

Justice in the Distribution of Inheritance Rights for Indigenous Peoples

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Abstract

Introduction: Based on the law, inheritance is given to people who are related by marriage and blood relations, in customary law communities specifically in the western part of Seram, inheritance is given to adopted or returned children, known as *dunale*, and the children who come home get two parts, namely the part from the biological parents and the part from the adoptive parents. This causes problems in families who feel unfair in obtaining inheritance rights for certain children.

Purposes of the Research: To analyze how an adopted child acquires an inheritance in order to provide justice for other children.

Methods of the Research: The method used in this research is the empirical research method. This research was carried out using an empirical juridical approach which is a descriptive qualitative analysis study. The research attempts to describe the solution to the problem of Justice in the Distribution of Inheritance Rights for Adopted Children in Indigenous Communities in West Seram in the Abio Community, West Seram Regency.

Findings of the Research: A home child or *dunale* is a child who is taken home as a legitimate child of the parents, even though the parents already have children or not, they will take home their grandchildren to be their children, whether from daughters or sons, and these children will receive inheritance rights from the parents who adopted them. Meanwhile, the child's family of origin no longer gets inheritance rights to maintain injustice in obtaining inheritance rights for other heirs from their original parents.

Keywords: Justice; distribution of inheritance rights; Foster child; Indigenous.

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INTRODUCTION

The development of national law must be rooted and raised from existing people's law, so that Indonesian national law must serve the interests of the people and the Indonesian nation.¹ The results of the Seminar on Customary Law and National Law Development, one of the items formulated, stated: That Customary Law is one of the important sources to obtain materials for national development that leads to the unification of law and especially what will be carried out through the act of laws and regulations without ignoring the arise/growth and development of Customary Law and Courts in Legal Development.² Marriage is a relationship between a man and a woman that is recognized as valid by the society concerned based on the applicable marriage regulations.³ The form of marriage depending on the local culture can vary and the purpose can vary. A valid marriage bond is evidenced by the existence of a document in the form of a marriage certificate. The

¹ Soerjono Soekanto, *Masalah Kedudukan dan Peranan Hukum Adat*, (Jakarta: Akademika, 1978), p. 1.

² Badan Pembinaan Hukum Nasional (BPHN), *Seminar Hukum Adat dan Pembinaan Hukum Nasional*, (Jakarta: BPHN, 1976), p. 251.

³ Gunsu Nurmansyah, Nunung Rodliyah, Recca Ayu Hapsari. *Pengantar Antropologi: Sebuah Ikhtisar Mengenai Antropologi*. (Bandar Lampung: Aura Publisher, 2019), p. 100.

definition of Marriage according to Law Number 1 of 1974 jo Law Number 16 of 2019 concerning Marriage, in Article 1, namely: "The innate bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family (household) based on the One Godhead.

Definition of Marriage according to experts Marriage is a very important event in human life. The foundations of marriage are formed by the natural elements of human life itself which include biological needs and functions, bearing offspring, the need for affection and brotherhood, nurturing the children into perfect members of society (*volwaardig*)⁴ According to Asser, Scolten, Melis, Wiarda and Pitlo marriage is an alliance between a man and a woman recognized by the state for eternal coexistence⁵ according to the Compilation of Islamic Law in Article 1, namely Marriage is marriage, which is a very strong contract or to obey Allah's commands and carry them out is worship.

Maluku as an integral part of the Republic of Indonesia also has a patrilineal customary law society, whose blood relationship structure follows the paternal line. Patrilineal customary law societies, especially in West Seram, which follow the paternal line, have a kinship system following the paternal line, where children born from marriage are included in the paternal line. The marriage system of indigenous peoples follows customs that are adjusted to religious law and remains subject to the provisions of the law. Where after the legal marriage is carried out, it will be followed by the registration of the marriage at the agency that oversees the marriage. Marriages that are carried out do not always run smoothly because there are things that can result in separation in the marriage that is carried out. In the villages in West Seram there is a tradition that is different from other communities, namely if in a marriage carried out the child that is born will be given to be adopted as a child by parents or grandparents, close relatives, distant relatives or those who do not have a sibling relationship to be adopted as children and are called adopted children, homecoming children or *dunale* terms of the West Seram community in Abio Village, Pasinaru Village and Abigalo Village. After being adopted based on customs, the child will have a position as a child of the family that adopted him. They have the right to inherit from their adoptive parents and also from their biological parents, this needs to be considered so that the rights of the children do not become legal problems that will harm the rights of other biological children, for that there are certain assets given to them as adopted children.

METHODS OF THE RESEARCH

This research was conducted using an empirical juridical approach which is a descriptive study of qualitative analysis. The research seeks to illustrate the solution of the problem of Justice in the Distribution of Inheritance Rights for Adopted Children in the Abio Indigenous Peoples, West Seram Regency.

RESULTS AND DISCUSSION

A. Child Adoption in the West Abio Seram community

Child adoption in Indonesia is through three legal systems, namely western law known as civil law, customary law, and Islamic law. The Civil Code or *Burgerlijk Weetboek* (BW) that applies in Indonesia does not recognize adoption institutions, which are regulated in the Civil Code is the adoption or adoption of children out of wedlock, which is contained in

⁴ Titik Triwulan dan Trianto, *Poligami Perspektif Perikatan Nikah*, (Jakarta: Presasti Pustaka, 2007), p. 2.

⁵ Pengertian Pernikahan Menurut Para Ahli, diakses dari <https://www.idpengertian.com/pengertian-pernikahan/>,

Chapter XII part III Article 280 to Article 290 of the Civil Code. However, this provision can be said to have nothing to do with adoption, because basically the Civil Code does not recognize adoption. The enactment of the Civil Code for the Chinese group, especially for family law, certainly poses a dilemma for the Chinese community. This is related to the non-regulation of adoption institutions based on Chinese family law before the enactment of the Civil Code, which is very thick with the tradition of adoption, especially for families that do not have children or male descendants in order to continue the existence of the family clan and the worship or maintenance of ancestral ashes.

In relation to this problem, the Dutch East Indies government in 1917 issued Staatblaad Number 129 which in Articles 5 to 15 provides regulations on adoption for the Chinese community in Indonesia. However, in connection with the growing adoption needs among the Chinese community today, the enactment of the Staatblaad of 1917 Number 129 which only regulated the adoption of boys. Article 5 of the Staatsblad of 1917 Number 129 states that if a man is married or has been married, does not have a legitimate male descendant in the male line either by blood or by appointment, he can adopt a person as his son. This is related to the custom of the Chinese society where boys are the descendants of their adoptive parents. Meanwhile, the adoption of girls is not allowed and null and void (Article 15 of the Staatsblad). Government Regulation Number 54 of 2007: Child adoption aims at the best interests of children in order to realize child welfare and child protection, which is carried out based on local customs and regulations and regulations.

Law Number 23 of 2002 concerning Child Protection, expressly states that the purpose of child adoption, the motivation for child adoption can only be carried out in the best interest of the child and is carried out based on local customs and the provisions of applicable laws and regulations. The practice of adopting a child with the commercial motivation of trade, commercial for fishing and then after the couple has obtained a child from his own womb or biological child, the adopted child who is only a bait is wasted or abandoned, is very contrary to the rights inherent in the child.

Child adoption in customary law is carried out by taking or adopting children preferably from their own families, often without the proper adoption certificate, with the many cultural diversity of customary tribes in Indonesia making the procedure for child adoption not the same between all Indonesian islands. In Java, child adoption does not require certain religious ceremonies and the consent of family members. However, unlike in some areas such as Lampung, Gayo and Nias, it is necessary to have a religious ceremony with an announcement and witnessed by the public and the approval of the family members concerned. The legal pattern in customary law in an act of customary law is that an act must be carried out clearly and in cash. Enlightenment is a principle of legality, which means that the act of law is done in front of and announced in front of the public, formally and has been considered by everyone to know it. As for cash, meaning that the deed will be completed immediately at that moment, it is impossible to withdraw it.

By human instinct, every married couple wants to have children to continue their offspring, inherit and become entertainment. A household that does not have children will feel arid and feel imperfect, in order to obtain children various ways are done such as adopting / adopting other people's children, both from family children and from other people to be used as biological children who take *nasab*, inherit inheritance after the adoptive parents die and others.⁶ Clearly, it means that the adoption of the child is carried out with

⁶ Abdul Wahab Abd. Muhaimin, *Kajian Islam Aktual* (Jakarta: Gaung Persada Press, 2011), p. 143.

the knowledge and in the presence of the head of the fellowship (head of custom) by performing traditional ceremonies. This is done with the intention that the public can know that there has been an action to sever the legal relationship between the adopted child and his own biological parents and to include the adopted child in the bond of the rights and obligations of the adoptive parents and their adoptive relatives. Meanwhile, what is meant by cash means that the legal act of raising the child must be accompanied by the traditional gift or payment, in the form of magical objects, money, clothes. With these gifts, the adoption of the child has been completed and immediately the adopted child changes his legal relationship from his biological parents to his adoptive parents.

In customary law societies that carry out child adoption as a legal act to make someone else's child a biological child for his adoptive parents, an adopted child is not only included in the household and family ties of his adoptive parents, he is also socially included in the kinship bond of his adoptive parents. The adoption of children in this community must be done in a clear and cash manner. This means that the adoption of a child is carried out secretly without inviting the entire family or only attended by a certain family and not attended by traditional or village leaders, and not by the payment of customary money. In the legal act of adoption of a child that does not aim to make him a biological child, it does not have to be done openly and in cash⁷

Families who do not have children or families who have children but they have grown up and have moved away leaving their parents, then parents adopt children to accompany them. The process of raising children is carried out in a clear manner, witnessed and known by all indigenous peoples and made their customary rituals in accordance with the customs in the western part of Sibio village, ahiolo, Sumit Pasinaru village, which is taken from the parents' house and then taken down to the church to make a joint prayer to confirm the adoption of the child as well as pray for his life and the life of his new parents. There are also children who are adopted while in the mother's womb so that the family who wants to adopt them finances all the needs of the mother from pregnancy to childbirth then the child is handed over and the prayer ceremony is made according to the customs and religion of the Abio community, namely Protestant Christianity, in general the Abio people prefer to adopt children from their own families. The procedure for child adoption in the Abio community is carried out by parents who do not have children or those who have children who adopt children for certain purposes such as: 1) adopting children to raise their children in place of married girls; 2) raising children to become the successors of the clan; 3) Raising children with the aim of nurturing to become friends because the children are adults and go out to migrate.

Adoption of children according to customary law in Abio Village, Elpaputih District, West Seram Regency based on hereditary customs, where raising children occurs if a daughter from a married family has to give her child to her parents or her brothers or the child can also be returned to the family of her female parents, this is a tradition of taking children home or *dunale* children or known as adopted children basically It is also done in light and cash It is called in the Wemale Tribal language (*dunale*) which means clan. There is no requirement to be a homecoming child, it can be male or female, depending on the family returning home or biological parents.

Taking children home or adopted children to the family, whether it is a family Having children or not having children, does not affect because it has become a tradition in Abio

⁷ Ima Susilowato, et.al., *Pengertian Konvensi Hak Anak*, (Jakarta: Unicef, 2003), p. 48

Village, ahiolo, Sumit Pasinaru village to adopt children as children Home Do not use an adoption letter, because this custom has been done for a long time and now the people of Abio Village continue to do that tradition, The children given to adoptive parents are also family because they have family relationships from our ancestors. The purpose of the adoption of children is to maintain the brotherhood between families, and to be a reminder of family connections, in order to maintain the preservation of the tradition of supporting each other and maintaining the unity called in Ahiolo Village "*Sou Youle Sou Nule*". The point is that the child returns home to continue to strengthen the bond of brotherhood, Adopted children who are adopted in the habits of the Ahiolo Indigenous People have no procedure because based on the lineage and every family of a child who is married and has children already knows their obligation to return the child to the clan of father and mother, and this has happened repeatedly and from generation to generation has been done since the ancestors this custom has been carried out and continues to run until today.

The procedure for taking the child home is carried out with the knowledge of the wider community, known or witnessed by the King, traditional leaders or the community, and written in the village administration book so that it has more legal certainty in writing. Based on customary law, every legal act must be carried out in cash and clearly so that in the process of adopting a child or taking the child home it is carried out simultaneously with the giving or handing over of goods that have a religious magical meaning which results in the breakdown of the relationship between the child and his biological parents, and then entering and being accepted as a child into the adoptive parents. However, in indigenous peoples, items that have a magical meaning have been taken so that usually what is given is only treasure in the form of objects in the future, in the adoption of children in Abio which is known as the return of children is carried out based on the agreement and agreement of both parties then a joint prayer is carried out by the adoptive family together with the child's family of origin in the church. The adoption of children or in the traditional term Abio anak pulang or *Dunale* is carried out without going through court procedures. Child adoption carried out in Indonesia as a customary law institution is not uniform both in its motivation and the procedure for its adoption. There is no unity of ways to carry it out, so the legal status of child adoption varies according to the customary law of each applicable region. There are various ways that are carried out by the community, some of which are also based on legal provisions, but most of them are done by custom, and often become a problem because they are not ratified in the Court but based on the decision of the Supreme Court Number: 1413/Pdt/1998 the adoption of children which contains legal rules whether a person is an adopted child or not, does not solely depend on the formalities of child adoption, But judging from the existing reality, namely that since he was a baby, circumcised, and married by his adoptive parents.

B. Justice in the Distribution of Inheritance Rights for Adopted Children in Indigenous Peoples in Western Seram Regency

Talking about justice, we know that justice is Justice, mainly means that a decision and action are based on objective norms. Justice is basically a relative concept, everyone is not the same, fair according to one is not necessarily fair to another, when someone asserts that he is doing a justice, it must of course be relevant to the public order where a scale of justice is recognized. The scale of justice varies greatly from place to place, each scale is defined and fully determined by the community according to the public order of the community. When a family adopts another person's child, which in abio community terms is called a homecoming child or *dunale*, the child according to customary law has the status of a

biological child. Based on the rule of law, a child who is adopted by himself is a legal child of his parents who adopted him, even without a court determination, if the child is treated well, nurtured, educated and schooled, endowed with affection. Children are expected to be substitutes or successors of the family in terms of breadwinners and as family protectors. Therefore, from the time the child is still in the womb, until he is born, and even later in his later growth, in the indigenous people there are many traditional ceremonies that are religious in nature and which are held in sequence following the physical growth of the child, all of which are aimed at protecting the child and the mother who is pregnant with him from all dangers and disturbances and later after the child is born, so that the child in question can become a child who can meet the expectations of parents.

Indigenous peoples in Indonesia, as mentioned by two Dutch scholars who have studied a lot of customary law in Indonesia: Ter Haar and van Vollenhoven, know about child adoption. However, the impact on inheritance can be different for each custom. There are indigenous peoples who consider and treat adopted children as children born to their adoptive parents so that they are treated the same as biological children. On the other hand, there are those who still do not break the relationship between adopted children and their biological parents. In fact, there are those who allow adopted children to get inheritance from adoptive parents as well as from their biological parents and this tradition also exists in the Western Scary Area in Abio Village, Ahiolo which sometimes brings problems to the family, especially during the distribution of inheritance.

Basically, those who have the right to be heirs are people who have a blood relationship with the heir and the heir's wife/husband who is still alive when the heir dies, this is regulated in Article 832 of the Civil Code which reads: According to the law, those who have the right to be heirs are blood relatives, both legal and non-marital ones, and the husband or wife who lives the longest. According to these regulations, If the surviving family and the longest-lived husband or wife do not exist, then all the inheritance belongs to the state, which is obliged to pay off the debts of the deceased, to the extent that the price of the inheritance is sufficient for it.

Based on the provisions of the article, if included in the category, there are four major groups of people who are entitled to inherit, namely: 1) Group I: the husband/wife who lives the longest and their children/descendants; 2) Group II: parents and siblings of heirs; 3) Group III: family in a straight line up after the father and mother heirs, for example grandparents who are heirs both from the mother and father; 4) Group IV: heir's uncles and aunts both from the father's and mother's sides, the descendants of uncles and aunts up to the sixth degree are counted from the heirs, the brothers of the grandparents and their descendants, until the sixth degree is counted from the heirs.

This group of heirs indicates who the heirs are in priority based on their order. This means that the heirs of group II cannot inherit the heir's legacy in the event that the heirs of group I still exist. By law, adopted children (who are not direct descendants of the heir) are not entitled to inheritance from the heirs. The legal status of adopted children is often less protected, especially when the adoptive parents die, where an adopted child who should have a legal position as a child in the marriage of his adoptive parents is neglected of his rights, including his inheritance rights. When using customary institutions, the determination of inheritance for adopted children depends on the applicable customary law. Therefore, the tradition of the Abio people is that in addition to getting inheritance

rights from their adoptive parents, they also still have the right to inheritance from their biological parents.

In Maluku, western Seram Regency, where adopted children can get inheritance rights from adoptive parents and also biological parents, causing problems in the family, especially in the biological family who have little property, it will be very detrimental to the siblings. Child adoption, which is often carried out in indigenous peoples, has different motivations and goals. This is not only influenced by the wishes of each individual or life partner, but also depends on the customary law system that applies in a certain area. Meanwhile, the customary law system will not be separated from the social effectiveness and community spirit concerned. Child adoption carried out based on customary customs is also closely related to inheritance rights and the kinship system embraced by the indigenous people. In a society that still upholds the laws and customary traditions, the gender of a child is also a consideration in order to continue the lineage.

The legal relationship between children and parents, between one and the other there is a difference. This difference is due to the kinship system of each region. When viewed from the origin of the child concerned, this greatly differentiates the position and rights of these children. However, it is called biological children, out-of-wedlock children, stepchildren, and adopted children in legal status have the same rights, namely in obtaining supervision, maintenance, and education from their parents. However, in the matter of the distribution of inheritance between biological children, out-of-wedlock children, stepchildren, and adopted children receive different and unequal parts or based on their portions, as follows: The position and rights of biological children in inheritance. All children born of the marriage of their father and mother are legally called biological children. If the marriage of the father and mother is invalid, then the child becomes an illegitimate biological child (kowar child, illegal jadah child, village child, astra child)⁸ A legitimate child is an heir of his parents who gave birth to him. As for illegitimate biological children, their rights are as follows: 1) They are not entitled to be heirs of their parents who gave birth to them, either from their father or from their mother; 2) Only entitled as an heir of the mother who gave birth to him or perhaps from his father alone without from his mother; 3) Equal rights with legal children as heirs of their biological parents.⁹

The position of the biological child in the inheritance of the inheritance is very important, because the biological child is the one who will inherit all the inheritance. The relationship with the position of biological children in customary inheritance law can be seen from the existing kinship system, namely the patrilineal kinship system, the matrilineal kinship system, and the parental or bilateral kinship system. In a patrilineal society that adheres to the male lineage, the position of boys is very prominent than girls, so that boys are the successors of the descendants and as heirs of their parents/fathers. A boy is the successor of his father's descendants who are drawn from one original father, while a daughter is prepared to become someone else's child who will strengthen someone else's lineage. Therefore, the position of the daughter is not as a successor to the descendants and not as an heir. In a patrilineal society, if there are no descendants at all, then the heir adopts a son from his siblings, because an adopted son can become the heir of his adoptive parents. Because it can be said that the family does not have male descendants, it can be said that the breakup of descendants is lost by descendants according to the Maluku indigenous people.

⁸ Hilman Hadikusuma, *Hukum Perkawinan Adat*, (Bandung: Citra Aditya Bakti, 1995), p. 143

⁹ *Ibid* 144

Children are the next generation of the family and the nation's ideals, therefore in today's reform era great attention must be directed to the development of the next generation, because if there are many *tarlantar* children in a country, this is very unfortunate. One of the real participations that is realized today is the permissibility of raising children by families who want to take care of them, considering Law Number 4 of 1979, that child adoption is one of the means to improve children's welfare Basically, child adoption aims at the best interests of children in order to realize child welfare and child protection, which is carried out based on local customs and provisions Laws and Regulations

Adoption of a child is an act of taking another person's child into his own family in the same way, so that between the person who picks up the child and the child who is picked up there is a legal relationship in the same family, as there is between the parents and their own biological children¹⁰ Taking children in *Abio* or children home is done with knowledge by the wider community, known or witnessed by the King, traditional leaders or the community, and written in the village administration book so that there is more legal certainty in writing. Based on customary law, every legal act must be carried out clearly and in cash so that in the process of adopting a child or taking the child home it is carried out simultaneously with the giving or handing over of goods that have a religious magical meaning which results in the breakdown of the relationship between the child and his biological parents, and then entering and being accepted as a child into the adoptive parents. A child who is adopted in the *abio* community has a relationship with the adoptive parents and has the legal status of being a child of the adoptive parent or taking him home

After the child returns home is adopted based on custom, the child returns home, of course, having a position as a biological child for the family that takes it, then the legal status of the child will be needed, one of which is related to inheritance rights. As a condition of inheritance, basically the child returns home to get a share of the inheritance from the parents who raised him. Which share is the same as the legal child of the adoptive parents for the common property that is left behind, while for the original property or inherited property of each party in the *Abio* Indigenous community, the returning child is not entitled to it because this is related to the siblings or siblings of the parent who adopted him as a returning child and there is no relationship with their heirs so that the original property can only be owned by the biological child.

As an adopted child, he does not have inheritance rights from his adoptive parents. Because, legally, inheritance rights arise due to blood relations or marital relations with the heirs. This is based on the provisions in Article 832 of the Civil Code, that those who have the right to become heirs are blood relatives, both legal and extramarital, and the husband or wife who lives the longest. Because adopted children cannot be categorized as people who have a blood relationship or marital relationship with their adoptive parents, adopted children cannot become heirs and do not have inheritance rights. However, what happens in the community of *Abio* Village is that in the western part of *Abio* Village, adopted children or children get inheritance rights either from their biological parents or adoptive parents or those who take them as children and this will certainly be a problem because these adopted children or children will get two parts of the property both from the adoptive parents and the biological parents so that it will be a problem with other heirs, For this reason, the child returns home and has received rights fairly in the family that took it so that they are not allowed to get inheritance rights from their biological parents.

¹⁰ Zaini, Mudernis. *Adopsi Suatu Tujuan Dari Tiga Sistem Hukum*. (Jakarta: Sinar Grafika, 2002), p. 6

CONCLUSION

The adoption of children in Abio, known as the return of children, has been carried out since ancient times, if a girl is married, it is obligatory to return one child to her parents' family. This is done based on the agreement and agreement of both parties and then a joint prayer is carried out in the church. The adoption of children or in the traditional term Abio of returning children is carried out without going through court procedures. The return of children who are adopted to the Abio community is carried out based on customary law, only done according to custom, after there is an agreement from the person who raised the child and his biological parents, then a joint prayer is carried out in the church and this child has a position as a biological child for the family that takes him, then the legal status of the child will be needed, one of which is related to inheritance rights. As a condition of inheritance, basically only 4 groups of inheritors and adopted children do not get it, but in the abio society, children return home to get a share of the inheritance from the parents who adopted them and no longer get a share of their biological parents, which is the same as the legal children of their adoptive parents.

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