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## CONCEPT OF WALI ADLUL DECISION IN ISLAMIC AND POSITIVE LAW PERSPECTIVE

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### **ABSTRACT**

Wedding is a vow between a man and a woman to reach the family goals. This definition strengthens that the wedding is like a vow that means there is freewill of each party to take the promise or having the similar principle of like or free contract in civil law. There are many problems aroused in the society, especially for the women who are ready to get married but sometimes complicated with the reluctant of her guardian to realize it. Finally, they take the simple way to realize their ambition and love by doing something avoided by the decency, obscenity, even religion norms. Therefore, the concept of adlol guardian decision in Islamic and positive law will be discussed in this research. This research used library research method whose a primary law source collection method is KHI and Islamic law source, either Al-Qoran or Al-Hadith, ijma' and qiyas, while its secondary law sourceyis fiqh books or literature related to the problem. The result of research about the determination of adlol guardian in Islamic or positive law is as the following: there is khilafiah of the difference of opinion among some priests. Syafi'iyah and Malikiyah priests tells that if the guardian is reluctant or adlol, so the guardian's duty will be directly taken by judge (Wali Hakim), while according to Hanafi and Hambali, it is forbidden to give the right of guardian to judge, but the right must be given to the following guardian by sequence till the end of the dzawil arham. While in Positive Law (KHI) in clause 23 verse 2 which tells if the guardian is reluctant or adlol, so the judge can be a guardian after court ruling. The positive law (KHI) should take all mahzab and change the guardian's petition classified into volunteer at first to be contentious problem.

**Key words:** Islamic Law. *Adlol* Guardian. Positive Law.

### **1. Introduction**

Marriage is the inner bond between a man and a woman as a husband and wife in order to form a happy and eternal family based on the omniscient divinity.<sup>2</sup> Prophet Muhammad SAW in carrying out his apostolic mission also regulate the marriage and guidance of the people in order to create a sakinah society, mawadah wa rohmah ma'al barokah. In the order contains several requirements and pillars that must be met.

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<sup>2</sup> Number 1 Year 1974 Law of Marriage

As mentioned in a hadith narrated by Aishah which means: "If a woman does a marriage without her consent the marriage is void, then if a man has intercourse her then she is entitled to her dowry, because she has justified her honor".<sup>3</sup> In the current era of globalization has been a life change that is so amazing, so that in the forms of change occurs in all sectors of life, mindset, socioeconomic, cultural and educational so that requires a change in the order of life around it.

Many printed or electronic media containing news about suicide among teenagers. One of them is the news of a private college student in Kediri who threw himself into the Brantas River because the girl's parents refused his proposal for that girl. From this case, it can be a lesson that parent should not be too impose their own will as well as the story of the poor girl should be thinking further, because so many ways to go to the better thing.

In the study of Islamic law a lot of discussion about the reluctance of a guardian or a parents who let their child to get married. One of them is the other explained by Syihabudin Al Qulyubi, preacher Syafi'iyah explained that the adlol guardian can receive his trust back again before marriage by the judge by presenting witnesses to the process.<sup>4</sup> So Abdurrahman Aljaziri also explains if there is someone who has the right guidance then prevent its mauliyah to marry with the prospective husband whom he had liked and has given the proper gift dowry and the child has reached the age above nine years, then it is classified as adlool guardian , except under the age of 9 years.<sup>5</sup>

To realize the purpose of service and protection of society in law, the government has adopted the Islamic law produced by parafuqoha 'in compilation of Islamic law in Indonesia, in case of the adlol of a marriage, guardian compilation of Islamic law explained in Article 23 paragraph, 1 judge guardian only can act as marriage guardian if the guardian of the family is absent or unlikely to present or unknown to his or her residence or ghoib or

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<sup>3</sup> M.Ali Asyaukani, *Nailul Autor VI* (Beirut: Darul Fikr, n.d.). hlm 249

<sup>4</sup> Syihabudin Al Qulyubi, *Hasyiyatul Qulyubi* (Beirut: Darul Fikr, n.d.). hlm. 225

<sup>5</sup> Abdurrahman Aljaziri, *Kitabul Fiqh 'Alamadzahibil Arba'Ah IV* (Beirut: Darul kutub al'ilmiyah, n.d.). 20 - 26

reluctantly. But the problem now is how to determine and handle it through the judge's decision and according to Islamic law.

In the Regulation of the Minister of Religious Affairs No. 2 of 1987 article 2, paragraph 3 which mentions the religious court examined and decided the adlol of bride to be guardian. In practice, the adlol guardian case is classified as a petition (Volunteer) which only involves the prospective bride only as the applicant without any other party being made the requested party. According to Prof. Yahya, one of the characteristics of volunteer cases is the absence of disputes with other parties, meaning that the applicant is not related to the rights of others, it should be emphasized that the principle of equqlity before the law must be said that the court must hear both parties.

By highlighting a problematic of possibilities faced with guardians may be urgent to be revealed and resolved and it is also important to disclose a positive legal review of Islamic law related to the issue of marriage guardianship in order to obtain a more detailed clarity as a reference to the settlement of the problem of the adlool guardianship.

Departing from the background above there are issues that need to be studied as follows how to analyze the concept of adlol guardianship determination according to both Islamic and positive law ?

## **2. Reseach Method**

In this case the writer uses the type of Library research focused on reading and understanding the literatures that can be used as a basic reference or supporting resources in accordance with the discussion referred to in this study. The research is descriptive analytic, comparative whose the data has been collected initially compiled, explained and then done the analysis, while the research approach used by researchers is a sociological juridical that is an approach whose a problem related to the behavior or personality of the community is often done and the behavior the behavior has to do with the law so that it becomes a symptom of legal symptoms

Sources of data in this study are primary and secondary data sources. Primary data source is in the form of positive law applicable in Indonesia, in this case using the compilation of Islamic law (KHI), and the books of *tafsir muroh labib tafsir ayatil ahkam*, while the book of hadith used *subulussalam*, *Sunan Abu dawud*, *Nailul author* and book of fiqh either from Syafi'i, Hambali, Hanafi or Maliki Mahdhab and secondary data that is in the form of article, internet and other supporting documents.<sup>6</sup>

After collecting the source of data, then the data were analyzed in order to get the conclusion. The method used to analyze the data is as follows

- 2.1. Deductive methods: This method is used to analyze and process existing data by drawing the general sense of the data data to a general conclusion.<sup>7</sup>
- 2.2. The Comparative Method: This method is used to compare opinions of jurists. From one data with other data to take one conclusion from those opinions which is then taken or selected more precise and superior with accompanying arguments that support.

### **3. Results and Discussion**

#### **3.1. Understanding and Terms guardian in marriage**

Guardian comes from *masdar walyan - walayatan* which means close, master, manage, rule, love, help, help, belong.<sup>8</sup> as defined by Abdurrahman Al-jaziri in his book *madzahibil arba'ah* which means " and invalid without it.<sup>9</sup> " Thus it can be interpreted that the guardian is the person who becomes the legitimate enforcement or cancellation of a marriage, and from here can be obtained the meaning that the existence of a guardian is a very important thing of a marriage contract itself which

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<sup>6</sup> Sutrisno Hadi, *Metodologi Research* (Yogyakarta: Andika Offset, 2004). Hlm. 47

<sup>7</sup> Hadi.

<sup>8</sup> Ahmad Warson, *Kamus Al-Munawir* (Yogyakarta: Pondok Krapyak, 1984). Hlm. 1960-

1691

<sup>9</sup> Aljaziri, *Kitabul Fiqh 'Alamadzahibil Arba'Ah IV*.

of course I need the legality of legal recognition lawful under the law or by positive law. The conditions of the guardians are according to Mahmud Yunus there are so many many disagreements, but nevertheless there are four conditions that have become agreement fuqoha 'are:

#### 3.3.1. Moslem

The unbelievers are not legitimate to be the marriage guardians of the mu'minah, this is based on the description of Al-Quran verse An Nisa 'verse 141 which means "Believers men and women believers are the guardians of others"

#### 3.3.2. Baligh (Mature)

A marriage guardian must be a male who has *baligh* and a child illegitimately become a guardian, It is based on a hadith that originated from Ayesha RA from the prophet SAW which means: "Released from responsibility for three people, among others: until he wakes up, crazy until he heals, and children until he grew up."<sup>10</sup>

#### 3.3.3. Good Mind

The rule is the same with the hadith that used the basic law "baligh" as the above d.) Men Unlawful women become marriage guardians, this is based on general guidance verses on guardians only on men, or in other words the person who is entrusted syara 'in the affairs of marriage is the man, so that the man is a condition for the guardian in marriage.

#### 3.3.4. Man

Woman cannot be a guardian. It is based on the general rule showing that guardian is only for man. On the other

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<sup>10</sup> Imam Suyuti, *Jam 'ius Soghir I* (Beirut: Darul Fikr, n.d.). hlm. 24

word it can be said that the person concerning on marriage is only a man.<sup>11</sup>

### 3.3.5. The Mursyid

This is based on the hadith of Ibn Abbas and narrated by Attobroni from the Prophet Muhammad SAW which means: "Unlawful marriage, except by going through a guardian *mursyid*". *Mursyid* here means fair as the description of Imam syafi'i that *fasiq* people are not legitimate to be a guardian.<sup>12</sup> Whereas on the contrary according to Imam Hanafi argued that the legal *fasiq* be guardian because the *mursyid* is not fair but clever.

## 3.2. Various guardians and its levels

The preachers agree that the guardian is divided into three kinds.

### 3.2.1. *Nasab* Guardian

Nasab means nation, according to the teachings of Patrinal nasab also defined by the family in the relationship of patrilineal lineage or patrilineal blood relationship. Guardian of nasab means male family member for the bride who has a blood relationship patrilineal with the bride, including in it are father, father, brother brother father own brother and others. While the guardian of nasab is divided into 2. a.) Guardian of nasab who entitled to force this is called the guardian mujbir guardian is made up of father, datuk the father of father and father and so on upwards. b.) Guardian of Nasab who has no power to force or usually consists of brother(sibling), uncle.

### 3.2.2. *Guardian Sulthon* (Judge)

Sulthon as the opinion of Inu qudama, he explained that the definition of sulthon's guardian is the Imam himself or the judge

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<sup>11</sup> Muhammad Yunus, *Hukum Perkawinan Dalam Islam* (Jakarta: Hida Karya Agung, 1983). Hlm. 55

<sup>12</sup> As-son'ani, *Subulus Salam II* (Surabaya: Al-Hidayah, 1983). Hlm 55

or the person who gets the mandate from both.<sup>13</sup> Meanwhile, according to Abu Zahra in the book *Ahwal Assyahsiyah* that the guardian *sulthon* may be called the judge's guardian is the ruler or the authorized representative in the field of marriage, usually can be a *penghulu* or other officers from the religious department, guardian *sulthon* can be indicated as follows. A) Imam or the regional head, b) a judge or a person appointed by the government, c) *qodli* or person handed over by an official on it. While that could lead to the transfer of the rights of a guardian to a guardian *sulthon* or judge is: 1. The guardian. 2. There is a dispute between the guardians

### 3.2.3. Guardian of *Muhakkam*

*Guardian Muhakkam* is a person appointed by both bride and groom to act as their marriage guardian, this is done when in their area there is no judge, because that is why then *muhakkam* become guardian.

Imam shafi'i said that the marriage of a woman is not valid unless married by a close guardian and if there is no guardian then it is married by the judge, while the order is as follows:

- 3.2.1. Father
- 3.2.2. Grandfather
- 3.2.3. Brother (Sibling)
- 3.2.4. Brother from the same father
- 3.2.5. The son of a sibling's brother
- 3.2.6. A boy from a half-brother
- 3.2.7. Uncle from mother
- 3.2.8. Uncle from father
- 3.2.9. The son of the uncle from mother
- 3.2.10. The son of an older uncle
- 3.2.11. Judge

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<sup>13</sup> Ibnu Qudamah, *Al-Mughni Wasyarhul Kabir* (Beirut: Libanon, n.d.). hlm. 351-369

### **3.3. Application of *Adlol* guardian in the perspective of Islamic Law**

#### 3.3.1. According to the Hanafi *Mahdzab*

In the Hanafi *mahdzab* it is found that the '*adolol*' sader described by Abdurrahman Aljaziri - if a *guardian* is '*adolol*' then his Movement to the guardian of *adolol* not to the judge. This is the same as the case when the guardian is difficult to import, then the more is the guardian of Ab`ad is not judge. Then Abdurrahman Aljaziri further explained As follows: "When a father prevents a young daughter and he is worthy of marriage, and also his partner who wishes to have sekufu and pays a mystical dowry, then thus the guardian of the guard is` *adolol*, and guardianship to be transferred to the next guardian, like grandfather if any, and if not then on his concubine and so on.<sup>14</sup>

#### 3.3.2. According to the Maliki *Mahdzab*

The tendency of the Maliki *Mahdzab* is similar to that of the Shafi'i *Mahdzab* as quoted by Syeh Jalaluddin Al-Mahali which means: "Whenever a good guardian is mujbir or not, obstructs his mawl (mate), with his partner who sekufu mauli also willingly with him, then the guardianship does not move to a distinguished guard, but it is entitled for the mauli to report his case to the judge, with the intention of questioning the guardian about the cause of its prevention. So if the guardian explains it with the intent of reason. The judge then leaves the matters to him but the judge orders the guardian to marry him, so if the guardian defies him after he has ordered the judge, then the judge acts to marry them.<sup>15</sup>

In another statement it is pointed out: "a guardian is actually singed" which *adolol* is certain that what he is doing is with the intention of preventing his mating from marriage, for if only to

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<sup>14</sup> Ibnu Rusyd, *Bidayatul Mujtahid* (Beirut: Darul Fikr, n.d.). hlm. 12

<sup>15</sup> Jalaluddin Al-Mahali, *Syarah minhajut Tholibin III*, ttp, Darul Fikr, tt, Page 225



reject the person applying, it can not show that he is' *adlol*, to attract the benefit of a guardian for his maiden, whatever he is his dear man to the girl will be evidently with the intention of damaging even once only, then the judge must order him to marry and if he is not able to marry, then the judge is to marry "

Stated from Ibn Rushd from the *Bidayatul Mujtahid*, whose translation is as follows: "There is no reason for a guardian to prevent his son from marrying when he wants a partner who has *sekufu* and with a mystical dowry. To the judge, and then for marriage done by the next guardian besides the father.

### 3.3.3. Shafi'i Madzhab

Concerning the involvement of a judge against the '*adlol*' guardian appears in the commentary of a scholar of Shafi'i *mahdzab*, ie, the faith of jalaludin almahali in one of his books whose translation is as follows: "It is necessary to attain certainty that a *guardian* is' *adlol* before the judge after the command and declared to refuse to marry, while the woman (whose maiden) follows the man who proposes her also present, or also brought witnesses to strengthen or hide (this if he is absent), (and after being brought before the judge) then when the guardian is willing marry it, then the goal (the resolution) will be achieved but if he is not willing to marry him, it is true he as a *adlol* guardian it can be realized with the availability to marry and with it also return the guardianship, and if the judge married due to the guardian's trustee, then the guardian claiming that he has withdrawn from his *adlol* and will in the election of marriage before the judge proceeds, it can not be won except by presenting witnesses.<sup>16</sup>

The event of the first '*adlol*' guardian is an event that occurred in the days of Allah's ruling. Immediately the friend *ma'qil bin yasar* changed his decision (to '*adlolan*') to the marriage

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<sup>16</sup> Qulyubi, *Hasyiyatul Qulyubi*.

of the younger brother, after getting an explanation from the prophet SAW. dan he said in the presence of the rosul of Allah which means. "I say-now I do O Allah's messenger-then the hadist hadith explains that the ma'qil friend marries his sister with her (abdullah bin mas`ud).<sup>17</sup> According to this *mahdzab* the judge is to marry on the mauili of the '*adlol*'. In this case has ever been emphasized by imam syafi`i as follows Meaning.

"If the *guardian* occur disputes, a judge should see that if only the guardian The explanation of the Jalaludin Al-Mahali above is the first step in determining and ensuring the status of the guardian, but the judge still gives the opportunity to repeal to the guardian's *adlolan* whose translation "a guardian that is simply could be realized with his willing to marry, and with it also returns its representatives, and if the judge conducts marriage due to the trustee's guardian, then the guardian confesses that he has withdrawn from his' *adlol* and will hold the marriage before it is held by the judge, it can not be in trima unless it presents the witnesses ". The events of the first '*adlol*' guardian is an event that occurred in the days of Allah's Imaginary at that time the friend of ma`qil bin Yasar changed his decision (to `adlolan) to the marriage of the younger brother, after having an explanation from the Prophet SAW and he said before the rosul of Allah which means" I say - now I do O Allah's messenger-then the hadist hadith explains that the ma'qil friend marries his sister with her (abdullah bin mas`ud).<sup>18</sup>

According to this *mahdzab* the judge who married on the mauili of the guardian in the deepest was once defined by imam syafi`i as follows If a *guardian* is a guardian who is '*adlol*' then he is ordered to be able to marry, if married then the problem is

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<sup>17</sup> Qudamah, *Al-Mughni Wasyarhul Kabir*.

<sup>18</sup> Qudamah.

solved, but if the guardian does not want to marry, then the light of the deterrent, and an obligation for the judge to marry or represent him to others to marry him.<sup>19</sup> But may the distant guardian as the guardian of *'adlol* not merely the judge who took the authority it means.

"That if a guardian prevents the woman from the beginning of the marriage, whereas he has desired to take place, because the pairs have *sekufu* even though his less mystical dowry. Then the judge to marry him as a substitute of the guardian (concerned) because the right for the guardian has not been void, because the prevention is done only once or twice only, then the judge is the one who replaces it. However, if the harassment is to be repeated many times then it becomes a faculty and declared a forbidden act. Thus it is his right to lose and to move is the representative to another who is a distinguished guardian.<sup>20</sup>

#### 3.3.4. According to the Hanbali *mahdzab*

According to the *mahdzab* of a servant that he once gave an explanation of the *'adlol*'s guardian, in his opinion that for the *adlol* guardian, move him to the guardian of *aqrob*. With the guardian's trust he moved to the guardian *ab, ad*, while on the other hand he explained that the trust went to the judge.

Sheikh Abdurrahmanb Al-Jaziri explained in his book: "If any man has the right of custody then prevents his mating from marrying to his future husband whom he likes, and by granting him a dowry according to the proper measure of the dowry generally, and he has attained the age of 9 years and even more, , then the guardian's attitude is not an attitude of *'adlol*, the guardian of his *mawlah* (and if the guardian is *adlol*) then the right of guardian becomes transferred from the *adlol* guardian to

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<sup>19</sup> Imam Syafi'i, *Al-Um III* (Beirut: Darul Fikr, n.d.). hlm. 14

<sup>20</sup> Aljaziri, *Kitabul Fiqh 'Alamadzahibil Arba' Ah IV*.

the judge's guardian, because he is the one who has the authority to marry upon his morality which his guardian prevents from mating, *guardian mujbir* or not *mujbir*.

In *mahdzab*, there are also among other scholars who tend to argue differently as follows: Ibnu Qudamah explains that the determination (settlement) *adlol* guardian must stand on the hadith `Aisah is not able to release the involvement of all guardians (in relatives kin) and then further. More clearly Ibnu Qudamah in his book:

"If the *aqrob* guardian prevents his maid from marrying, then the judge can not be his guardian. Because the guardian of *aqrob* has made a barrier of himself from marriage. So then turn to the guardianship of the next guardian (*daari asobah*). This happens as if the guardian of *aqrob* is crazy or dead, thus marriage may be done on the *mauli*, by the guardian other than the *aqrob* guardian. Then the guardian *ab`ad* (occupying) as the original guardian (*aqrob*)".

#### **3.4. The `adlol guardian according to KHI**

When we examine the notion of the '*adlol* guardian' contained in article 23 paragraph (2) of KHI. There mentioned in the case of guardian `*adlol*, then the guardian judge just acts as marriage guardian after there is a religious verdict about the guardian.

The law of the pleading of adulthood guardian is found in book II of technical and administrative technical guidance of religious court of 2007 edition. On page 134 mentioned, the prospective bride who will hold marriage whose marriage guardian does not want to conduct marriage can apply for the pleading of '*adlol* guardian to religious court. Regulation of the minister of religion number 2 in 1987 became another law. Article 2 paragraph (3) of this regulation states, the religious court examined and stipulated the `*adlol* guardian of the guardian in a brief manner at the request of the prospective bride by presenting the guardian of the bride. In practice, the guardian `*adlol* case is classified as a volunteer that

only involves a bride as a petitioner without any other party being invited.

Here is the problem. In fact, there is clearly a dispute between the bride and groom. Since there is a dispute, the case should be classified as contentious.<sup>21</sup>

According to Prof. Yahya Harahap, one of the characteristics of volunteer cases is the absence of disputes with other parties. In this case it should be emphasized that the principle of law must be enforced. That is, the court must listen to both parties. Guardian nasab according to him, not *cukuo* be a witness, but must be one party in the case of guardians' *adlol*.

In addition, if the '*adlol* guardian' is still classified as a volunteer case, then the equality before the law principle will be injured. The result of this petition is the determination, not the verdict. Since a parent or guardian is not considered a litigant, he has no legal standing to carry out legal measures such as *verzet*, appeal and cassation. On the contrary, if the petition is rejected, the prospective bride may file a cassation attempt. This argument is based on article 23 verse (2) compilation of Islamic law. It is mentioned, in the case of the '*adlol*' guardian, the new judge may act as marriage guardian after a court decision religion concerning the guardian. It should be understood here that the verdict is a contentious matter, while the product of the volunteer case is the determination.

e.) The relevance of jurisprudence and KHI

In this article the author will try to find the correlation between *fiqh mukahat*, laws about marriage, and KHI buku I about marriage and connect it between the three. From the results of this correlation will be seen that the laws and regulations applicable in Indonesia on marriage in principle does not violate the provisions of religious law called *munakahat fiqh*.

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<sup>21</sup> accessed on 20 January 2018 <http://www.PA-lubuklinglau>

In discussing the source of jurisprudence and the number of versions of the jurisprudence fiqh as the realization of the various opinions in understanding the sources of jurisprudence that have not run parts of the law can be assured that the source of jurisprudence is feasible to be reviewed, and the fiqh that exists with many versions it is worth formulating, so that the existing marriage law can be accepted as a result of a new formulation of *munakahat* fiqh. Thus, the marriage law is in principle acceptable because it does not violate the provisions in force in the fiqh *munahat* without seeing certain *madhha* fiqh.

KHI is structured with the intent to supplement the Marriage Law and is cultivated in a peractist manner as a law of law even though its position is not uniform. KHI thus berinduk the marriage law, then the material should not conflict with the marriage law. Therefore, the entire material of the marriage law is copied into the KHI even though with different formulas. In addition, in the KHI added other materials whose principles are not contrary to the marriage law. Relevance is in *munakahat* fiqh with the marriage law or in general laws of marriage law with all possibilities. Then explained also that the KHI is a marriage law equipped *munakahat* fiqh, Law of Marriage as the author describes above.

But the *munakahat* fiqh which is part of the KHI is not entirely the same as the *munakahat* fiqh contained in the *madhhab* adhered so far ie *madhhab syafi'i* because *munakahat* fiqh in KHI has been opened without other *madhhab* besides *shafi'i*. The compilation of Islamic law occupies a relatively important position, at least in the context of Islamic legal legislation requiring the touch of *sulthon tanfidziyah*. Apart from the non-inclusion of KHI in a legally binding legislation hierarchy, the KHI as a product of *ulil amri*, which has been packed in the form of a joint consensus between scholars and jurists in Indonesia, and can be viewed as binding normally. Although in principle there is no significant difference, but it needs to re-examine the technical aspects. Thus, the fiqh

passed down by previous scholars and has become a guideline in society can be totally codified. This can happen when the lawmakers, the House of Representatives pay more attention to the legal awareness of the majority Muslim community.

#### **4. Conclusion**

From the above description can be taken a conclusion as follows according to the perspective of Islamic jurisprudence and KHI, *adlol* guardian is a guardian who performs a preventive act to establish its *mauli* marriage with no justified Islamic reason while the criteria of *adlol* guardian when the prevention is not justified syara 'include (a) prospective husband already has same level (b). has paid his mystical dowry (c) both are mutually wanted to hold a marriage.

Decision of the *adlol* guardian on fiqh moves to the *aqrob* and *ab'ad* guardian based on the inheritance. Having been declared to the *adlol* by the judge, whereas according to the Law of Positive (KHI) the *adlol* guardian is taken over directly by the judge after passing the hearing session, while the reason for increase the process of determination and settlement.

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