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## **Adoption in Indonesian Legal System**

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## ADOPTION IN INDONESIAN LEGAL SYSTEM

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### ABSTRACT

In some countries the adoption procedure is legally well arranged despite their variety of procedures range between written to customary law. This paper will discuss the various potential problems that will arise in adoption affairs, for instance which adoption systems that are in force, the need of unifying the laws, as well as supervision model to protect the rights and lives of adopted children.

In Indonesian written legal system, adoption regulation is found in the Civil Code. This regulation is intended to the Indonesian citizens of *Tiong Hoa* or Chinese descendant and other foreign Asian descents. Besides, adoption is also regulated in the Act number 4/1979 on Child Welfare, the Act nr. 23/2002 on Child Protection, and Government Regulation nr. 54/2007 on Implementation of Adoption emphasizing the principle that adoption is only allowed for the child's best interests in order to promote the child's welfare.

In Indonesian customary law system that basically prevails to the indigenous Indonesians there are several types of adoption, namely: (1) to adopt a child fully (the child is taken away from the family's origin), and (2) to adopt a child without removing the child from the family's origin (child of *pupon*). There are some motives in adoption in customary law.

The absence of the unification of adoption procedure makes the procedures varied till now let alone the different adoption procedures based on various customs. One thing to be realized is the fact that the adoption based on custom will potentially create legal problems in the future, especially if the adoption is done by those of foreign nationality. It is therefore important to make unification of adoption regulations soon in order to ensure legal certainty. There is also a need of oversight conducted by the government and society as well in order the adoption is done based on honest motives that will protect the child's interests.

Keywords: adoption, adoption by custom, the child's best interests.

### Modes of Adoption in the History of Mankind

Although it is known since an early year in the history of mankind, the process of adoption is varied in its development throughout the world. India and China, for instance, practiced the process of adoption for ritual and cultural aims rather than for the will of the adopter or let alone the interest of the adopted child. Performing funeral ceremony for their parents that should be done by the first son had forced many parents' relative to adopt a child.

In Roman Empire, adoption can be found more in the aristocracy family rather than in ordinary family. An abandoned child was usually picked up by somebody else to be treated

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as a slave rather than an adopted child. In Hawaii, the process of adoption is common among family members rather than unknown child.

The decline of many emperors in Europe and the rise power of the church also provided an impact toward adoption process. Abandoned child who used to be treated as a slave was cared under monastery life. Later on, the church developed an orphanage as a shelter to accept abandoned child into a “family”.

The development of modern adoption was started in the United States in which it introduced two important principles i.e. “the best interest of the child” and the secrecy process. Those two principles were then followed by other country because there was a shift in paradigm that adopting is not a matter of having a child in the family but having a child is to create a family. Therefore the need of adoption for a married couple without a child was increase and the need of cutting the relationship between an adopted child and their original parents was also emerged.

Having said that, the paper will then discuss on how the international law responded to the variety of state policy towards the adoption process.

### **Adoption under International Law<sup>4</sup>**

On September 14, 1973 The Institute of International Law managed to provide a recommendation based on Seventh Commission with Rapporteur Mr. Rodolfo de Nova for the effects of adoption in private international law. In General tis recommendation can be said as a continuation of the work done by Hague Conference on Private International Law in which recognized difficulties in choosing applicable law relating to adoptions.

The resolution recommended that the law of the adopter, in principle, will govern the relation between the adopted persons and the adopter. However, concerning the consent of the parents who their child is adopted, it is the law of the parents that will govern whether the consent that is given is legitimated or not.

Went further, the resolution also provided detailed recommendation concerning married couple, custody of the child, duties and responsibility of the adopter and their parental power. Furthermore, in relation to any criminal liability, tort or contract on the effect of adoption’s process will be governed by the of that particular issues.

Finally, the resolution recommended that each countries should develop rules and procedures on how each countries governs the adoption in their own territorial. Twenty years later after the resolution of The Institute of International Law, the world concluded a convention on Protection of Children and Co-operation in respect of Inter-country adoption<sup>5</sup>.

The convention emphasized that the adoption is done on the best interest of the child therefore it is a mandatory that the child is adoptable in which there is no inducement by payment or compensation of any kind for engaging in this adoption process.

The convention also urged the establishment of a Central Authority that will be responsible for taking all appropriate measures in processing the inter-country adoption. In doing so, this central authority may give an accreditation status to other agency that conducts the adoption. Moreover, this central authority should ensure that those accredited agencies observe the convention.

As it is recommended by the institute of international law and the above-mentioned convention, this paper will examine whether Indonesia has develop rules and procedures on how the adoption process is governed.

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<sup>4</sup> It is quoted from Session of Rome 1973 of The Institute of International Law, it was downloaded from [www.idi-iil.org](http://www.idi-iil.org) at March 12, 2013.

<sup>5</sup> The Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption was concluded on May 29, 1993.

## Pluralism in the Regulation of Adoption

Adoption here means a child adoption. Adoption is an act of taking other people's children in their own families in such a way, so that the person who adopts the child and raises the adopted child having a kinship like parents and their own child.

In Indonesia there are several terms to refer to adoption. R. Soepomo<sup>6</sup> in his book "*West Java Traditional Civil Law*" states that in West Java there is a term "*mupu anak*" (in the North Banten and Cirebon), "*mulung* or *ngukut anak*" (in Sunda), and "*mungut anak*" (in Jakarta). While the adopted child is referred to as the "*anak angkat*" (Indonesia), "*anak pupon*" (Java), "*anak pulung*", "*anak kukut*" (Sunda) and "*anak pungut*" (Jakarta).

In practice in the community, there are at least two purposes of adoption, namely:

1. Adopting child fully with the aim of putting the adopted child as own child. This is called *mupu anak*, *ngukut anak*, and so on.
2. Adopting a child for the purpose of helping the adopted child's parents to take care for him because of their economic inability and other reasons. It is called "*ngan miara bae*", which is merely to take care the child.<sup>7</sup>

Today, adoption is not only to serve the interests of the prospective adoptive parents, but more focused on the interests of the prospective adoptive child. Setting adoption is not just to provide certainty and clarity regarding child adoption but it is needed to ensure the interests of the prospective adoptive child, to guarantee the education, safety, caring and growth of adopted child, so the adoption provides an opportunity for child to live more comfortably.<sup>8</sup>

The backgrounds of child adoption in general are:

1. having no children;
2. having no descent;
3. because of compassion (helping displaced children);
4. to help work at home;
5. kinship relations;
6. customary in the community and trust.

Civil law in Indonesia so far is still plural. Pluralistic nature of Indonesian civil law originated from the Dutch administration in Indonesia. During this period, based on Article 163 jo article 131 of Indische Staats Regeling (IS), the Dutch East Indies (now the Indonesian territory) was divided into 3 groups as follows:

1. European Group and their descendants;
2. Foreign Eastern Group, which was further divided into the Eastern Group of Tiong Hoa and other Foreign East Groups.
3. *Bumiputera* (Native) Group.

The classification had an impact on the law applied for each class; for them the private law applies differently. For the European group, the European civil law applied was *Burgerlijk Wetboek* (BW) and *Wetboek van Koophandel* (WvK). The Foreign Eastern Group applied part of the European civil law (BW and WvK) and the law of their country of origin/their ancestors. For the *Bumiputera* Group (native) applied their own customary law. The thing to be concerned is the *Bumiputera* Group consisted of many different tribes which have their own different laws and traditions.

In turn, it affects the variety of rules applied in the child adoption processes. Each legal system in Indonesia has its own attitude towards adoption on the existence, form, and content of the child adoption agency. In addition, the regulations can not meet the needs of

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<sup>6</sup> R. Soepomo, 1982, *Hukum Perdata Adat Jawa Barat*, Jakarta : Penerbit Djambatan, p. 24.

<sup>7</sup> Ibid, p. 24.

<sup>8</sup> Rusli Pandika, 2012, *Hukum Pengangkatan Anak*, Jakarta: Sinar Grafika, p. 10.

the adoption practice because of the changes in the ways of thinking and lifestyle of the people.

The European group essentially did not recognize adoption so that in *Burgerlijk Wetboek* basically the regulation on adoption was unknown. This is different from the habit of Tiong Hoa group who applied patrilineal kinship system. Tiong Hoa communities highly need a son who will continue to carry the family name. On the basis of the consideration, furthermore in *Burgerlijk Wetboek*, it was added the regulation on adoption. For the *Bumiputera*, the adoption matter has been known for a long time, despite the regulation adoption varies from one region to another. Slamet Mulyana in his book states that in the legislation in Majapahit kingdom era, namely *Kitab Kutara Manawa* (13th-14th century) it is discovered the word of "adoptee who came from other people". This indicates that, at the time, the adoption agency was known.<sup>9</sup>

### **The Position of a Child in a Family**

In the area of Java, it is known an adage that says "a lot of kids, means a lot of luck". Therefore, among the Java community in particular and Indonesia in general, children become something important in a family. Children are men of the future, which means that children are the next generation, linking ancestry and progressors of human life.<sup>10</sup> In general, parents hope someday their child will be able to realize the hopes and aspirations that have not been reached. On the other hand, a child is the heir of wealth and assets left by the parents later when they died.<sup>11</sup>

The birth of a child is a legal event that raises many legal consequences. With the birth of a child, it will lead to inheritance relationships, family relationships, proxy relationships, and other relationships related to the birth of the child as the new subject of law with all his status before the law.<sup>12</sup> In Indonesia, the problem on the position of a child is set in Act No 1, 1974 on the Principles of Marriage, which is in Chapter IX Article 42 through Article 47. Article 42 says that legitimate child is a child born in or as a result of a legal marriage.

The presence of a child in a marriage, is so important that is often said that the presence of children is the goal of a marriage. As a consequence, the non existence of a child in a marriage can be used as a reason for divorce or the reasons for a husband to do the polygamy with the expectation that, in the next marriage, the child will be obtained. Another option is to do adoption. In this context, the adoption only in terms of the interests of the prospective adoptive parents who need adopted child's presence as a complement to their happiness. The presence of these adopted children is, at once, a replacement for a legitimate child they do not have, who will continue the lineage and family name as well as the inheritors of the parents' wealth.

According to Soerojo Wignjodipoero<sup>13</sup> in his "*Introduction and Principles of Customary Law*," a biological child has the most important position in every family in indigenous communities. In addition to be regarded as the successor of generation, a child is also seen as a place where all hope of his parents in the future shall be relied on. Similarly,

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<sup>9</sup> Slamet Mulyana, 1967, *Perundang-undangan Madjapahit*, Jakarta: Bharata, p. 153, read also Slamet Mulyana, 1979, *Nagara Kertagama dan Tafsir Sejarahnya*, Jakarta: Bharata, p. 214.

<sup>10</sup> Zainuddin, 1994, *Seluk Beluk Pendidikan dari Al-Ghazali*, Jakarta : Bumi Aksara, p. 18

<sup>11</sup> D.Y. Witanto, 2012, *Hukum Keluarga Hak dan Kedudukan Anak Luar Kawin Pasca Keluarnya Putusan MK Tentang Uji Materiil UU Perkawinan*, Jakarta : Prestasi Pustaka, hal 1-2

<sup>12</sup> D.Y. Witanto, *Ibid*, p. 3

<sup>13</sup> Soerojo Wignjodipoera, 1995, *Pengantar dan Asas-Asas Hukum Adat*, Jakarta : PT. Toko Gunung Agung, p. 111.

child is seen as the protector for his parents later when the parents are no longer physically able to earn their own living. Therefore, parents who do not have children will do anything to get (own) children. The way is usually by adoption. The reasons given are usually:

1. Because they do not have their own child so that adopting child is the way to get descent.;
2. Because they do not have a child so that adopting child is expected to be able to get the child sooner.;
3. It is encouraged by the compassion against the child, for example, because his life is not economically sufficient.<sup>14</sup>

## **Adoption in Indonesian Legal System**

### **1. Adoption in Customary Legal System**

Currently, in Indonesia, there are civil legal pluralism, including on the issue of adoption. In some regions, adoption is only performed traditionally, without the establishment of the Court, while in urban communities adoption is usually accompanied by the establishment of the Court. Adoption of customary legal systems has various ways because the various ethnic groups in Indonesia have different customs and kinship systems. Generally, Indonesian kinship system can be classified as follows:

- a) Communities with the paternal system (patriarchy);
- b) Communities with the maternal system (matrilineal);
- c) Communities with a system of the maternal-paternal (bilateral or parental), which further is differentiated into:
  - 1) Communities made up of family units (family or gezin);
  - 2) Communities made up of ethnic units (tribal).<sup>15</sup>

Community with patrilineal system is the community based on unilateral kinship systems by taking the lineage (blood) from male or father. The form of the relative groups is lineage and clan. Lineage is a genealogical unity that includes people who can be traced the kinship line in real, whereas the relationship of clan is traditional.<sup>16</sup>

In patrilineal communities, the position of a son is so important to continue the descent in terms of both social and economic. The legal consequences arising from the patrilineal system is that the wife, because of her marriage (usually married with the system of honest money payment) is excluded from her family, and then goes into her husband's family. Children who are born become the family of the father (following the lineage of the father). The treasure is owned by the father (husband) although later it is for his off springs.

According to Ter Haar<sup>17</sup>, in a community like this, a child of father's kinship group (male) is important in terms of inheritance, social relationships and marriage. While maternal kinship is less or not important to him. The examples of patrilineal community are the communities in Tapanuli, Lampung, Nias, Bali, Seram and Ambon.

Community with the maternal system (matrilineal) is the community based the system of unilateral kinship with the lineage (blood) from women or mothers. The form of kinship in matrilineal community is the same as the form of patrilineal community kinship. In this case what is important is not just the child or female offspring, but the most important for a child is a child or female offspring from the mother's family or relatives.<sup>18</sup> The examples of such community include Minangkabau community, Enggano, and so forth.

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<sup>14</sup> Soerojo Wignjodipoero, *Ibid.*, 119.

<sup>15</sup> Rusli Pandika, 2012, *Hukum Pengangkatan Anak*, Jakarta: Sinar Grafika, p. 37.

<sup>16</sup> Harsojo dalam Rusli Pandika, *Ibid*, p. 38.

<sup>17</sup> Teer Haar, p. 178, as quoted in Rusli Pandika, *Ibid*, p. 38.

<sup>18</sup> Rusli Pandika, *Ibid*, p. 39.

The legal consequences that arise are all family is mother's family. Children enter the maternal family line and inherit from their mother's family. Meanwhile, the husband or father is not in the mother's family or not in the wife's family. In terms of inheritance, women's position is more prominent than men.

Community with the system of maternal-paternal (bilateral, parental or double unilateral) is a community that draw the lineage from both the father and mother. In the form of the bilateral community, the kinship based on family unit (family or *gezin*) is found as a relative unit consisting of 10 to 12 families.<sup>19</sup> In the parental kinship systems, the position of men and women is not distinguished, including in terms of inheritance.

The differences in kinship systems that exist in a community lead to the different position of a child in a family. In patrilineal community, son's position is so important since son continues the family line. Conversely, in matrilineal community, daughter's position is important in the family. Similarly, in the *Tiong Hoa* community (Foreign East) in Indonesia, the position of sons is important as the successor to the lineage. Therefore, in the Civil Code - which is still valid up to present in Indonesia, at that time it was inserted the provisions on adoption. The insertion of this provision on adoption was in *Staatsblaad* 1917 No. 129. With the adoption provisions, it provides an opportunity for the *Tiong Hoa* community who has no male descendants can adopt a boy. In the *Staatsblaad* (State Gazete), the adoption is specific only for boy adoption, even though the practice had been intruded by jurisprudence.

Soerojo Wignjodipuro<sup>20</sup> mentioned that the fellowship embracing maternal-paternal lineage, the relationship of children with the family of the father or the mother is as equally tight or in the same level. It also brings the effect on the issue of the marriage prohibition, inheritance, the obligation to maintain and other legal relations to both sides of the family are the same.

In a matrilineal community fellowship, the relation between the child and family of the mother is much closer and more important than the relation between the child and the family of the father. And vice versa, in a patrilineal fellowship, the relationship with the family of the father is considered more important and has higher degree. It does not mean that the fellowship with unilateral kinship does not recognize the family of the second party. Relations with the second part continues to be recognized; only because of the unilateral nature of the community that causes the family relation with one of the parties becomes tighter and more important.

In unilateral community, it is also known an adoption agency. In Indonesian community, which is unilateral-patrilineal, not having a son or male offspring, as well as in the unilateral-matrilineal community in terms of not having a daughter, is not just a problem for the couple, but a problem for all their relatives. This is due to the communal nature of the community that brings close ties and relationships between individuals and their family. Even, according to Pandika Rusli<sup>21</sup>, more or less, the contact with the surrounding communities will also be affected. This is especially for those who occupy important social status in a community, so the problem of not having descent becomes a major problem for the community. In the regions that recognize adoption, generally, the reason for adoption is because they do not have offspring and to continue the descent.

According to Soerojo Wignjodipoero<sup>22</sup>, the customary community system there are several forms of adoption:

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<sup>19</sup> Ibid, p. 39.

<sup>20</sup> Soerojo Wignjodipuro, 1995, *Pengantar dan Asas-Asas Hukum Adat*, Jakarta: Penerbit Gunung Agung Jakarta, p. 115.

<sup>21</sup> Rusli Pandika, Op.cit., p. 40

<sup>22</sup> Soerojo Wignjodipoero, Op.cit., p. 118.

- 1) Adopting a child not from family.  
Adoption in this way is conducted by including other people's child into the family who adopts. Normally, this action is accompanied by a delivery of magical goods or money to the original family of the child. The reason for this adoption in general is "afraid of not having descent." The legal status of the child adopted in such a way is the same as a biological child of the adoptive parents. Whereas, the family relationship with his/her own parents is customarily broken. Adoption in this way has to be performed clearly (with traditional ceremonies), and with the help of the chief. The adoption in this way is usually done in Gayo (West Sumatra), Lampung, Nias Island, and Kalimantan.
- 2) Adopting a child from family  
A child is typically adopted from one of the existing clan having customary relationship. But sometimes the child is taken from out of the clan, even in some villages the child can also be taken from the wife's family environment (*pradana*). In families who recognize the presence of concubine, the children of concubines are adopted by the wife. Such adoption in Bali is called "*Nyentanayang*" and performed transparently, and the adopted child must break his/her family ties with his/her mother and his/her mother's family customarily. It is usually done by burning a thread (symbolizing the child's relationship with the family broken up) and customarily pay by a thousand *kepeng* (*Balinese traditional currency*) along with a complete set of women's clothing (the relationship with the mother is broken). The child is then put in the kinship of the adoptive family (*diperas*) and announced to the people (*disiarkan*).
- 3) Adopting a child from the nieces and nephews.  
This act is commonly done in Java, Sulawesi and some other areas. Adopting niece/nephew to be treated as their own child is really a shift in family relationships (in the broader sense). It is usually done without being accompanied by payments of money or the delivery of any goods to the parents of the child.  
In the area of East Java, as a visible sign (bright) to the natural parents as a magical condition, it is given the money in the amount of "*rongwang segobang*" (= 17.5 cents). Meanwhile, in the Minahasa region, an adopted child is given visible signs called "*parade*" in recognizing the child to be an adopted child.

IGN. Sugangga<sup>23</sup> in his book entitled "*Hukum Waris Adat*" (Customary Inheritance Law) states that the customary law recognizes two types of adoption, namely:

- 1) Openly Child adoption which is done in bright (visible) and cash, meaning that the adoption is open and attended by whole families, traditional leaders / custom officials (this is the meaning of bright), and at that time it is also given customary payment (in cash terms).
- 2) Secretly Child adoption which is not done in bright and not cash, meaning that the adoption is done secretly, without inviting the whole family, usually only certain families, not attended by the leaders / officials or people from village officials, and not with the customary payment. This is usually with humanity motive and wants to take a child to maintain and alleviate the burden of the child's original parents.

In a customary child adoption, there are are two types of adopted children, namely:

- a) Foster child;
- b) Picked child (adoptee) (it is also frequently called as *anak pungut*, or *anak pupon* (in Banyumas); *aneuk geuteung* (Aceh), *anak mongos* (Bali).

The difference between foster child (adopted child) and picked child is in terms of its legal consequences. Foster child has the same position as well as biological child. Only in the case of inheritance, adopted child is not entitled to inherit the treasures (the treasures of

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<sup>23</sup> IGN. Sugangga, 1995, *Hukum Waris Adat*, Semarang: Diponegoro University press, p. 35-36.



adoptive family). On the other hand, a picked child is not eligible to inherit from the adoptive parents, he/she is only the heir of his/her biological parents.

In the legislation system, customary adoption is given the place. Article 39 paragraph (1) of Child Protection Law states: "Adoption is only done for the best interests of the child and based on local custom and statutory provisions that apply". However, the adoptive parents remained with the obligation to implement in accordance with the applicable laws.

## 2. Adoption in Civil Law System for Tionghoa Group

The *Burgerlijk Wetboek* of Netherlands does not recognize adoption agencies, in contrast to the French Civil Code that become its source. The background is that, according to the Dutch people, a child must have consanguinity.<sup>24</sup> That is why the Indonesian Civil Code does not recognize adoption agency. Gouw Giok Siong stated that "... adoption is not possible under applicable law for the people of European Group in Indonesia."<sup>25</sup> The groups who were enabled to perform child adoption, according to Gouw Giok Siong, were the *Bumiputera* (native) and Chinese group. The reason is that the old rules of adoption had not changed.

The new Dutch *Burgerlijk Wetboek* (after the change), since 1956, has recognized adoption agency. The purpose of this institution is not to continue the descent, but to raise children who have no parents or whose parents can not afford, so that the social and humanitarian elements play the role.<sup>26</sup>

The Tionghoa people (Chinese) and other Foreign Eastern groups came to Indonesia by bringing their customary law - which is not written from their countries. However, in Indonesia, the customary law they carried had developed themselves in the association of their lives in Indonesia because of the influence of natural and social environments of Indonesia. Moreover, Western legal effect as a result of the Dutch colonial government was active in organizing these groups for their political and economic interests.<sup>27</sup> It is necessary to consider that is the Tionghoa (Chinese) customary law that has developed in Indonesia and not the custom that exists in their ancestral land.<sup>28</sup> Then, it does not deal with the Chinese customary law existed in China, but Chinese in Indonesia or Chinese who are subject to civil law that applies in Indonesia. Nevertheless, it can not be denied, however, that the Chinese customary law that has developed in Indonesia basically can not be separated from the way of life of Chinese people.<sup>29</sup>

The family system of traditional Chinese community is a unilateral-patrilineal kinship system, so the ties of kinship based clan get an important place in it.<sup>30</sup> A daughter of a Chinese family, when married, would follow her husband and parent-in-law like to devote to her own parents. One of the primary duties of parents in the Chinese tradition is the obligation to marry off their son so that he can continue the family line. However, in terms of magic, there are ancestral rituals that can only be done by sons. For parents who do not have sons to carry out the ritual, one day after they died they will be in hunger and suffering in the spirit world. Thus, sons as descendant successor of Chinese families have an important role

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<sup>24</sup> R. Subekti, *Perbandingan Hukum Perdata*. Pradnya Paramita, Jakarta, 1974, p. 21

<sup>25</sup> Gouw Giok Siong, *Hukum Perdata Internasional Indonesia*, first edition. Kong Po, Jakarta, 1963, p. 10

<sup>26</sup> Rusli Pandika, *op.cit.*, p. 26

<sup>27</sup> Sudiman Kartohadiprodjo, *Pengantar Tata Hukum di Indonesia*, PT. Pembangunan dan Ghalia Indonesia, Jakarta, 1977, p. 188

<sup>28</sup> Kusumadi Pudjosewojo, *Pedoman Peladjaran Tata Hukum Indonesia*, Gadjah Mada University press, Jogjakarta, p. 73

<sup>29</sup> Rusli Pandika, *op.cit.*, p. 67.

<sup>30</sup> *Ibid*, p. 69

as the successor of the descent and for the devotion of homage ceremony to their ancestors and to their parents after they died later.<sup>31</sup> Therefore, for Chinese families who do not have sons, they adopted a boy to preserve bloodlines and perform offering ritual to their ancestors. Based on this view, prior to the issuance of the provisions for the Chinese adoption (Stbl. 1917 No. 129), the Chinese in Indonesia is only possible to adopt boys.

From the provisions of Stbl. 1917 no 129 on child adoption for the Chinese group in Indonesian legal system, it is obvious that the regulation requires that all adoptions meet certain compulsory requirements. When the requirements referred are not met, it will result in the cancellation of the adoption. The Ordinance in Stbl. 1917 no 129 set of adoption in Chapter II with the heading of "*Van Adoptie*" consists of 11 chapters, from chapter 5 to chapter 15.<sup>32</sup>

The terms of adoption:

- a) The one who can perform adoptions is a married man, whether the marriage is still ongoing or has been broken by a divorce or death. A married woman but the marriage is broken up because of death can also do adoptions when she does not hold a marriage again with another man after her husband's death. This difference is attributed to the position of women in marriage under the family legal system of Civil Code article 108.
- b) There is an agreement of the people who will do it, and should not be imposed by others.
- c) Only allowed if the prospective adoptive parents have no legitimate male offspring, either by marriage or by adoption in the male line.
- d) The child who can be adopted is a child or blood relatives of others, as long as the child is a Chinese boy, who has no wife, no children, and has not been adopted by others.<sup>33</sup>

For legitimate adoption, it must meet various requirements specified in the Stbl. 1917 No 129 both the conditions on the adopting and adopted party.

The effect of child adoption on foster child:

- a) The nonexistence of legal relationship between the adopted child and his original parents as well as all his/her all blood relatives and family members from his/her original parents.
- b) Being a family member of adoptive parents as the legal child considered to be born from the marriage of a couple who adopts him/her
- c) If the adopted child is from the family of the same blood relatives either from legitimate or out of of marriage, then the child will receive the same descendant degree as the degree of the descent before.
- d) Inheritance relationship with his/her adoptive parents, and the abolition of inheritance relationships with original parents.
- e) Obtain the other family name from the name of the adoptive male or husband family.<sup>34</sup>

### **3. Adoption in National Legal System**

In the past, child adoption was performed with the approach to fulfill the interests of adoptive parents. It can be seen from the pattern of adoption which put the central interests of parents, such as: because they do not have offspring, continuing the descent, or to seek employment. In the current perspective, adoption gives more emphasis on the interests of the child. The efforts to emphasize on the interests of the child appears in the Act No 4, 1979 on Child Welfare, which is in Article 12 paragraph (1) and paragraph (3) expressly state that adoption is for the welfare of the child. In addition to the Child Welfare Act, the effort to

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<sup>31</sup> Ibid, p. 72

<sup>32</sup> Rusli Pandika, op.cit., p. 73

<sup>33</sup> Ibid, p. 73 - 77

<sup>34</sup> Ibid, p. 80-81

provide protection to the adopted child is also given in the Act No. 23, 2002 on Child Protection. Article 39 paragraph (1) states that adoption can only be done for the best interests of the child and is based on custom laws and regulations.

The policies outlined in this Act have also contained in the implementing regulations; i.e. the Indonesian Government Regulation No. 54, 2007 on the Implementation of Child Adoption and the Regulation of Social Affairs Minister No. 110/HUK/2009 on Adoption Requirements.

Consideration Emphasis in adoption to the best interests of the child does not mean banning the prospective adoptive parents having other motivations - such as for not having a biological child - but this is an attempt for the government to provide protection to children's rights, especially the attempt to prevent the 'adoption' agencies which is just as guise of children exploitation, or even trafficking efforts, as in some cases of child trafficking revealed, it was done by midwives (who have access to help assist a mother who gives birth).

With the enactment of the Child Welfare Act, Child Protection Act, as well as the Indonesian Government Regulation No. 54, 2007 on the implementation of child doption, Indonesian Government Regulation No. 54, 2007 and the Regulation of the Social Affairs Minister No. 110/HUK/2009 on Adoption Requirements, then the regulation as a reference in the adoption is clearer and firmer, so it is expected that there will be no deviations in practice.

In principle, The Regulation the Social Affairs Minister No. 110/HUK/2009 states the five principles of adoption;

- a) Adoption can only be done for the best interests of the child and is based on local customs and the applicable provisions and laws;
- b) Adoption does not break the blood relationship between the adopted child and his/her biological parents<sup>35</sup>;
- c) prospective adoptive parents must have the same religion professed by the prospective adoptive child<sup>36</sup>;
- d) In the case of a child with unknown origin, the child's religion is adapted to the religion of the majority population in which the child is found;
- e) The child adoption of Indonesian citizen by a foreigner can only be done as a last effort.

In order to meet the goals that adoption is for the best interests of the child, then according to this Regulation of Social Affair Minister, the child who can be adopted is: (1) a child under 18 years old, (2) a child getting the priority for adoption is the neglected or abandoned child and (3) the child is in a family care or child care institution, (4) the child requires special protection.

Prospective adoptive child is divided into three categories;

- a) The child under the age of 6 (six) years old is the major priority; namely, the child who experiences a neglect, both the child in an urgent situation and the childr who need special protection.
- b) The child aged 6 to 12 years old, as long as there are urgent reasons based on social report, who is the neglected child in an emergency situation.
- c) The child aged 12 to under 18 years old, the abandoned children who need special protection.

In the Regulation of Social Affairs Minister No. 110/HUK/2009, there are two types of adoption: (1) the child adoption among Indonesian citizens, and (2) the child adoption

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<sup>35</sup> In the principle of adoption by Islamic Law, adoption does not break the relation between the child with his/her original parents.

<sup>36</sup> The right to embrace a religion for the adopted child (freedom to religion) is included in article 39 paragraph (3) of Child Protection Law stating that the prospective adoptive parents must be in the same religion as the religion of the prospective adoptive child.

between Indonesian citizens and foreigners. Meanwhile, according to Article 10, the child adoption among Indonesian citizens includes:

- a) The child adoption by local law;
- b) The child adoption by legislation/ law.

The Indonesian child adoption by an Indonesian citizen can be done directly (the adopted child who is in control of the biological parent or trustee) or through the Institute of Child Care. Adoption can be done by a couple or by a single parent. Adoption by single parents can only be done after obtaining permission from the Minister. Foreigner's child adoptions by Indonesian single parents can be done after obtaining written approval from the Government of the Republic of Indonesia and the Government of the country of origin of the child, as well as meeting the requirements and procedures established by the state where the prospective adoptive child comes from.

Indonesian child adoption by foreigner (or one of them is foreigner) can only be done through the Institute of Child Care. Then, it is not possible for the foreign adoptive parents to adopt directly. However, on this subject, it has been resolved by the jurisprudence of the Court, on the basis that the adopted child from the prospective adoptive parents with the same blood relatives. In Inter-country adoption, a single parent is not allowed to adopt a child. This provision is slightly different from the rules for child adoption among Indonesian citizens, which opens opportunities for single parents to adopt a child.

In addition to the requirements as mentioned above, the application of child adoption between Indonesian citizens and foreigner (both adoptive parents are foreigners), also attach a court order that would require that the prospective adoptive child is a neglected child. This is to meet the requirements that Indonesian citizen adoption by foreigners is the last effort (*ultimum remedium*) so that the child is not neglected.

With the presence of the Regulation of Social Affairs Minister No. 110/HUK/2009 is sufficient to provide a relief for Indonesian people because it provides clarity on adoption arrangements. However, by opening the opportunities for customary adoption, it keeps the existence of pluralistic nature.

#### **4. Adoption Child Under Citizenship Act no 12/2006**

Indonesian Citizenship Act recognizes an adopted child to be granted an Indonesian Citizenship. Article 21 paragraph (2) of the Citizenship Act stated that a foreign child who is adopted by Indonesian parents before Indonesian court could be granted an Indonesian Citizenship. Furthermore, in the case of a child in question might have a double citizenship, the child in question might choose which nationality he or she belongs to after she or he reached the age of 18.

Rampant cases of illegal adoption, child trafficking, and adopted child negligence require the government to regulate the supervision of adoption. It is to prevent that the practice of adoption, originally aimed for the best interests of the child, do not turn into a disaster for adopted children and their families. Adoption supervision is implemented in order to:

- a) prevent the adoption which is not in accordance with the laws;
- b) reduce the cases of deviation or violations to adoption;
- c) monitor the implementation of adoption.

The supervision is conducted by the government and society. The Government's supervision is conducted by the Ministry of Social Affairs, and the supervision by the public is carried out by individuals, families, groups, childcare and child protection agencies.

## Conclusions

Based on the description above, it can be concluded:

- a) Adoption is an act of taking other people's children in own families in such a way, so that the person who adopts the child and adopted child have the same kinship as parents and their own child.
- b) There are several motives for adoption. The most important is adoption is performed because adoptive parents do not have children of their own; they have not been blessed with a children yet, they are driven by a sense of compassion for the child.
- c) Adoption, currently, is mainly carried out with consideration of the child's interests, while intercountry adoption is performed as ultimum remidium.
- d) Adoption can be implemented either by custom or comply with laws and regulations. But in terms of intercountry adoption, it should be carried out with the permission of the court.
- e) Monitoring of adoption implementation is aimed at preventing illegal adoption, minimizing deviation in adoption and providing protection for adopted children.

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