

Regulation and Implementation of Wali Adhol in Practice at the Religious Courts

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Abstract

"Wali" in marriage is a pillar which should be fulfilled for prospective brides as in Article 19 through 23 Islamic Law Compilation and Article 18 of Regulation of the Minister of Religion Number 11 the Year 2007 on Marriage Registration. The necessity of a guardian (Wali) in marriage is basically an agreement of the majority of scholars, except the Hanafiyah schools that do not require a guardianship (Wali) for women, because Wali of marriage is harmonious, then marriage without her guardian marriage is invalid. Article 2 of Law Number 3 the Year 2006 on Religious Court states that Religious Courts are one of the perpetrators of judicial power for the people of Islamic justice seekers on certain cases, as referred to in this Law include certain cases in the term of application for a guardian's determination (Wali Adhol). In practice, Wali Adhol case is classified as a volunteer who only involves the prospective bride as a Petitioner without any other party made to the applicant. Regulations and Implementation of Wali Adhol's determination in the practice of execution in the Religious Courts are based on Book II Guidelines for Implementation of Duties and Administrative Courts MARI Dirjen Badilag page 139 Letter C "Wali Adhol" at point 4 that the case of Wali Adhol is Volunteer with the legal product of determination. This research uses a socio-legal research approach covering two main aspects: (i) legal research aspect, that is, research object remains a law in the meaning of "norms" of law, rule, principle, concept, theory, and doctrine of law; (ii) socio-research aspects, namely the use of methods and theories of social sciences about the law to assist researchers in an analysis.

Keywords: Guardianship, Adhol, Guardian, Justice.

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INTRODUCTION

It is known as the Surambi Court which has two authorities, the first thing that will be solved according to Islamic law alone, secondly, the matter that will be resolved according to customary law, and Javanese tradition. In matters, such as marriage, divorce, and inheritance are not filed and not resolved in the Surambi Courts tribunal but sufficiently filed to the rulers who examine and decide the matter at the court. In termination of the case, the ruler was assisted by three members of the Surambi council as an advisor. This authority is similar to the Religious Court in Priangan which has the authority and power to examine, adjudicate and resolve matters of marriage and inheritance. Even when the reign of Mataram empire had fallen, the things that were threatened with corporal punishment and death sentence which were the jurisdiction of the Civil Judgment, because they could not be sent to Mataram became the authority of the Religious Courts [1].

There are some areas outside Java such as Aceh, Jambi, Palembang, Bengkulu, West Sumatra, Lampung all have a Religious Court which has the authority to resolve matters of marriage, divorce, and inheritance or legacy. In Sulawesi, the integration of Islamic teachings, and its institutions in government and customary governments are more fluent, because of the dominant role of the king as the casting of matter. One example is the Bone kingdom where the king is the supreme ruler of a kingdom that is authorized to decide religious matters, ie, marriage, and inheritance outside other kingdoms.

The 1945 Constitution is mentioned in Chapter IX of article 24 verse (2) that religious justice is one of the judges. Religious jurisdiction is one of the judges in Indonesia under the provisions of Article 10 paragraph (1) of Law no. 14 of 1970 which has been amended by Law No.35 Year 1999 and lastly replaced by Law Number 48 the Year 2009 About Judicial Power. While in Law Number 3 the Year 2006 About Amendment to

Law No. 7 of 1989 in article 2 mentioned: "The Religious Court is one of the perpetrators of judicial power for the people of Islamic justice seekers on the particular case as referred to in this law."

The definition of procedural law or formal law aims to ensure the compliance of material civil law. Therefore, the procedural law contains how to implement and maintain or enforce the rules contained in material civil law. The procedural law applicable in religious courts is the law of the civil procedure applicable in the general court environment except those explicitly regulated.

Judicial power is an independent state power to hold judicial jurisdiction to uphold the law and justice based on Pancasila, for the implementation of the state of the Republic of Indonesia. Basically, the principle of judicial independence and the judiciary outlined in Law Number 3 of 2006 concerning the amendment to Law Number 7 of 1989 on religious justice is referring to article 24 of the 1945 Constitution and jo. Article 1 of Law Number 4 of 2004 on judicial power.

In the elucidation of Article 1 of Law Number 48 of 2009 it states "This mediocre judicial power contains a sense of inexistence of judicial power which is free from the interference of other State powers, and the freedom from coercion, directive or recommendation that comes from extrajudicial except in case which is permitted by law [2]."

The legal state is understood legally as a supremely valuable good, but it does unnecessarily have a universal human good. Here one can not think that the rule as a core of formal legality is applicable to all circumstances. Formal legality works well in the realm of social life, where neutral situations, such as trade, punishments in people who commit criminal violence and those who disturb the ownership of others. Rules-based on rules, not the rule of man. According to Tamahana, the situation can be achieved while the balance between the two can be achieved, which is essentially self-restraint,

In law science, it is mentioned that the purpose of the law is to create order and justice. In discussing the issue of legal objectives, many opinions are raised by scholars. However, it is generally possible to state that legal goals are something the law intends to achieve. According to L. J Van Apeldoorn's legal purpose is to preserve public order. In maintaining ordered the law has to protect the interests of the community equally.

Regarding the interests of the community, Roscoe Pond distinguishes between personal interests, public interest, and social interests. If Van Apeldoorn's views are linked to the view of Roscoe Pond, it means

in maintaining public order, and the law must be able to balance personal, public, and social interests. The arrangement in which there is a balance between these interests by Van Apeldoorn is said to be a fair arrangement.

Justice according to Ulpianus is *Justitia est perpetua et constans voluntas jus suum cuique tribuendi* which if translated into free justice is a constant and constant desire to give to the person what is his right. This case means that justice should always consider the interests involved in it.

Dr. Wirjono Prodjodikoro, S. H. In his book "The act of breaking the law," states that the purpose of the Law is to bring salvation, happiness, and order in society. He said that each member of society has a diverse interest. The existence and the number of interests depend on the form and the nature of humanity that is in the body of the members of their respective societies. Each appetite creates a desire to gain satisfaction in his daily life and to make all interests well-preserved.

In principle, judges must implement laws and regulations correctly and fairly, but if the application of legislation will lead to injustice, the judge must take sides with justice (moral justice) by overriding the law, or legal justice as five decisions which are the primary objects of the above research. Because in the opinion of researchers, good law is a law that is in accordance with the laws that live in society (living law) which of course is also appropriate or a reflection of the values that apply in society (social justice), this opinion is in accordance with what was conveyed by Bagir Manan. That the concept of law living in the community (The Living Law) is the first concept developed by Eugene Ehrlich as a reaction to the view on legalistic legal science which prioritizes legal regulations as contained in the laws and regulations (written) and ignores the growth the symptoms of law that exist in society. Therefore, every judge must try to decide a case according to the applicable legal provisions by not ignoring legal values and a sense of justice that lives and develops in the community. Thus, the verdicts that were dropped will be able to give satisfaction to justice seekers. That is to achieve justice for justice seekers who are the substance of the Adhol guardian case, where there are rights and obligations between children and parents, but the state does not give the same space, according to the author of the application "Wali Adhol" it should be examined in a number of reasons, namely:

- "Wali mujbir" (has forced rights) to marry or not marry off his child.
- "Wali" is the legitimate pillar of marriage.
- Fathers and children have equal rights before the law (Equality before the law).
- "Wali adhol" is a dispute between parents and children.

Article 1 Number 12 of the Law Number 23 of 2002 that is: child rights are a part of human rights that must be guaranteed, protected, and fulfilled by parents, families, communities, governments, and countries. Based on the above background can be summarized some of the issues to be studied in this paper, as follows:

- How is the regulation of "Wali Adhol" in practice in the Religious Courts?
- How is the implementation of "Wali Adhol" in practice in the Religious Courts?

RESEARCH METHODS

The current research uses a socio-legal research approach covering two main aspects: (i) legal research aspect that remains research object in the form of law in the meaning of "norms" of law, rule, principle, concept, theory, and doctrine of law; (ii) socio-research aspects of the use of methods and theories of social sciences about the law to help researchers in the analysis. If the applicant is dissatisfied, then his or her legal remedy is Cassation. Substituted to be the case of "Wali Adhol," which is Contentious with verdict product. If the applicant is not satisfied, then his legal remedy is Appeal and Cases.

DISCUSSION

Regulation of "Wali Adhol" on the practice in the Religious Courts

This period began with the Staatsblad (the Dutch Indies Regulation) governing the authority of the Religious Courts among others: Staatsblad No. 22 The year 1820 article 13: Regents must pay attention to religious matters and to keep the pastors able to perform their duties by Javanese customs and habits as in marriage, distribution of heirlooms, and similar. Staatsblad No. 12 the Year 1823 the authority of the Palembang Religious Court includes marriage, divorce, division of property, to whom the child is handed over when the parents are divorced, and the will. Staatsblad No. 53 of 1931 which includes the authority of the Religious Court which is restricted only to examine matters on marriage, divorce, and reconciliation. Hadanah, waqf, and others were revoked and handed over to landraad (State Court). Staatsblad No. 116 of 1937 article 2a paragraph (1).

On March 8, 1942, the Dutch East Indies government surrendered to Japan, where Indonesia was then occupied by Japan. At that time the Japanese government determined that all the laws and regulations derived from the Dutch Indies government remained in force as long as it did not conflict with the interests of Japan. The changes made by the Japanese government as the name change of judicial bodies into Japanese, such as: Tiho Hooi (State Court), Keizai Hooi (Police Judge), Ken Hooi (District Court), Gun Hooi (Court of Obligation), Kiaikoyo Kootoo Hooi (Islamic high court), Sooryoo Hooi (Religious Meeting).

Since the independence of the Republic of Indonesia in 1945, there have been several laws and regulations that were born relating to the Religious Courts and their authorities. The authority of the Religious Courts was initially discussed regarding marriage registration, divorce, and reconciliation, where seven legislative regulations were born since the independence of the Republic of Indonesia in 1945 namely:

- Government Regulation no. V-SD March 25, 1946, on the high court of Islamic jurisdiction of the Ministry of Justice, was transferred to the Religious Ministry. That is, the government handed the High Islamic Court from the Ministry of Justice to the Ministry of Religious Affairs (now the Ministry of Religious Affairs).
- Law No. 22 of 1946 for Java and Madura, which contains the registration of marriage, divorce, and specialized reference in the area.
- Law No. 19 of 1948 concerning the Arrangement and Authority of the Judiciary and Prosecutor's Office.
- The birth of the Constitution of the United Republic of Indonesia on 27 December 1949. The ultimate here is the Federal and District Courts.
- The birth of the Provisional Constitution (UUDS) of 1950 under Law no. 7 of 1950, while the judicial field remains as RIS time.
- The birth of Emergency Law No. 1 of 1951 on interim measures to conduct unity arrangements and civil litigation relating to the judiciary.
- Birth of Law No. 32 of 1954 dated October 26, 1954 concerning the enactment of the Law of the Republic of Indonesia dated November 21, 1946, on the registration of marriage "talak, rujuk" in all areas outside Java and Madura.

After the seven regulations came some other laws and regulations:

- Government Regulation No. 29 of 1957 (LN No. 73) concerning the Establishment of a Religious Court / Shariah Court in Aceh Province, which has the authority: 1) Disputes between husband and wife who are Muslim; 2) All matters according to living law are broken according to Islamic religious law relating to marriage, talak and rujuk, fasakh, and Hadanah; 3) Case inheritance, endowments, grants, alms, baitulmal, etc. related to that and; 4) The case of divorce and ratification that "taklik talak" is valid.
- Government Regulation No. 45 of 1957 concerning the Establishment of the Syariah Court of Justice outside Java and Madura, the authority is: 1) Marriage; 2) Divorce; 3) Reconciliation; 4) Fasakh; 5) Livelihood; 6) Mahar ;7) Maskan; 8) Mut'ah; 9) Hadanah; 10) The inheritance heirs; 11) Waqf ;12) Grants ;13) Alms; 14) Baitulmal.
- Law No. 1 Year 1974 concerning marriage, which applies to all citizens of RI on January 2, 1974.

- Government Regulation no. 28 of 1977 concerning the occupation of land, which is also regulated in KHI articles 215 to 227, which was later updated in Law No.41 of 2004 on waqf.
- The latest regulation on the authority of religious courts is written in the Law on the revision of Law No. 7 of 1989 on religious justice, article 49 of Law no. 3 of 2006 which reads, "The Religious Courts in charge and the authority of examining, deciding, and settling the matter at the first level among the Muslim people in terms of marriage, heirs, wills, grants, waqfs, zakat, infaq, shadaqah, and economics shariah."

Implementation of "Wali Adhol" in practice in Religious Court

1. Acceptance of Case

Registration of the case is filed to the Religious Court through the officer's office at desk 1. Activities conducted at desk 1 in the process of settlement of the Court case are as follows:

- Acceptance of appeal, resistance, statement of appeal, cassation, reconsideration request, execution, explanation and cost estimation of case and execution cost.
- Make a power of attorney to pay in triple, and submit a power of attorney to pay to the plaintiff or applicant candidate.
- Surrender the letter of claim or application to the plaintiff or applicant candidate.
- Assess the cost of the item as specified in article 121 of HIR or article 145 of RBG which is then stated in the power of attorney to pay.
- Provide the necessary explanations regarding the matters filed following the Chairman of the Supreme Court of the Supreme Court of the Republic of Indonesia Religious Affairs court on 11 January 1994, No.: MA / Kumdil / 012 / I / K / 1994

2. Case examination in the Court session.

Examination of the case is carried out in the presence of the court session through several stages as follows:

- The first stage. This phase consists of (1) Judge to open trial, (2) Judge to ask the identity of the parties, (3) to make peace. In this stage, the Judge should be serious in reconciling the parties [3]. If the reconciling effort is unsuccessful, then the session can be continued at the next stage.
- The second stage, reading a lawsuit or request by the plaintiff or the applicant. At this stage, the plaintiff or the applicant has the right to re-examine the whole material of the lawsuit, posita or petitum whether it is correct and complete and should not be out of the scope contained in the lawsuit.
- The third stage, the defendant or the applicant is given the opportunity to defend him/herself and propose it all through the Judge's panel in the

session, including the replication, and the duplicate of the plaintiff or the applicant; defendant.

- The fourth stage, proof. The plaintiff or applicant submits all evidence to support the arguments of the claim filed. Likewise, the defendant submitted evidence to support the answer (their objection).
- The fifth stage, the conclusion of each party, either in the plaintiff or applicant and the defendant submitted a final opinion on the results of the examination.
- Sixth stage, assembly deliberations and decisions. The judge conveyed all opinions about the case and concluded in the ruling as the end of the dispute between the panel of judges.

3. Settlement of cases (legal remedies, appeals, cassation, and judicial review)

The legal effort is an effort given by the Law to a person or legal entity for and in some instances against the judge's decision [4] such as Appeal, Cassation and Judicial Review

CONCLUSION

"Wali" in marriage is a pillar which should be fulfilled for a bride as in Article 19 up to 23 Compilation of Islamic Law and Article 18 Regulation of Minister of Religion Number 11 the Year 2007 on Marriage Record. The need for a "wali" in marriage is basically an agreement of the majority of scholars, except the Hanafiyah schools that do not require a wali for women, because the wali is a harmony, so marriage without her wali marriage is invalid. Article 2 of Law Number 3 the Year 2006 on Religious Court states that Religious Courts are one of the perpetrators of judicial power for the people of Islamic justice seekers on some issues, as referred to in this Act include some instances in the case of a guardian's determination Adhol. This case is following the Regulation of the Minister of Religious Affairs No. 30 of 2005. Article 2 paragraph (2) which mentions the decision with the decision of the Religious Court / Shariah Court which occupies the place of residence of the prospective bride.

In practice, the case of Wali Adhol is classified as a volunteer who only involves the prospective bride as a petitioner without any other party to be called upon. "Here is the problem" the fact is there is clearly a dispute between the prospective bride and her guardian "Wali Nasab" because there is a dispute, it is classified as contentious. The Guardian "Wali Adhol" in the Religious Court was relatively small compared to divorce, but from year to year, there was an increase. Regulation and Implementation of Wali Adhol in the practice of execution at the Religious Courts is based on Book II Guidelines for Implementation of Duties and Administrative Courts MARI Dirjen Badilag page 139 letter c Wali Adhol at point 4 that the case of Wali Adhol is Volunteer with the legal product of determination.

REFERENCES

1. Djalil, A. B. (2006). *Peradilan agama di Indonesia: gemuruhnya politik hukum (hukum Islam, hukum barat, hukum adat) dalam rentang sejarah bersama pasang surut lembaga peradilan agama hingga lahirnya peradilan syariat Islam Aceh*. Kencana.
2. Mujahidin, A. (2012). *Pembaharuan hukum acara peradilan agama: dilengkapi format formulir beperkara*. Ghalia Indonesia.
3. Mukti, A. (2003). *Praktek Perkara Perdata Pada Pengadilan Agama*, Pustaka Pelajar, Yogyakarta.
4. Mujahidin, A. (2008). *Pembaharuan Hukum Acara Perdata Peradilan Agama dan Mahkamah Syar'iyah di Indonesia*. Jakarta: IKAHI.