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“Indonesia Clean of Corruption in 2020”

"Comparative Law System of Procurement of Goods and Services around Countries in Asia, Australia and Europe”

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THE RECONSTRUCTION OF DIVORCE DUE TO Marital STATUS UNDER THE UNAUTHORIZED GUARDIAN AS VALUE OF JUSTICE

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ABSTRACT

A marriage due to an unlawful guardian must be canceled, but often divorce of unlawful guardianship is decided by divorce and talaq, this is not in accordance with the value of justice as in the 5th principle of Pancasila and the Constitution of the Republic of Indonesia. So the authors intend to reconstruct it, by formulating the problem, 1. How is the divorce proceeding in marriage due to the current illegitimate legal status of a guardian? 2. How is the effect of divorce on marriage due to the current unauthorized legal status of guardians?, 3. What is the legal reconstruction Divorce on marriage due to the status of unlawful guardians of justice value?,

This article uses a qualitative approach, socio legal research, then researchers use the theory of justice as Grand Theory, Law Enforcement as Middle Theory and Legal Protection as Application Theory, As for the reconstruction is to answer the formula The above problem, namely: 1. the implementation of the cancellation of marriage today is when the submission is canceled then the decision is the marriage was decided by divorce, sometimes the filing of divorce / divorce is not investigated in advance whether there is a status of unlawful guardian or not. 2. The answer is the effect of divorce on marriage that there is an illegal guardian's status, if the divorce is decided then the rights demanded back, or other rights not delivered, because if the trial in the form of divorce, usually one of the defendants / requested did not come. Consequently a. The cancellation of marriage must be synchronized with Article 26 of the Marriage Act No. 1 of 1974, which is intended when the cancellation must be in accordance with the juridical reasons, b. For those who already have a marriage certificate, can not be canceled but must be repeated marriage, or ordinary divorce, c.In the cancellation should be examined exactly why the status of guardians is not valid, if due to deliberate from the woman then still said divorce, d.Dalam trial divorce Or talak, if after examined there are unlawful guardians, it must be decided cancellation of marriage not divorce.

Keywords: Reconstruction, Divorce, Guardian, Unlawful
I. Introduction

A. Background

Divorce due to the unauthorized guardian was happened a lot to become the reasons for divorce between the two bride, it makes the religious courts become more complicated in terms of deciding, because obviously his wedding letter is legitimate, and stated also their guardian of marriage. On the other hands unauthorized guardian to make excuses in terms of accelerating divorce, on the other hand also occur the lawsuit against the Office of Religious Affairs is concerned due to the unauthorized lifting guardian.

This makes a special study to be investigated, and it turned out in the statute of marriage, namely Law No. 1 of 1974, have not been specially listed in article in the divorce, or annulment of marriage due to unauthorized guardian. Therefor the writer lifting the title of “The Reconstruction of Divorce Due to Marital Status Under the Unauthorized Guardian as Value of Justice”.

B. Problem Formulation

1. How is the implementation of divorce on marriage as a result of the unauthorized guardian status nowadays?
2. How is the impact of divorce on marriage as a result of the unauthorized guardian status nowadays?
3. How is the reconstruction of the divorce laws on marriage as a result of unauthorized guardian status values of justice?

C. Objective of Dissertation Research

Trusts in Indonesia in marriage, giving priority to the biological father, after the biological father is not there then you male birth father was guardianship

II. Literature review

A. The concept of Guardianship in the Marriage by Fiqh Perspective

Guardian is required by law, may be forced upon others, according to the field of the law. Guardian consists of general and specific things. Special guardian intent means pertaining to human and property. Guardian is discussed a marriage thing for humans, namely the guardianship.
Meaning: Guardian at a wedding, it was crucial due to the legitimate in the marriage, then marriage will not valid if: there is no father or guardian, and relatives concerned, submitted to the Sultan and the owner; and the provision of valuable tradition as the guardian at the detailed feasibility jurisdiction doctrine or as obedience may apply.

In addition, besides of Article 2 (1) of the Marriage Law, that the validity of a marriage is determined by the religion and beliefs of each, then according to Article 2 paragraph (2) of the Marriage Law is determined also that every marriage must be recorded in accordance with laws applicable law.

B. Philosophy of Guardianship in Marriage by Fiqh Perspective

Guardianship according to Fiqh is called area of authority and protection means. According to the terms of Fiqh, guardianship is fully control given by religion to someone to control and protect people or goods. It means guardian is a person who protects with a vengeance, even lives at stake, so here called the guardian not only status but rather the protection of others.

C. Concept of Marriage Legal Guardianship in Positive.

Guardianship in Indonesia as general is to follow the Act No. 1 of 1974, but on the legislation explained that the marriage be adjusted in their respective religions, but there is some elaboration as the Constitution of the Republic of Indonesia Year 1945, Article 28 B reads

According to the imam Syafií that marriage without a guardian then the Fasid marriage as follows:

 قال الشافعي: ولو أن امرأة نكحت نكاها فاسدا فولدت من ذلك النكاح ولدا وكان النكاح بغير ولي أو بغير شهود عدول أو أي نكاح فاسد ما كان ما خلا أن تنكح في عدتها من زوج يلحق به النسب أو حملت فنزل لها ابن فاضل عدوها فولدت من الولد النكاح نكاها فاسدا والمرأة المرضع كما يكون الحمل ابن الناكح نكاها صحيحًا.
Syafi’i said, though her marriage imperfect, and from the wedding, produce children and the marriage without a guardian and witnesses, the marriage proper imperfect, it must be repeated with legal marriage then an exception to the marriage it promised a pair caused by heredity, or pregnant and nursing women, the birth was a boy who marry chaste though imperfect and women who are breastfeeding and child conceived in a legal marriage.

In the book *Alamat-fiqhul Islami Wa adillatuhu* with Madhab Khanafi explained that⁴:

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A ruined wedding present in both health conditions and types are: marriage without witnesses, temporary marriage, collecting five in a decade, and the combination of a woman and her brother, and a third woman without the knowledge of those who marry, knowing is not the solution: imperfect according to Abu Hanifah, and that opinion is void Rojikh.

### III. Implementation of Divorce in The Guardian Marital Status Due Unauthorized Current time

#### A. Cancellation of Marriage in Indonesia

Cancellation Marriage in Indonesia is not made specially in a separate article, but for the cancellation policy implementers decide to experience variations, as well as the decision of divorce between Ferrial Paisa Sirait vs Marhamah Adnan, with Judge Decision No. 160 / Pdt.G / 2002 PA./ Medan, June 5, 2002, that the decision resulted in divorce, although the beginning was the cancellation of the marriage, because the husband parties appealed and finally, finally decided by the Supreme Court with No. 150 K / AG / 2003 dated February 24, 2004, with a form of divorce Raji. Cancellation of the Marriage between Heni Puspita bint Ujiman and Sukari bin Zuhri, Heni puspita married to Sukari with a guardian who is not legitimate, even though it is the brother of his father, but because in trouble and the husband left for 4 years, finally Puspita propose the cancellation of the marriage due unauthorized guardian. Cancellation of the cases mentioned above Kendal Religious Courts

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adjudicating civil cases in the first degree, in the trial has passed its decisions with the number: 1042 Pdt.G / 2004 / PA.Kdl.

But looks cancellation of the marriage, the effect is not too well because it was canceled, but because there is a problem, but the cancellation of the marriage due to the unauthorized guardian, as the reason quickly to imminent divorce, with the cancellation of the marriage.

B. Marriage in Muslim Countries

1. Saudi Arabia

Government of the Kingdom of Saudi Arabia called the Monarchy structure. Cabinet with the King is the executive and regulatory power in the State. The Prime Minister is Khadim al-Haramain ash-Syarifain (the Two Holy City) King Abdullah bin Abdul Aziz Al-Saud, and the Crown Prince was Prince Sultan bin Abdul Aziz Al-Saud, Deputy Prime Minister and Minister of Defense, Aviation and Inspector General. Judicial system comes from Al-Qur`an and Sunnah.

2. Morocco

Of guardians in Moroccan family law is discussed in several chapters. Article 13 states that the marriage must be met: The skill of a man and a woman to marry, there is no agreement to terminate a dowry, their guardian when specified, the fair witness and the absence of impediments to marriage. Discussion guardian is also contained in Article 17 which requires a power of attorney for a wedding that uses guardian while Article 18, a guardian cannot be married to a woman who became his guardian.

3. Malaysia

Malaysia has family laws in each state regulates the administrative part of Islamic law, the marriage registration in Malaysia is something that is required. But this marriage provisions enforced by all states of Malaysia. Malaysia does not determine the legitimacy or the cancellation of a marriage. Conditions valid or cancellation of the marriage based on Islamic law. However, the omission to register marriages considered an offense in most areas in Malaysia.

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5 http://www.mofa.gov.sa/Detail.asp?InSectionID=5703&InNewsItemID=82600
6 Moroccan Family Law Article 17 and 18.
7 Tahir Mahmood 29, 1987, p. 201
4. Jordan

As for the position of mayor and guardianship provisions described in Article 9 to Article 13. Guardian in marriage is the order ashobah Binafsihi in the order of inheritance according to the Madzhab Hanafi. A guardian must be sensible, puberty and a Muslim. In this case, the writer can take the red thread that the position of guardian is to some people who are equal, then a guardian among them the right to abort her guardian rights. Then if it turns out no one Aqrob guardian, for the benefit of the guardianship sequence moves on to the next guardian. The widow aged 18 years or older no further regulation.

5. South Yemen

Marriage in South Yemen had differences with other Muslim countries. According to the country's family law, registration of marriage affects the validity of a marriage. Thus, registration of marriage is not merely an administrative requirement only.

Viewed from this thing, it is also very important for guardianship because they follow the Islamic law in force in accordance to the Madzhab may be understood.

IV. Impact of Divorce On Marital Status Due Unauthorized Guardian

The impact of divorce on marriage as a result of the unauthorized guardian, bring positive and negative effects:

A. Husband Wife Relationship break down Due to Cancellation of Marriage

Surely officially severed the relationship between husband and wife, but she decided that, some judges give policy, if the cancellation was due to a guardian is invalid indeed, then the marriage is instructed to repeat, then will decide to divorce Raji.

B. Distribution of Joint Assets Post-Cancellation of the Marriage

In Islam there is actually no terms or the legal division of property like this, but in Indonesia has become a tradition, that if there is separation there must be a division of property. Because in Indonesia, it was used to women to help work and career, then it is very necessary to the division of property, after the divorce.

C. Impact of Children in Deliver

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8 Abdul Wahhab Khalaf al Syakhsiyyah FI al Ahwal Ahkamul Shari'ati al Islamiyah, Kuwait: Darul Qolam, 1990, p. 60
9 Ibid Atho, Mudzhar and Khairuddin Nasution h.72
Children born remain the responsibility of both of them, in a sense like a family intact, even strengthened again the decision of the Court of out of wedlock children have a civil relationship with her biological father, especially with the process of legal marriage, just less because the guardianship is not valid.

D. Impact of Cancellation Decisions Marital Status Due to Unauthorized Guardian

The cancellation was a very significant impact, because of the given decision with large differences in terms of the case. However, the most important is the legal protection, of legal certainty and reach values of justice, for persons with a case, as well as the things that caused the cancellation.

V. Reconstruction of Divorce Due to Marital Status Under the Unauthorized Guardian as Values of Justice

A. Cancellation Marital Status Due Mayor Yang Unauthorized According Sila All 5 Pancasila and the Constitution of NRI 1945.

1. Justice as 5th Sila in Pancasila

The cancellation of the marriage due to the unauthorized guardian status, is a very complicated issue. it will be seen from the realm of all five precepts of Pancasila and the Constitution of the Republic of Indonesia in 1945, as follows while According to5th Sila in Pancasila that the cancellation came from not rightful guardian, actually do not need to proceed with their divorce, because if you see the article 5th Pancasila reading "social justice for all Indonesian people" can be understood that fair treatment is the right of every citizen without exception.

2. Fairness According to the Constitution of the Republic of Indonesia Year 1945.

Under the Basic Law of the Republic of Indonesia in 1945 found in some article, of which explains about the fairness and the right as a human being, as for the statement as follows:

Article 28 A in paragraph (1) reads "The right to life and survival and life". The verse is clear that every human being has the right to live and preserve life.

B. Cancellation Marital Status Due to Unauthorized Guardian in various Muslims countries of Southeast Asia

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10 Paragraph 37 of Article 28 A (1) of the Constitution of the Republic of Indonesia in 1945
1. Saudi Arabia

   Rights and obligations of legal guardian is a must in Hanbali Madzhab, even marriage is considered invalid without a guardian.\(^{11}\)

2. Jordan

   women who have turned 18 years old can be in marriage himself without a guardian. Then required the suitability of wills between the guardian widow aged 18 years or more.

3. Morocco

   Thus the law of the State of Morocco gave freedom to women are able to marry herself without a guardian, or guardian submit marry her, and even then did not have such rules as the existing guardian.

4. Malaysia

   in Malaysian family law explains that, the position of guardian in Malaysia is very important family law, which is that for a wedding can be done by a guardian in front of the officer, by the vice-mayor or by a marriage registrar officer acting on behalf of the guardian. If the guardian is not Nasab, regent of the act as a guardian for the marriage.

5. Indonesia

   Conditions of guardian in marriage law in Indonesia can be found on the Compilation of Islamic Law from Article 20 to Article 23\(^{12}\). Guardian is a pillar (a show) in a marriage. As for the cancellation of some events because of the marriage was invalid marriage guardian as and case of cancellation of marriage.

C. Reconstruction Through Divorce Law Request and Lawsuit On Marital Status Due to Unauthorized Guardian by the Perspective of Fiqh and Law No. 1 of 1974 Based on the Values of Justice

   Marriage law No. 1 of 1974 concerning the cancellation of the marriage, which is written in article 22 which states that "marriage can be canceled if the parties do not qualify requirements to enter into marriage". As well as in article 71 letter e Compilation of Islamic Law states that, "a marriage can be canceled if the marriage took place without a guardian or held by guardian who are not entitled."

   The irony many marriage annulments decided by a religious court, even though they already have a marriage certificate should correct if the request for

\(^{11}\) Ahmad bin Qudamah Al Maqdisi, Umdatu fi al fiqh al-Hanbali sect, Maktabah, Isriyah, Berut 2003, p. 90.

\(^{12}\) Law Compilation of Islam Article 22
annulment is no marriage certificate, it can be considered valid, but what happens is the cancellation of approval. So in this case do not fit the marriage laws in force. Even with a marriage annulment process is faster than regular divorce.

This we know from the results of a court decision religion and different religious high court verdict, as for the discussion as follows:

The Decision No. 1769 / Pdt.G / 2009 / PA. Bks, issued by the Islamic Court of Bekasi bringing the verdict in the case Request Cancellation marriage between the Applicant (Applicant original) `with Respondent I (respondent original). Bekasi Religious Court declared marriage certificate applicant with the first Respondent / Appellant, issued by KUA District of Bekasi City Rawalumbu it does not have permanent legal force or can be said to be invalid. Respondent that KUA head Rawalumbu District of Bekasi City, as the official record Marriage Petitioner Deed (First Applicant) / compa Respondent I (original defendant) / Appellant in as a registration certificate that does not have binding legal force.

The decision resulted from the efforts an appeal made by the Appellant (originally Respondent I) to compa (which was originally native Applicant) the Decision No. 264 / Pdt.G / 2010 / PTA. Bdg, issued by the High Court of Bandung Religion canceled by the decision of the Decision No. 264 / Pdt. G / 2010 / PTA. Bdg, the Panel of Judges wear basic legal consideration the provisions of article 26 of Law No. 1 of 1974 on Marriage, mentioned in No. 1 of 1974 on the cancellation of the marriage of article 26.

As for some basic and legal considerations Religious High Court judges who handle cases Bandung include:

First, based on consideration of the Assembly are the provisions of Article 26 of Law No. 1 of 1974. Second, Petition/compa based on the grounds that the marriage of the Applicant/Respondent compa with I/Comparative recorded at the District Office of Religious Affairs Rawalumbu with Marriage Certificate Number. , 712. 02/VIII/2008 dated August 2, 2008, was carried out using male guardians who are not eligible.
Therefore, pursuant to Article 26 paragraph (2) of Law No. 1 of 1974, as mentioned above, the right to apply for cancellation of the marriage by the husband be dead, and that marriage should be updated so it is legitimate\textsuperscript{16}.

the Applicant / compa on petition number 3 and 4 should be declared unacceptable. The conclusion of the decision is the decision\textsuperscript{17} of the Court of Religion, marriage states canceled due to unauthorized guardian, but the decision of the High Court of Religion Bandung (Decision No. 264 / Pdt.G / 2010 / PTA. Bdg) it can be concluded that the Bekasi Religious Court decision is not correct, and decided on marriage was illegal, but the marriage must be repeated in order to be valid, while the fatal error lies in KUA, which records the marriage without a legal guardian. This is in accordance with Article 26, Paragraph 2 of Act No. 1 of 1974, as mentioned above, the right to apply for cancellation of the marriage by the husband be dead, and that marriage should be updated so that legitimate\textsuperscript{18}.

After discussing the various discussions, from theory, to the case of cancellation, the author intends to reconstruct divorce on marriage as a result of the unauthorized guardian based on the values of justice are:

1. Cancellation of marriage must be synchronized with Article 26, paragraph 2 on the Marriage Law No. 1 of 1974, which meant is when cancellations must be in accordance with legitimate reasons.

2. For those who already have a marriage certificate, cannot be canceled but must be repeated marriage, or divorce usual.

3. In cancellation must be studied very well why can not a legitimate guardian, if selected for intentional on the part of the woman's remains said to be a divorce.

4. In the trial of divorce or Talaq, if after investigation found unauthorized guardian, then it should be decided cancellation of marriage is not a divorce

VI. Cover

A. Conclusions

Conclusions of this dissertation addresses three issues that are formulated in Chapter I, as follows:

1. Conclusion of the first implementation of the cancellation of marriage today is when the submission is canceled then the decision is that marriage decided to

\textsuperscript{16} Read Law No. 1 of 1974, and read Decision No. 264 / Pdt.G / 2010 / PTA.Bdg
\textsuperscript{17} Decision No. 264 / Pdt.G / 2010 / PTA.Bdg
\textsuperscript{18} Decision No. 264 / Pdt.G / 2010 / PTA.Bdg
2. The second conclusion of divorcement can impact on marriage are illegitimate guardian, if it is decided divorce then their inheritance rights, or other rights not delivered, because if tried in the form of divorce, usually one of the defendants did not come, that is where justice cannot be enforced because one party did not attend the hearing.

3. The third conclusion is:
   a. Cancellation of marriage should be synchronized with Article 26, paragraph 2 on the Marriage Law No. 1 of 1974, which meant is when cancellations must be in accordance with legitimate reasons.
   b. For those who already have a marriage certificate, cannot be canceled but must be repeated marriage, or divorce usual.
   c. In cancellation must be studied very well why can not a legitimate guardian, if selected for intentional on the part of the woman's remains said to be a divorce.
   d. In the trial of divorce or Talaq, if after investigation found unauthorized guardian, then it should be decided cancellation of marriage is not a divorce.

B. Implications

In this dissertation research has implications for theoretical and practical implications as for details on the information below:

1. Implications terroristic

The theoretical implications of this research can build up a new paradigm of the theory of the law of marriage, especially in the cancellation of the marriage, which is based on justice, where the cancellation of marriages that already have a marriage certificate must be re-marriage.

2. Practical implications

The practical implications of this research is concerned with the practical things, such as a judge in addressing cases of marriage annulment especially on the field, in order to observe what mode is used, why use a marriage annulment process, in filing a divorce.

C. Suggestions
1. This dissertation research recommends to the agency related to the cancellation of marriage in order to be able to decide based on the philosophical, fairness and legal certainty as well as examine the hermeneutics. In addition, it also reveals the values of justice, as implied in the precepts 5th Pancasila.

2. The Government and Parliament to amend Article 26 paragraph (2) of Act 1 of 1974 reads
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