) which reads "Everyone is free to embrace their own religion and to worship according to that religion. and their beliefs," and "The state guarantees the freedom of every person to embrace their own religion and to worship according to their religion and beliefs."²⁶

As for the explanation in Article 22 paragraph (1), what is meant by freedom to embrace one's religion and beliefs is the right of every person to have a religion, in accordance with the beliefs he or she holds, with or without any coercion. Therefore, it is strictly prohibited for anyone to force someone to convert to religion, this includes the government and the state. On the contrary, the government is obliged and responsible to respect and protect religious freedom, as stipulated in Article 71 of Law Number 39 of 1999 concerning Human Rights (HAM).

However, as stated in article 28 J paragraph (1) and paragraph (2) of the 1945 Constitution, religious freedom in Indonesia is not free without

²⁵ Tim Penyusun Puslitbang kehidupan Beragama, *Kompilasi Kebijakan dan Peraturan PerundangUndangan Kerukunan Umat beragama*, (Jakarta : Departemen Agama RI Badan Litbang dan Diklat Puslitbang Kehidupan Beragama, 2009), Hlm. 17

²⁶ Undang-undang Nomor 39 tahun 1999 tentang Hak Asasi Manusia Pasal 22 ayat (1) dan (2).

restrictions, but is limited by respect for other people and orderly society, nation and state, as follows²⁷:

- (1) Everyone is obliged to respect the human rights of others in the legal order of society, nation and state.
- (2) In exercising his rights and freedoms, every person is obliged to comply with the restrictions established by law with the sole aim of ensuring.

The Requirements of Adoption

In accordance with Article 12 of Government Regulation Number 54 of 2007 concerning Implementation of Child Adoption is as follows²⁸:

1. The requirements of prospective adopted children
 - a) Not yet 18 (eighteen) years old;
 - b) Is an abandoned or neglected child;
 - c) Being in care of a family or in a foster care institution;
 - d) Requires special protection.
2. Age of the adopted child as referred to in paragraph (1) letter a includes:
 - a) Children under 6 (six) years old are the main priority;
 - b) Children aged 6 (six) years up to not yet 12 (twelve) years old, as long as there is an urgent reason;
 - c) Children aged 12 (twelve) years to under 18 (eighteen) years of age, as long as the child requires special protection.

As for Article 13 of Government Regulation Number 54 of 2007, it is determined that prospective adoptive parents must fulfill the following requirements²⁹:

1. Physically and spiritually healthy.
2. At least 30 (thirty) years old and a maximum of 55 (fifty five) years.
3. Have the same religion as the prospective adopted children religion.
4. Have good behavior and never been punished for committing a crime.

²⁷ 28 J ayat (1) dan ayat (2) UUD 1945

²⁸ Peraturan Pemerintah Nomor 54 Tahun 2007 Tentang Pelaksanaan Pengangkatan Anak

²⁹ Peraturan Pemerintah Nomor 54 Tahun 2007 Tentang Pelaksanaan Pengangkatan Anak

5. Have good behavior and never been punished for committing a crime.
6. Married status for a minimum of 5 (five) years.
7. Not a same-sex couple.
8. Do not or have not children or only have one child.
9. In good condition economically and socially.
10. Obtain the children consent and written permission of the child's parent or guardian.
11. Make a written statement that the adoption of the child is in the best interests of the child, welfare and protection of the child.
12. There is a social report from a local social worker.
13. Has cared for a prospective adopted child for at least 6 (six) months, since the care permit was granted.
14. Obtain permission from the minister and/or head of social agency.

Article 28 of the Minister of Social Affairs Regulation Number 110/HUK/2009 concerning Criteria for Adopting Children stipulates the following:³⁰

1. Prospective adoptive parents can adopt a child maximum 2 (two) times with a minimum interval of 2 (two) years.
2. The time interval for adopting a second child as intended in paragraph (1) may be excluded for children with disabilities.
3. In the event that the prospective adopted children are twins, the adoption of the children can be carried out simultaneously with their twin siblings by the prospective adoptive parents.

Analysis of Adopted Children from the Perspective of Islamic Law

Islamic law only recognizes and even recommends adopting children for the welfare of the child concerned without breaking the lineage of the biological parents. Even though the adopted child will later be educated, cared for and paid for for his daily needs by his adoptive parents, the child still has a legal relationship with his biological parents and with all the consequences. For families who are financially capable, it is recommended to help underprivileged children through child adoption agencies, as a way to worship Allah. This is to show concern for other people, and to fulfill social obligations. As a result of the maintenance of legal ties, nasab, mahrom, and

³⁰ Peraturan Pemerintah Nomor 54 Tahun 2007 Tentang Pelaksanaan Pengangkatan Anak

hijab between the two adoptive parents, the adoption of a child is essentially nurturing in the view of Islamic law. Adoption or child adoption is a transfer of responsibility to the role of original parents or biological parents as caregivers, educators and guardians, which is the only thing that changes.

According to Islamic law, adopted children cannot be called biological children. According to a hadith, Rasulullah SAW threatened someone who would sacrifice their child to someone who was not real. This is made clear in the hadith of Rasulullah SAW who said: "Whoever commits himself to a man other than his father even though he knows that he is not his father, heaven is forbidden to him" (HR. Bukhori Muslim).³¹ Assigning the genealogy of an adoptive father to an adopted child is a mistake because it confuses the genealogy, and mixes up the lineages, and changes the law of inheritance so that people who are not allowed to inherit do so, and results in the loss of inheritance rights for those who inherit.

Adopted children are not included in causes of kinship relationships with their adoptive families if seen from the factors that cause the development of lineage relationships, instead these factors include marriage with a legally recognized partner³² Here is intended that children born to a woman in a valid marriage are assigned to her husband, while children adopted from a woman in a valid marriage are not given to the woman who adopted them. Based on this study, it is very clear that in Islam, adopted children do not have familial ties with their adoptive parents, and the position of adopted children remains as someone else to their adoptive parents.

Based on this fundamental thought, the interpretation of Islamic law does not prohibit adoptive parents from providing their adopted children with various types of assistance or economic guarantees, such as in the form of³³:

1. Providing grants to adopted children provide for their future life.
2. Providing a will to adopted child with provision that no more than 1/3 (one third) of the adoptive parents' assets will be passed on to their heirs.

One way to maintain and improve children's welfare is through adoption, which provides both current and long-term protection for children. This is done in order to safeguard and uphold children's rights, which are an

³¹ Andi Syamsu Alam dan Fauzan, *Hukum Pengangkatan Anak Perspektif Islam*, 176-177

³² *Ibid*, Hlm.179

³³M. Budiarto, *Pengangkatan Anak Ditinjau Dari Segi Hukum*, (Jakarta: Akademika Pressindo, 1991), hlm.25.

integral aspect of human rights that must be upheld by society, the state, communities, families and parents. There is no age limit in Islamic law regarding the adoption of children, this includes both adopted children and adoptive parents and there are also no regulations for adoptive parents who are single or unmarried, or by married couples, and/or adopting children. by widows or widowers. This includes the adoption of adult and married children who are also permitted to be adopted. Because in this case, as long as there is no prohibition in Islamic law, the law is permissible (permissible). Islamic law also states that parents who wish to adopt a child must be or are required to be of the same religion, namely Islam. This is nothing other than the aim of anticipating that in the future someone will become an apostate or leave the Islamic religion.

From the things stated above, it can be understood that the Islamic religion encourages Muslims to take care of other people who are incapable, needy, neglected and neglected. However, it is not permissible to sever the relationship between these rights and those of their biological parents/family. This maintenance must be based on a form of compensation solely in accordance with Islamic teachings. And it was conveyed that the principles of child adoption according to Islamic law aim to prevent a child from being neglected in life and are directional in nature which can be accompanied by providing livelihood assistance for the child's welfare.

Therefore, the author can understand the following things as the rights of adopted children which must be upheld and fulfilled in Article 39 paragraph (3) of Law Number 35 of 2014 as follows:³⁴

- a. A person has right to protection from violence and discrimination, as well as the ability to live, develop and participate in society fairly and in accordance with human dignity.
- b. Freedom to practice one religion according to one's wishes, to think and express as one pleases, and to do so under the supervision of parents or other legal guardians.
- c. Have the right to receive teaching and education with the aim of fostering behavior and personality development in accordance with their interests and abilities.
- d. Have the right to a name as personal identity and citizenship status.

³⁴ Pasal 39 ayat (3) Undang-Undang Nomor 35 Tahun 2014

- e. Have the right to know their parents, be raised and cared for by their own parents.
- f. Have the right to obtain health services and social security in accordance with physical, mental, spiritual and social needs.
- g. Children have the right to be cared for, adopted as foster children, or adopted as children by other people in accordance with the provisions of applicable laws and regulations, if for some reason the parents cannot guarantee the child's growth and development or if the child is neglected.
- h. Every child has the right to be protected from discrimination, economic and sexual exploitation, neglect, cruelty, violence, injustice and other forms of abuse while in the care of parents, guardians or other caregivers.

If you look at the sentence contained in Article 39 paragraph (3) of Law Number 35 of 2014 concerning Child Protection which reads "Prospective adoptive parents must share the religion adhered to by the prospective adopted child", in line with the provisions of Islamic law which teaches not to change or not break a child's lineage when the child is adopted by adults who are not his biological parents. Basically, whether the adoption of a child is legal or legal according to the laws in force in Indonesia can be seen from the suitability of the procedures regulated in legislation and local community customs. It can be seen in Law Number 35 of 2014 concerning Child Protection, that the adoption or adoption of a child does not involve breaking blood or relations with the biological parents. This is also clarified in Article 2 paragraph (1) letter c Regulation of the Minister of Social Affairs of the Republic of Indonesia No. 110/Huk/ 2009 concerning Child Adoption which stipulates that the principles of child adoption include that Prospective Adoptive Parents (COTA) must share the religion of the Prospective Adopted Child (CAA).

The requirement that the parents of a prospective adopted child must have the same beliefs as the adopted child means that an adoption application cannot be forwarded to court. Explanations regarding the religion adhered to by parents and adopted children have also been regulated in Article 3 of Government Regulation no. 54 of 2007 concerning Implementation of Child Adoption. Therefore, Islam does not support the adoption system for fear that opportunities will arise to adopt children from other religions and allow them to live under one roof. However, you need to know that in the MUI Fatwa it is permissible to adopt children, which in the

sense of shifting the obligation to support, care for and educate in the context of worshipping Allah SWT.³⁵

In Government Regulation Number 54 of 2007, there are no regulations regarding the adoption of children that must be carried out from a valid marriage. Because the requirements for adopting a child, both the prospective adoptive parents and the child who will be adopted, do not regulate hereditary status. On the other hand, the identity of children can be clearly understood by considering their status as descendants. The adopted child's past will be used in this case as a report to the Department of Social Affairs.

Adopting a child without changing his lineage and religious status is carried out out of a sense of social responsibility, namely, to care for, care for and educate with all his heart and love like his own child is a commendable act and includes carrying out pious deeds recommended by the teachings of the Islamic religion. We can see that the purpose of the principle "must be of the same religion" is solely for the good of the child himself. In this way, it can be interpreted that the adoptive parents have implemented the applicable legal provisions properly, namely carrying out the best interests of the child.

Analysis of Religious Freedom Guarantees

In fact, religious freedom in Indonesia has been constitutionally regulated and guaranteed in the 1945 Constitution of the Republic of Indonesia, which is part of human rights which receive recognition, guarantees and legal protection by the state. So governments and society now have a greater need to respect everyone's right to practice their beliefs by acting respectfully.³⁶ Understanding that freedom of religion in Indonesia begins with believing state was founded on the basis of belief in one Almighty God, as stated in article 29 of the 1945 Constitution. Beside that, it is reaffirmed in article 28E paragraph (2) which essentially states that "everyone is free to embrace religion and worship "according to their religion, they have right to freedom belief, and state guarantees the rights of religion and the rights of every

³⁵ A.Rafik, *Hukum Islam Indonesia*, (Jakarta : PT.Raja Grafindo Persada,2000), hlm.366

³⁶ Radjawane & Pieter. (2014), *Kebebasan beragama sebagai hak konstitusi di Indonesia*. Jurnal Ilmiah Fakultas Hukum Universitas Pattimura Ambon, Volume 20, No. 1, hlm.32

person, including the congregation, to carry out worship in accordance with their beliefs."

Article 18 of the International Covenant on Civil and Political Rights, which regulates Human Rights, guarantees the right freedom of religion and belief. Ratify the Convention on Civil and Political Rights through the ratification of Law Number 12 of 2005, namely that humans have basic right to freedom of religion which cannot be taken away. These rights are known as Human Rights. To uphold the dignity of the human individual, the state grants certain legal rights to that person.³⁷ In the provisions of Article 18 paragraph (1) of the Universal Declaration of Human Rights, it is stated that "Everyone has the right to freedom of thought, belief and religion", this right includes freedom to adhere or accept a religion or belief of own choice, and freedom, both individually and together with other people, and either in public or private places to practice their religion or beliefs in worship, obedience, practice and teaching.

If we look at the rules of the Constitutional Court which is registered with case number. 83/PUU-XX/2022 was not accepted because the applicant argument had no legal basis at all. Whereas based on all legal considerations, according to the Court there is no conflict of norms in Article 39 paragraph (3) of Law Number 35 of 2014 with Article 28B paragraph (1) and Article 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia consider comprehensively understanding the essence of the norms in Article 39 paragraph (3) of Law Number 35 of 2014 which cannot be read as a stand-alone but must be linked to other paragraphs. However, in the Constitutional Court decision it was seen that it did not take into account the 1945 Constitution, only seeing that the applicant could not explain the perceived loss of his constitutional rights and did not have the legal standing to act as a Petitioner in the case.

It can be seen that religious rights in Indonesia are also regulated in the provisions of Article 28E paragraph (1) and paragraph (2) of the 1945 Constitution of the Republic of Indonesia which states:

- (1) Every person is free to embrace religion and worship according to his religion, to choose education and teaching, to choose employment, to choose citizenship, to choose a place of residence within the territory of the country and to leave it, and has the right to return.

³⁷ Pasal 2 ayat (1) International Convenan on Civil and Political Righ (ICCPR)

- (2) Every person has the right to freedom to believe, express thoughts and attitudes, in accordance with his conscience.

Likewise, it is regulated in Article 28I paragraph (1) of the 1945 Constitution which states that "The right to life, the right not to be tortured, the right to freedom of thought and conscience, the right to religion, the right not to be enslaved, the right to be recognized as a person before the law, and The right not to be prosecuted on the basis of retroactive laws is a human right that cannot be reduced under any circumstances" and likewise with Article 29 paragraph (2) of the 1945 Constitution of the Republic of Indonesia which states that the state guarantees the independence of every resident to embrace their respective religions and worship according to their religion and beliefs.

In addition, statutory provisions guarantee the right to religion as a component of human rights which must be upheld, respected and protected, but its implementation must not damage public morals, public security or peace in society. In a democratic society, the public welfare, compliance with the rule of law, and the achievement of these goals are all important.

Because of this, the state imposes restrictions and prohibitions on the exercise of freedom in various matters, based on the provisions of Article 28J paragraph (2) of the 1945 Constitution that "In exercising his rights and freedoms, every person is obliged to comply with the restrictions stipulated by law by the sole purpose of ensuring recognition and respect for the rights and freedoms of others and to fulfill fair demands in accordance with moral considerations, religious values, security and public order in a democratic society".³⁸

If look at the provisions regarding child adoption in Indonesia which require prospective adoptive parents to be of the same religion as the religion adopted by the prospective adopted child, then you can refer to the provisions in the restrictions and prohibitions mentioned in Article 18 paragraph (3) of Law Number 12 of 2005 which states that "Freedom to practice one religion or belief can only be limited by legal provisions necessary to protect the security, order, health or morals of society or the basic rights and freedoms of others". It is necessary to realize that the reason behind adopting a child or adopting a child having to be of the same religion is that in adopting a child the main principle that must be taken into account

³⁸ Pasal 28J ayat (2) UUD 1945

is the interests of the child. The best interests in this case do not only talk about the interests of the child materially, but also pay attention to the spiritual side, namely beliefs and morals and avoid issues of religious coercion. Because adoption is the transfer of a child from the sphere of authority of the biological parents or legal guardians who are responsible for the care, education and raising of the child to the family environment of the adoptive parents. Adopting a child cannot be separated from fulfilling children rights in fulfilling the rights to child welfare and protection. Because children rights are human rights given by God Almighty, which are inherent and owned from the moment they are born, which cannot be equaled by adults.³⁹

Article 42 paragraph (2) of Law Number 23 of 2002 concerning Child Protection stipulates that a child must follow the religion of the parents before being allowed to choose another religion. However, the article does not explain when a child is allowed to choose another religion. The article only states that a child can do this if mature and responsible, and have followed all the rules and regulations regarding chosen religion as well as applicable laws and regulations. This suggests that even if a child religion initially conforms to the parents of religion, the child will eventually regain control over own beliefs.

In the consideration of Law Number 35 of 2014 concerning amendments to Law Number 23 of 2002 concerning Child Protection, it is stated that the Unitary State of the Republic of Indonesia guarantees the welfare of its citizens, including the protection of children rights, which are human rights that must be guaranteed, protected, and filled with parents. With the aim that children can develop and grow well in accordance with what is expected, it is necessary to provide adequate support for child self development process. Before a child makes a choice, the child religion follows the religion of the parents. Adoption of a child cannot be separated from fulfillment of children rights related to the protection and welfare of children.

The incident in the field experienced by Mrs. Dewi provides evidence that the adoption of children from different religions occurs, thus giving adoptive parents a quandary. Meanwhile, adoption was carried out on abandoned babies whose religion was adapted that majority of the

³⁹ Hesa Harmonique, "Pengangkatan Anak Oleh Orangtua Tunggal Yang Berbeda Agama Dalam Tjauan Hukum Islam Dan Perundangan Indonesia," *Skripsi Universitas Indonesia* (2012), hlm. 5

population, which was discovered for the first time. It can be said to be abandoned because the family does not want to care the baby. Meanwhile, the right to religion itself is contained in Article 28E paragraphs (1) and (2) of the 1945 Constitution. It can be assumed that every child has the right to religion and is protected throughout his life. This is contained in Law Number 35 of 2014 Article 6 concerning Child Protection which states that "Every child has the right to worship according to their religion, think and express themselves according to their level of intelligence and age".⁴⁰

Children are a gift and trust given by God Almighty. Children are an inseparable part of human survival and the survival of a nation. Therefore, children need good guidance, family conditions and an environment that supports their development. Regarding the sentence in Article 39 of Law Number 35 of 2014 concerning Child Protection which requires parents to share the same religion as the religion adhered by prospective adopted child, that with the aim of protecting child right to embrace a religion, lest in the future the child changes religion to suit the religion of his adoptive parents. Because the position of adopted children of course in a weak condition compared the position of adoptive parents. In this way, the provisions regarding restrictions and prohibitions on religious freedom apply so that order and general welfare in society are implemented.

Regulations regarding child adoption in Indonesia are needed to protect two interests, that interests of prospective adoptive parents and also interests of prospective adopted children. Adoption of a child has legal consequences that impact guardianship and inheritance⁴¹ In the case of guardianship, when a decision or determination is made by the court, the adoptive parents legally become the guardians of the adopted child. From that moment on, all the rights and obligations of biological parents are transferred to adoptive parents. Except for female adopted children who convert to Islam, when they want to get married, the only people who can be guardians of their marriage are their biological parents or blood relatives. In line with the obligation to adopt children of the same religion because adopted children also need to know the origins of their biological family. Therefore, the principle that prospective adoptive parents must share the same religion as the prospective adopted child is certainly not without reason.

⁴⁰ Undang-Undang Nomor 35 Tahun 2014 tentang Perubahan atas Undang-Undang nomor 23 tahun 2002 tentang Perlindungan Anak

⁴¹ Syeh Muhammad Yusuf Qardhawi, *Al Halal wa al Haram fii Islam*, Alih Bahasa H. Muammal Hamidy, (Surabaya: Bina Ilmu, 1993), Hlm. 308.

Hopefully that firmness will be able to prevent prospective adoptive parents from issues of religious coercion against prospective adopted children and also for the sake of a good future for the child.

Supervision of implementation child adoption needs to be carried out and can be equated with the aim of protecting so that in the future no violations occur. If the adopted child has different beliefs from the prospective adoptive parents, the government continues provide supervision from the application stage to the Court decision without regard to race, religion, gender or certain groups. In this way, the government hopes to provide satisfaction to the community in pursuing their rights. However, in Law Number 39 of 1999 concerning Human Rights Article 55 states that every child has the right to worship according to their respective religion, express and think according to their intellectual level and age under the guidance of their parents or guardians⁴². From this sentence can be clearly seen that there is no mention of a prohibition on adopting children of different religions, however, if this carried out continuously will have a negative impact in terms of religion on the children being adopted. Because, the one who has an important role is the adoptive parent who is the guardian, so if the two of them have different religions there will be concerns about reduced spirituality in the child.

CLOSING

Based on the research above, there are several important things that can be concluded that in Indonesia child adoption is permitted in accordance with Law Number 35 of 2014 concerning amendments to Law Number 23 of 2002 concerning Child Protection. Meanwhile, Article 39 paragraph (1) explicitly states that adoption can only be carried out in the best interests of the child and carried out based on local customs and the provisions of applicable laws and regulations. In fact, what is meant by Article 39 paragraph (1) is ensure that children are protected, most of whom are dependent on their parents. The government also stipulated Government Regulation Number 54 of 2007 concerning Implementation of Child Adoption to implement laws relating to child adoption. Further regulations regarding child adoption are also contained in Article 28 of the Minister of Social Affairs Regulation Number 110/HUK/2009 concerning Criteria for Adoption.

⁴² Pasal 55 Undang-undang Nomor 39 Tahun 1999 Tentang Hak Asasi Manusia

Analysis of child adoption in Islamic law only recognizes and does not change the lineage. Even Islamic law also recommends adopting children for the children welfare. There are pros and cons to Article 39 paragraph (3) of Law Number 35 of 2014. There is a sentence that prospective adoptive parents must adhere the same religion as the prospective adopted child. This is not intended for another purpose but rather the influence of the adoptive the parents religion on the adopted child only one way. Meanwhile, the right to religion itself is contained in Article 28E paragraphs (1) and (2) of the 1945 Constitution. It can be assumed that every child has the right to religion and protected throughout of life. However, the provisions regarding restrictions and prohibitions on freedom of religion apply to ensure order and general welfare in society.

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