

Legal Analysis of Illegal Adoption Without Court Determination and Legal Protection of Children's Rights in Indonesia

Arya Wijaya¹, Wulan Windiarti²

^{1,2} Fakultas Hukum, Universitas Pelita Bangsa, Indonesia
Email: Aryawjy067@gmail.com, wulanwindiarti@pelitabangsa.ac.id

The practice of informal or underhand (de facto) child adoption accompanied by the manipulation of population administration documents is widespread within the sociological reality of Indonesian society. This phenomenon triggers juridical issues when bypassing the formal channels of civil court proceedings (voluntair) results in uncertainty regarding the child's civil status, thereby causing vulnerability in substantive civil law protection and the fulfillment of the child's future economic (inheritance) rights. This research carries a fundamental urgency to examine the synchronization of cross-sectoral adoption regulations, test the effectiveness of law enforcement through the lens of legal sociology, and formulate an ideal non-penal (administrative-civil) solution model for child protection. The research method applied is normative juridical, relying on primary, secondary, and tertiary legal materials obtained through library research. The problem-approach is conducted via the statute approach, conceptual approach, and case approach. All legal materials are analyzed qualitatively-normatively using deductive reasoning through the method of legal syllogism as well as legal interpretation methods (rechtsinterpretatie). The theories utilized to dissect the issues in this study are Soerjono Soekanto's Legal Effectiveness Theory and Satjipto Rahardjo's Legal Protection Theory. The research results indicate that the legal regulation of child adoption in Indonesia is pluralistic (encompassing national, customary, and Islamic laws), where the rigid enforcement of penal sanctions in the population sector is deemed ineffective due to the dominance of the community's Legal Culture Factor that prioritizes humanitarian motives, which is harmoniously responded to by the Law Enforcer Factor through humanistic discretionary policies. This policy aligns with the modern sentencing paradigm in the New Criminal Code (Law Number 1 of 2023), which prioritizes restorative justice. In conclusion, the substantive legal protection of de facto foster children must be manifested through administrative-civil legalization channels to ensure that the principle of the best interests of the child is truly realized.

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Corresponding Author:

Arya Wijaya

Fakultas Hukum, Universitas Pelita Bangsa, Indonesia Bekasi, Indonesia

Aryawjy067@gmail.com

1. Introduction

Children are a trust and the next generation of the nation, whose existence plays a strategic role in determining the future direction of a country. From a national and international legal perspective, children are no longer viewed merely as objects of protection, but rather as legal subjects with inherent human rights. Consequently, the state is not only obligated to guarantee the survival of children but also responsible for ensuring the full fulfillment of their civil, social, and legal rights. Child protection is an integral part of the human rights protection system. The 1945 Constitution of the Republic of Indonesia expressly states that every child has the right to survive, grow and develop, and has the right to protection from violence and discrimination.

Without a valid identity, a child can face various difficulties in accessing public services such as education, health care, social protection, and legal protection. Therefore, a birth certificate, as an official state document, plays a crucial role in ensuring legal recognition of a child's status. Many children are not officially registered in the population administration system and therefore lack birth certificates. This situation can have various detrimental legal and social consequences for children, as without a clear legal identity, a child becomes vulnerable to various forms of rights violations.

Adoption is a legal act that transfers responsibility for the care, maintenance, and education of a child from the biological parents to the adoptive parents. In Indonesia, adoption is regulated by various laws and regulations, one of which is Government Regulation Number 54 of 2007 concerning the Implementation of Adoption. This regulation emphasizes that adoption must be carried out in the best interests of the child and must be subject to a court order. These provisions show that the state is trying to provide legal protection guarantees for children in the adoption process.

According to Satjipto Rahardjo, the law basically aims to provide protection for human interests, including vulnerable groups such as children. In the context of adoption, legal protection is necessary to ensure that the adoption process is not misused for purposes detrimental to the child, such as exploitation or child trafficking. Therefore, the adoption process must be implemented carefully and in accordance with applicable laws.

However, in practice, informal adoptions still occur in society without following proper legal procedures. Adoptions are often based solely on family agreements or customary practices, without a court order. This practice has the potential to give rise to various legal issues, particularly regarding the child's civil status, inheritance rights, and the legal certainty of the relationship between the adopted child and the adoptive parents.

This sociological fact demonstrates that formal adoption mechanisms are often avoided by some groups in society under various pretexts. There is a tendency to misuse the guise of adoption through informal or "underhand" channels. This informal adoption practice not only impacts the purely civil realm but is also prone to shifting toward the manipulation of the child's origin and population documents to bypass official bureaucratic channels. The differences in legal systems in Indonesia also add to the complexity of regulating adoption. In customary law, adoption is often viewed as a legal act that can create the same familial relationship as a biological child. Meanwhile, under Islamic law, adoption does not sever the bloodline between a child and their biological parents, but merely transfers the responsibility for care. This conceptual difference in reality has significant legal implications, particularly in inheritance and civil relations. A condition of *das sein* has emerged in society where the practice of informal adoption based on humanitarian motives, kinship, or mutual assistance remains socially and customarily recognized, even though legally and formally (*das sollen*) such actions deviate from the corridor of PP No. 54/2007 because they do not result in a court decision. Uniquely, in real life, adoptive parents who carry out this informal adoption practice are not immediately subject to criminal sanctions in prison, even though there is a shadow of the formal crime of population administration manipulation. This sociological phenomenon raises fundamental legal questions regarding the source of law and what parameters prevent the law from working rigidly in imposing criminal sanctions on perpetrators of informal adoption who act in good faith.

To dissect the phenomenon of non-criminalization of adopters without a court order, a comprehensive analysis is needed through Soerjono Soekanto's Theory of Legal Effectiveness. According to Soerjono Soekanto, the effectiveness of law enforcement in society is determined by five systemic factors, namely the legal factor itself, law enforcement factors, means/facilities factors, community factors, and legal culture factors. In the context of informal adoption, the failure of the criminal function is predominantly influenced by the legal culture factor (legal culture) of society that normalizes *de facto* care based on moral propriety, as well as the factor of law enforcement that uses the principle of judicial

discretion. Law enforcement officials tend to view that imprisoning adoptive parents who have cared for, loved, and educated their children properly will actually harm the child's psychology and is contrary to the principle of the child's best interest.

Based on all the above descriptions, it can be concluded that the deviation of the child adoption procedure without a formal court decision is a real manifestation of the gap between written law and the legal values that exist in society. Therefore, an in-depth normative-analytical study is needed regarding how the legal regulations for adoption without a court decision are harmonized in Indonesia, as well as how a substantive legal protection model is formed to safeguard the civil rights of children without having to prioritize a retributive approach to criminalizing adoptive parents. Based on this, the author is interested in conducting research with the title: "Legal Analysis of Illegal Child Adoption (Adoption) Without a Court Decision and Legal Protection of Children's Rights in Indonesia".

2. Literature Review and Problem Statement

To dissect the phenomenon of non-criminalization of adopters without a court order, a comprehensive analysis is needed through Soerjono Soekanto's Theory of Legal Effectiveness. According to Soerjono Soekanto, the effectiveness of law enforcement in society is determined by five systemic factors, namely the legal factor itself, law enforcement factors, facilities/institutions, community factors, and legal culture factors. In the context of informal adoption, the failure of the criminal function is predominantly influenced by the legal culture of society that normalizes de facto parenting based on moral propriety, as well as the law enforcement factor that uses the principle of judicial discretion. Law enforcement officials tend to view that imprisoning adoptive parents who have cared for, loved, and educated their children properly will actually harm the child's psychology and is contrary to the principle of the child's best interest. Based on all of these descriptions, it can be concluded that deviations in child adoption procedures without a formal court decision are a clear manifestation of the gap between written law and legal values that exist in society.

Therefore, an in-depth normative-analytical study is needed regarding how the legal regulations for adoption without a court order are harmonized in Indonesia, as well as how a substantive legal protection model is formed to secure children's civil rights without having to prioritize a retributive approach to criminalizing adoptive parents. Based on this, the author is interested in conducting research with the title: "Legal Analysis of Illegal Child Adoption (Adoption) Without a Court Order and Legal Protection of Children's Rights in Indonesia". The constitutional rights of children in Indonesia have a fundamental basis in Article 28B paragraph (2) of the 1945 Constitution of the Republic of Indonesia which explicitly states that: "Every child has the right to survive, grow and develop and has the right to protection from violence and discrimination." This constitutional provision places children's rights as fundamental human rights and requires the state and parents to ensure their optimal fulfillment. Article 28B serves as the highest constitutional basis that legitimizes child protection regulations in Indonesia, which include: (1) The right to survival (survival rights): includes the right to life, health, and a decent standard of living. (2) The right to development (development rights): includes the right to education, play, recreation, and information. (3) The right to protection (protection rights): includes protection from physical and mental violence, neglect, and economic and social exploitation. (4) The right to participation (participation rights): allows children to express their opinions in matters that affect their lives.

The Dutch colonial legacy of the Civil Code (KUHPerdata/Burgerlijk Wetboek) did not explicitly regulate the institution of adoption for indigenous people due to differences between Western legal traditions and sociological practices in Indonesia. This normative vacuum (*rechtsvacuum*) was then filled by post-independence regulations. Law Number 4 of 1979 concerning Child Welfare became the initial milestone that emphasized that adoption is absolutely carried out for the welfare and best interests of the

child, not solely the interests of the adoptive parents. In customary law, as a living law, adoption is closely linked to the local kinship and inheritance system. One of the practices most strongly analyzed in various legal sociology literature is the Balinese custom known as *maperas*. In the patrilineal kinship system in Bali, the continuation of the lineage (*kapurusa*) and the maintenance of the family shrine (*sangguh/merajan*) must be carried out by sons. If a family does not have a son, the *maperas* ceremony is a communally valid customary legal solution. The Compilation of Islamic Law (KHI) in Indonesia, based on Presidential Instruction Number 1 of 1991, specifically regulates the institution of adoption to align it with Islamic law. In Islamic law, the concept of adoption that completely severs the original lineage (*tabanni*) is strictly prohibited because lineage is natural and cannot be changed by human legal manipulation. The implication is that adopted children cannot be named using the adoptive parents' surnames, do not have the status of automatic heirs (*ab-intestato*), and adoptive parents cannot legally act as biological marriage guardians for their adopted children.

Government Regulation Number 54 of 2007 concerning the Implementation of Child Adoption is the most comprehensive technical regulation containing preventive legal protection instruments. This regulation was issued to fulfill the mandate of the hierarchy of norms under the Child Protection Law to ensure that the transfer of child custody takes place within the corridor of state law, whether carried out between Indonesian citizens (WNI) or between Indonesian citizens and foreign citizens (WNA) through restrictions on the principle of international subsidiarity. Viewed from Satjipto Rahardjo's Theory of Legal Protection, repressive legal intervention by the state must not be destructive to protected legal subjects. If law enforcement officials rigidly immediately use criminal instruments of imprisonment against adoptive parents who are proven to care for, love, and provide for the child's living needs adequately, then such action will actually give rise to a new form of suffering for the child (*re-victimization*). Therefore, the sociological approach of law demands a clear separation between informal adoption based on purely humanitarian motives, with purely criminal practices such as child trafficking.

Law Number 23 of 2002 concerning Child Protection explicitly prohibits all forms of child adoption that deviate from the formal legal corridor of the state. This prohibition norm is regulated in Article 79, which states that: "Any person who carries out child adoption that is contrary to the provisions as referred to in Article 39 paragraph (1), paragraph (2), and paragraph (3), shall be punished with imprisonment of up to 5 (five) years and/or a maximum fine of Rp. 100,000,000.00 (one hundred million rupiah)." The formulation of this article refers to violations of the material elements of adoption, such as ignoring the principle of the best interests of the child (Article 39 paragraph 1) or intentionally carrying out an adoption that sever the blood/biological relationship with the biological parents (Article 39 paragraph 2). However, in its development, the application of this article must be synchronized with the nature of child protection law which is progressive, where the imposition of sanctions must not sacrifice the psychological stability of the child who has already been well cared for.

Mode The practice of underhand adoption in the field is often accompanied by shortcuts in the form of reporting inaccurate population data, so that the child in question can be directly included in the Family Card (KK) of Prospective Adoptive Parents (COTA) as a "biological child". This act of manipulating data elements is in conflict with Article 93 of Law Number 23 of 2006 concerning Population Administration which states: "Any person who intentionally manipulates data and/or data elements in reporting Population Events and/or Important Events, shall be punished with imprisonment for a maximum of 6 (six) years and/or a maximum fine of Rp. 50,000,000.00 (fifty million rupiah)." Furthermore, if in practice it involves individuals who deliberately issue inaccurate birth certificates in order to disguise the child's origins, this regulation also provides for the threat of sanctions in Article 96 with a maximum prison sentence of 5 (five) years. This provision is positioned as a guarantee of orderly state administration so that the civil status of every citizen is recorded authentically and validly.

3. Method

This research uses normative legal research, often referred to as doctrinal or library legal research. Normative legal research focuses on the study of legal norms written in legislation, legal doctrine, legal principles, and legal materials relevant to the legal issue being studied. In this study, a normative approach is used to analyze in depth the legal regulatory framework for the practice of illegal adoption without a court order in Indonesia, as well as the substantive legal protection model for children's rights from the impact of ignoring formal legal status of residence. The study was conducted by examining the alignment of implementing regulations of PP No. 54/2007 with child protection laws, the status of living laws such as customary law and Islamic law (kafālah), and the doctrinal views of legal experts.

This study does not examine the sociological behavior of society directly through field research, but rather examines law as an integrated system of norms. This aims to dissect how law enforcement factors work through optimizing judicial discretion and the principle of legal benefit that aligns with the modern legal paradigm in the New Criminal Code (Law Number 1 of 2023), so that the enforcement of legal regulations can guarantee children's civil rights beyond mere civil administrative formalities. The method of collecting legal materials in this research was conducted through library research using documentation techniques. The library study was conducted by researching, tracking, reading, and reviewing various normative legal documents closely related to child adoption procedures and guarantees of child rights protection, including legal texts, legal doctrine books, contemporary scientific journals, and official court rulings. The legal materials that had been successfully collected and classified were then analyzed using normative qualitative analysis methods. Normative qualitative analysis was conducted by interpreting, dissecting, and reviewing the contents of laws and regulations, legal doctrine, and the ratio decidendi of court rulings or decisions systematically, logically, and in-depth.

In drawing legal conclusions, this study employed deductive reasoning techniques through the legal syllogism method. This reasoning method connects positive legal norms as the general premise (major premise) with the legal facts of clandestine adoption practices as the specific premise (minor premise) to produce valid legal conclusions.

4. Results and Discussion

Foundation Legal and Normative Framework for Child Adoption in Indonesia

The institution of child adoption in Indonesia is comprehensively regulated in Government Regulation No. 54 of 2007 concerning the Implementation of Child Adoption (hereinafter referred to as PP No. 54/2007). This instrument is a technical implementing regulation derived directly from Law No. 23 of 2002 concerning Child Protection, as amended by Law No. 35 of 2014. This normative framework explicitly stipulates that child adoption must be carried out through formal, hierarchical procedures and involve the active role of state institutions. This formalization is intended to ensure certainty in civil law while providing optimal legal protection for children's basic rights. Philosophically, the regulation of child adoption in Indonesian legal jurisdiction places the principle of the best interests of the child as the highest foundation.

This fundamental principle refers directly to the international mandate in the 1989 Convention on the Rights of the Child, which was officially ratified by the Indonesian government through Presidential Decree Number 36 of 1990. The legal consequences of this ratification require that every policy, action, and legal decision taken by the executive, legislative, and judicial institutions must place the welfare, security, and future security aspects of children as the most important consideration. In its implementation, Government Regulation No. 54/2007 outlines that adoption requires a multi-stage administrative examination and a thorough assessment of material feasibility before the application is submitted to the judicial institution. This formal and hierarchical procedural flow is closely aligned with Hans Kelsen's

Theory of Legal Certainty, which states that legal order rests on a hierarchy of norms (*Stufenbau des Recht*) and clear procedures. This formal guarantee of predictability is necessary to test the legality of legal subjects' actions and minimize abuse of the family institution.

The concrete structure of the hierarchy of regulations for adoption applications is illustrated sequentially in Figure 4.1. However, the enforcement of this regulation faces the challenges of Indonesia's pluralistic legal landscape, where customary and Islamic law coexist empirically within society. Although Government Regulation No. 54/2007 was formulated as a unifying effort to harmonize these various legal systems, the reality is that the diversity of adoption concepts across sociological regions often creates obstacles. Conflicting understandings between positive law, customary law, and religious law regarding the essence of adoption ultimately encourage the growth of clandestine adoption practices outside of formal court mechanisms.

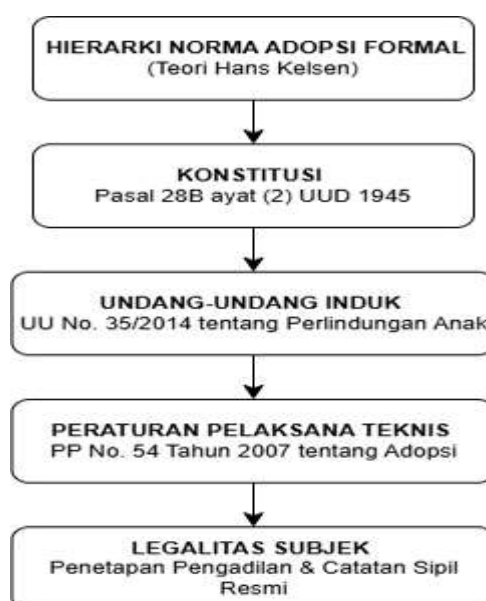


Fig. 1. Hierarchy of Formal Adoption Norms

Analysis of the Judge's Legal Discovery (*Rechtsvinding*) in Adoption Cases

After all administrative stages at the Social Services have been fulfilled and the 6 (six) month temporary care period has been declared successful, COTA can register the application file with the District Court or Religious Court whose jurisdiction covers the applicant's legal domicile. The child adoption trial process is categorized as a voluntary application case, which is unilateral (*ex-parte*) in nature and does not involve an opposing party (*contentious*). Even though the trial is *ex-parte*, the judge must not act passively by only examining the formal validity of the documents on paper.

The judge is obliged to carry out the material *rechtsvinding* (legal discovery) function by thoroughly examining the following substantive elements in the trial: (1) Examination of Key Witnesses: The judge is obliged to summon and hear the testimony of witnesses under oath, which includes the social worker who prepared the home study report, the biological parents or legal guardian, and community leaders around the applicant's domicile. (2) Examination of the Child's Right to be Heard: For prospective adopted children aged 10 years or older, the judge is obliged to hear directly the child's wishes and consent without any pressure from the applicant. This process must be carried out with a child-friendly approach to avoid judicial trauma. (3) Material Eligibility Test: The judge considers the correlation between the applicant's goals, marital stability, moral track record, guarantee of economic viability, and similarities in religious aspects between the COTA and the child. The judge's considerations refer to civil procedural law which

requires strong material evidence in cases of determination in order to guarantee the interests of the legal subjects represented.

Analysis of the Effectiveness of Criminal Law Policy Based on the Ultimum Remedium Principle

For law enforcement measures that set aside rigid criminal law against the practice of underhand adoption in good faith is in line with the spirit of national legal reform as stated in the New Criminal Code (KUHP) (Law Number 1 of 2023). The New Criminal Code fundamentally shifts the legal paradigm from its original retributive (physical retribution) nature to corrective, rehabilitative, and restorative justice. Based on the provisions of Articles 51 and 52 of the New Criminal Code, every imposition of legal sanctions or actions must align with the objectives of modern criminal law, including resolving conflicts arising from violations of regulations, restoring sociological balance in society, and upholding humanitarian values and substantive justice. The author analyzes that the essence of "restoring the situation" in cases of clandestine adoption is not to impose imprisonment on adoptive parents. Criminalization would actually deprive the child of their right to proper care. Therefore, a just solution must be achieved through non-penal policies, namely facilitating the administrative amnesty process, optimizing integrated circuit courts, and encouraging adoptive parents to immediately confirm the child's civil legal status through an official application for a determination in a judicial institution to ensure the child's true identity in the future.

Analysis of Factors Contributing to the Ineffectiveness of Rigid Sentencing (Soerjono Soekanto's Theoretical Approach)

In written regulations, the laws on child protection and population administration in Indonesia are actually quite rigidly designed. However, legal loopholes arise due to overlapping regulations on civil matters and criminal sanctions for population matters. Government Regulation No. 54 of 2007 only contains administrative sanctions without direct criminal provisions, instead relying on cross-referencing to its parent law.

As a result, there is a gap in interpretation at the investigator level when determining the precise limits of when a violation of formal civil adoption procedures can be brought into the realm of material criminal liability. This uncertainty in normative texts hinders the consistent enforcement of administrative population law. Law enforcement (police, prosecutors, and judges) play a crucial role as bridges for legal benefits. In reality, law enforcement wisely chooses not to impose imprisonment on adoptive parents who are proven to have properly cared for and loved their children. This policy is taken because law enforcement is obliged to align itself with the Modern Sentencing Guidelines in the New Criminal Code (Law Number 1 of 2023), where punishment is no longer retributive (rigid revenge) but must prioritize humanitarian values, restoring social balance, and restorative justice. Law enforcement officials recognize that imprisoning foster parents will actually destroy the child's psychological and mental stability and future. Therefore, law enforcement factors that use a sociological expediency approach overcome the rigidity of the legal text to safeguard the child's best interests.

Operational constraints in the field are exacerbated by the limited resources and facilities available to child protection agencies. The limited number of professional Social Workers (Peksos) compared to the vast area of supervision results in the initial filtration function and early detection of the practice of transferring custody underhand being difficult to carry out from the start. The lack of free legal aid posts at the grassroots level and the suboptimal integrated digital coordination between population agencies has resulted in passive oversight, resulting in legal arrangements only being implemented after a family civil dispute is reported, rather than based on proactive preventive measures from the state administration system. Societal factors relate to the level of legal understanding and awareness of the legal subjects bound by the rules. In Indonesia, the wider community remains haunted by the perception that processing official adoption through the courts is complex, bureaucratic, convoluted, and expensive. The lack of public awareness regarding the procedures for facilitating mobile application hearings (voluntary) or population

document amnesty programs encourages people to choose informal (underhand) shortcuts that are considered more practical and economical, without considering the long-term impact of civil legal flaws that will overshadow the future of children's rights. Legal culture is the most dominant factor and the root cause of the widespread practice of adoption without judicial approval in Indonesia. The sociological culture of Indonesian legal society in general still strongly places social sentiment, kinship ties, and universal religious moral values (such as the Islamic concept of *kafālah* parenting) far above the formal legality of state bureaucracy.

The act of taking in another person's abandoned or impoverished child and placing it directly on the Family Card (KK) is identified by the collective community as a noble, normal, and "well-intentioned" act to save the child's fate. Due to the absence of evil intentions (*mens rea*), this sociological legal culture paralyzes the operation of repressive-retributive written law, because the law that lives in society (living law) rejects physical punishment against adoptive parents who act in good faith.

5. Conclusion

Based on the research results, it can be concluded that legal regulations regarding child adoption in Indonesia are regulated through various legal instruments, including civil law, population administration, customary law, and Islamic law, all of which are oriented towards protecting the rights and ensuring the legal status of children. The legal system also clearly differentiates between adoption without a court order, which is carried out due to administrative constraints, and the crime of human trafficking, which is determined by elements of exploitation, malicious intent, and commercial gain. In practice, law enforcement against adoption without a court order has not been effective due to the influence of the legal culture of society, which still considers the practice a form of social and familial concern. Therefore, law enforcement officers tend to use a discretionary approach to prioritize the best interests of the child, although the effectiveness of supervision is also still hampered by limited facilities, budgets, and legal aid services. From a legal protection perspective, the absence of a court order makes adopted children vulnerable to losing certainty over their civil rights, such as inheritance rights and legal identity protection. Thus, a more appropriate solution is through a non-penal approach in the form of simplifying administrative procedures, strengthening legal education for the community, and encouraging prospective adoptive parents to obtain a court order to ensure legal protection and optimal fulfillment of children's rights.

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