

Maslahat Aspects as A Basis for Judges Considerations in the Implementation of Forced Money (Dwangsom) in Religious Courts

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Abstract

One of the important issues in the judge's decision and its relation to legal discovery due to a legal vacuum, especially in the Religious Courts, is regarding the application of forced money penalties (dwangsom). Previously, there were 3 sources of civil law applicable in Indonesia, namely HIR (for natives for Java and Madura), RBg. (for natives outside Java and Madura), Reglement op de Rechtsvordering or better known by the abbreviation Rv (group of Europeans and Foreign East residing in Indonesia). The provisions regarding the dwangsom itself are regulated in the Civil Procedure Regulations (the existence of the dwangsom institution itself is regulated in Chapter V Part 3 Rv. namely in Articles 606a and 606b. However, the enactment of UU Emergency t 1 of 1951 Article 5 paragraph (1) expressly states the application of HIR and RBg and confirmed through the Supreme Court Circular Letter (SEMA) Number 19/1964 and SEMA Number 3/1965 which confirms the application of HIR and RBg. As for Article 393 paragraph (1) HIR in conjunction with Article 721 RBg, it strictly prohibits all forms of procedural law other than those stipulated in the HIR and RBg, including Rv.. However, in fact dwangsom applications are still frequently encountered in cases proceeding at the Religious Courts. The type of research used is normative research. The type of research conducted in legal development activities according to legal science practice or legal dogmatics. The results of this study indicate that the application of forced money (dwangsom) in the Religious Courts is carried out in an effort a Eliminate difficulties or difficulties with the implementation of the judge's decision so that it is obeyed by the defendant/respondent. In line with the concept of masalah mursalah, the application of dwangsom regulated in Rv. even though it is no longer valid, the facts are still relevant and in fact needed and bring benefits in judicial practice to facilitate the implementation of judges' decisions in the Religious Courts. This was reinforced by jurisprudence, doctrine and the results of the 2012 Supreme Court National Work Meeting.

I. Introduction

In general, if the subject matter is about the existence of law, often our attention is only focused on regulations in the sense of rules or only limited to statutory regulations, both written and values that develop in society. Even though laws around the world are certainly not likely to be perfect and can adopt all activities of human life integrally. It is possible that at one time the law was not complete, sometimes it was not clear how to implement it. Even if this happens, the law must still be enforced. If so, the judge who is given the task and authority to adjudicate may not postpone or reject the case requested for trial.

Along with the development and dynamics of community life, of course, not all can be accommodated in one regulation that completely meets the needs of all the complex problems of society itself. Because the law is incomplete and unclear, the judge must look for the law, must find the law through legal discovery (*rechtvindings*). Legal discovery can basically be interpreted as the process of law formation by judges or other legal officers who are given the task by law to implement law against concrete events.¹

The argument is clearly contained in Article 10 paragraph (1) of UU 48 of 2009 concerning *Kekuasaan Kehakiman* stipulates that "The court is prohibited from refusing to examine, adjudicate, and decide on a case filed on the pretext that the law does not exist or is unclear, but it is obligatory to examine and prosecute".²

One of the important issues in the judge's decision and its relation to legal discovery due to a legal vacuum, especially in the Religious Courts, is regarding the application of *dwangsom* (forced money) punishment. *Dwangsom* (forced money) is basically a punishment for the defendant which is determined by the judge's decision based on the request of the plaintiff. Previously, there were 3 sources of civil law applicable in Indonesia, namely *HIR* (for natives for Java and Madura), *RBg.* (for natives outside Java and Madura), *Reglement op de Rechtsvordering* or better known by the abbreviation *Rv* (group of Europeans and Foreign East residing in Indonesia).

Forced money (*dwangsom*) is an amount of money stipulated in a judge's decision that must be paid by the convict for the benefit of the opposing party if he does not fulfill the principal sentence. The provisions regarding *dwangsom* itself are regulated in the Civil Procedure Regulations (*Reglement op de Rechtsvordering*) or better known as the abbreviation *Rv*. The existence of the *dwangsom* institution itself is regulated in Chapter V Section 3 *Rv*. namely in Articles 606a and 606b.³

Dwangsom is only an accessory to the principal sentence, however, for the judge to hear and decide on the charge, his integrity and professionalism remains at stake. Judges are still not justified in arbitrarily dropping *dwangsom* with simple legal considerations (*summir*). Refusing or granting a *dwangsom* must be with adequate consideration not only of the juridical aspect, but also must be logical, realistic and factual

¹Sudikno Mertokusumo, 1996, *Penemuan Hukum Sebuah Pengantar*, Yogyakarta Liberty, hlm.

²Lihat Undang-Undang Nomor 48 Tahun 2009 tentang *Kekuasaan Kehakiman*

³Harifin Tumpa, *Memahami Eksistensi Uang Paksa (Dwangsom) dan Implementasinya di Indonesia*. (Jakarta: Prenada Media Group, 2010), hlm. 9

so that the legal interests to be achieved can be realized, where the dwangsom punishment really functions effectively for the resolution of the case in question.⁴

Even though it is considered to put psychological pressure on the convicted person so that the convicted person voluntarily carries out the judge's decision, according to several doctrines, such as Supomo that juridically Rv. which is used as the legal basis for procedural law in the Religious Courts is actually no longer valid in Indonesia since the UU Emergency 1 of 1951 was issued because Article 5 paragraph (1) of the Law expressly states the validity of HIR and RBg., in this case Civil procedural law which is officially declared valid only HIR for Java and Madura and RBg. for other regions in Indonesia.⁵

Meanwhile, according to Mertokusumo that Rv. is no longer valid with the issuance of Emergency Law Number 1 of 1951 because Article 5 paragraph (1) of the Law expressly states the validity of HIR and RBg. and confirmed through the Supreme Court Circular Letter (SEMA) Number 19/1964 and SEMA Number 3/1965 which confirms the application of HIR and RBg. As for Article 393 paragraph (1) HIR jo. Article 721 RBg. expressly prohibits all forms of procedural law other than those stipulated in the said HIR and RBg. But the fact is that dwangsom requests are still often encountered in cases at the Religious Courts.

Although juridically dwangsom does not apply in procedural law in the Religious Courts as described above, the Supreme Court in its decision dated September 28, 1955 determined that dwangsom can be used to realize material truth.⁶

The researcher argues that basically the application of dwangsom in judge's decisions is part of the legal discovery process carried out in the Religious Courts because of the legal vacuum as described above. However, the researcher observes that in several decisions, not a few dwangsom applications that have been filed at the Religious Courts so far have rarely been granted by the judges, although in several other cases dwangsom requests have also been granted.

However, so far the effectiveness of the application of forced money (dwangsom) in the Religious Courts still has many problems that require careful study, both juridically and practically, including the institution. Dwangsom, which is actually one of the instruments for executing a judge's decision, often creates new problems in settling cases. For this reason, researchers conducted research on the application of dwangsom in the Religious Courts as an effort to emphasize the importance of the existence of dwangsom for the settlement of cases in the Religious Courts so that the execution of decisions is not non-executable.

Therefore, the researcher believes that this dwangsom issue must become very urgent study material in academic discourse so that it provides input for the enactment of special rules which legally regulate it both in Laws, Court Regulations, and through a Supreme Court Circular Letter including the institution that will carry out the execution

⁴Cik Basir, 2015, *Penerapan Lembaga Dwangsom (Uang Paksa) Di Lingkungan Peradilan Agama*, Cet.1 Deepublish, Yogyakarta, hlm. 5

⁵Supomo 1958. *Hukum Acara Perdata Pengadilan Negeri*. Fasco, Jakarta, hlm. 11

⁶Harifin A tumpa, *Op.Cit*

of the dwangsom itself.

2. Research Method

The type of research used is normative research. Types of research carried out in legal development activities according to practical law science or legal dogmatics and/or hermeneutics and critical constructivism, all of which are directed at the texts of laws that apply in a positive legal order, based on concepts, categories, theories theory, classification and methods in the framework of the legal discovery process conducted by Religious Court judges against the application of forced money (dwangsom).

The research approach is the statutory approach and historical approach. The legal approach is carried out by conducting a study of legal sources related to the problem at hand. The main object of study in the case approach is the ratio decidendi or reasoning, namely the court's considerations in arriving at a decision. Both for practical purposes and for academic studies, the ratio decidendi or rationale is a reference for the preparation of arguments in solving legal issues.

3. Results and Discussion

A. Definition of Forced Money (Dwangsom)

For legal practitioners and academics, the term dwangsom is of course not something new. The term dwangsom comes from the Dutch language which can be equated with the term forced money, namely a stipulation decided by a judge as a punishment that must be paid. According to Subekti dwangsom or often termed forced money, so far as a court decision decides punishment for something other than paying a certain amount of money, then it can be stated that if during or when the convicted person does not / has not complied with the decision, then he is obliged to pay an amount of money due set out in the decision.⁷

Marcel Stome Marcel Stome professor at Rijksuniversiteit Gent, Antwerp Belgium argues "*De dwangsom is een bijkomende veroordeling van de schuldenaar om aan de schuldeiser een geldsom te betalen voor het geval dat de schuldenaar niet aan de hoofdveroordeling voldoet, welke bijkomende veroordeling er toe strekt om op de schuldenaar drukt te oefenen opdat hij de tegen hem uitgesproken hoofd veroordeling zal nakomen*" which if interpreted freely is dwangsom (forced money) is an additional punishment for the debtor to pay a sum of money to the debtor, in the event that the debtor does not fulfill the principal sentence. Which additional punishment is intended to put pressure on the debtor so that he fulfills the principal sentence decision.

P. A. Stein gives the notion of dwangsom as forced money, namely the amount of money specified in the decision, which sentence is handed over to the plaintiff, in the event that, as long as or at any time, the convict does not carry out the sentence. Dwangsom is determined in an amount of money, either in the form of a sum of

⁷Subekti, 1973, *Kamus Hukum*, Prqadnya Paramita, Jakarta, hlm. 38.

money at once, or for a period of time or for every violation.

Article 611a Paragraph 1 *Burgerlijke Rechtsvordering* (Dutch) “*De rechter kan op vordering van een der parti jen de wederpartij veroordelen tot betaling van een geldsom, dwangsom genaamd, voor het geval dat aan de hooflveroordeling niet wordt voldaan, onverminderd het recht op schadevergoeding indien daartoe gronden zijn. Een dwangsom kan echter niet worden opgelegd in geval van een veroordeling tot betaling van een geldsom*”, the meaning is that at the demands of one of the parties, the judge can punish the other party to pay an amount of money, which is called forced money in the event that the principal sentence is not carried out, without reducing the right to compensation in that case it is based.

Referring to the provisions of article 611a regarding the formulation of the meaning of dwangsom according to Simorangkir, it is forced money that is determined as a punishment that must be paid because an agreement is not fulfilled.⁸ Meanwhile, according to Tumpa dwangsom, it is a punishment imposed by a judge on one of the parties in the form of payment of a fine in the amount of money, if the principal sentence cannot be carried out.⁹

Meanwhile, Abdul Manan defines dwangsom as an additional law for a person who is sentenced to pay a sum of money other than what has been stated in the main sentence with the intention that the convict is willing to carry out the main sentence as it should be carried out on time.¹⁰ Meanwhile, according to Mulyadi, dwangsom is an additional claim made by the plaintiff against the defendant in the form of an amount of money so that in the judge's decision it is determined that the convict must pay it apart from paying a sum of money if the principal sentence is not fulfilled by the judge.¹¹

B. Relevance of requests for forced money (Dwangsom) in the Religious Courts

As explained above, dwangsom has been implemented in such a way in judicial practice in Indonesia so far. The implementation of the dwangsom institution regulated in Rv. So far, in judicial practice in Indonesia, especially in the general court environment, it can indeed be justified and considered not to be in conflict with the HIR or RBg systems. Apart from being based on several Supreme Court jurisprudences, this is also in line with the opinions of legal experts regarding this matter. But the question is how it is with the Religious Courts. does the Religious Court also have the authority to apply, grant, or impose such dwangsom punishment as general courts, and if the Religious Courts have authority, what is the formal basis.

The above question is important to answer because as mentioned in the

⁸Simorangkir, 2007, *Kamus Hukum*, Sinar Grafika, Jakarta, hlm 41

⁹Harifi A. Tumpa, 2010, *Memahasmi Eksistensi Uang Paksa (Dwangsom) dan Implementasinya di Indonesia*, Preneda Media Group, Jakarta, hlm. 13

¹⁰Abdul Manan, 2005, *Penerapan Hukum Acara Perdata di Lingkungan Peradilan Agama*, Jakarta, Kencana Predana Media Group hlm, 438

¹¹Lik Mulyadi, *Tuntutan Provisionil dan Uang Paksa (Dwangsom) Dalam Hukum Acara Perdata*, Bandung, Alumni , hlm. 181

introduction that among the reasons for the rare granting of dwangsom requests in the Religious Courts, apart from the fact that there are still many judges who do not sufficiently understand the existence and urgency of forced money (dwangsom) itself in the context of competence judiciary, is also due to the fact that there are still many judges of the Religious Courts who are not quite sure that the demand for forced money (dwangsom) falls under the authority of the Religious Courts. Even today, there are still judges at the Religious Courts who are of the opinion that the dwangsom application is not under the jurisdiction of the Religious Courts. So that the dwangsom application filed at the Religious Court must be declared unacceptable (*Niet Ontvankelijke verklaard*).¹²

This is something that is natural because until now the rules regarding the application of forced money (dwangsom) to the Religious Courts are not explicitly contained in the laws of the Religious Courts. This is different from the state administrative court environment, where provisions regarding the application of forced money (dwangsom) in the decisions of state administrative court judges have been regulated in UU 9 of 2004 concerning Amendments to UU 5 of 1986 concerning State Administrative Courts.

In Article 116 paragraph (4) of the law it is stated that "in the event that the defendant is not willing to carry out a court decision that has obtained permanent legal force, the official concerned is subject to coercive measures in the form of forced payment of a sum of money and/or administrative sanctions." The explanation of the article states that "What is meant by the official concerned being subject to forced money in this provision is an imposition in the form of payment of an amount of money determined by the judge because of his position which is stated in the verdict when deciding to grant the plaintiff's claim".

Thus, on the basis of the provisions of this law, state administrative court judges already have a clear juridical basis in terms of imposing a forced money penalty (dwangsom) in their decision. Although it must be admitted that in technical and procedural terms the application of forced money in the decisions of state administrative court judges has so far been problematic.¹³

Not so with the environment of the Religious Courts. To find out whether the Religious Courts have the authority or not to grant or impose dwangsom sentences submitted to them, in this case requires a separate study related to the procedural law of the Religious Courts, in this case, of course, it must refer to the main basis for applying procedural law (formal law) that applies to environment of the Religious Courts. For this reason, it is better to first state the procedural law that applies within the Religious Courts.

With regard to the implementation of the dwangsom institution itself in the Religious Courts, especially for judges, it seems that until now there is still much that needs to be understood further as soon as possible amid the increasing

¹²*Ibid*

¹³*Ibid*

prevalence of dwangsom applications being filed in the Religious Courts which are apparently not only filed in hadhanah cases, but in cases other material disputes (zakenrecht). Even so far in the Religious Courts, in fact dwangsom applications are actually more often filed in cases of material disputes.¹⁴

Of course, this cannot be separated because the application of the dwangsom institution in hadhanah cases is still controversial. Of the many dwangsom applications that have been filed in the Religious Courts so far, especially in cases of material disputes (zakenrecht), it turns out that it is still very rare that the judge accepts them. It is undeniable that this is due, among other things, to the limited understanding of some Religious Court judges regarding the existence and urgency of the dwangsom institution itself on the one hand and its application in the Religious Courts on the other hand.¹⁵

C. **Maslahah Mursalah as a Study Perspective**

Al-maslahah as a legal proposition implies that al-maslahah becomes the basis and benchmark in determining law. In other words, the law of a particular problem is determined in such a way because the benefit requires that the law be set on that problem.

Ulama are of the opinion that every law stipulated by text or ijma is based on wisdom in the form of achieving benefit or benefit and avoiding mafsadat. Its legal basis boils down to the interests of human benefit (al-maslahah). They believe that none of the legal provisions stipulated by the texts in which there is no benefit for humans, both benefit in this world and in the hereafter.¹⁶ Asy-Syatibi, one of the ulama of the Maliki school of thought said that al-maslahah al-mursalah is every principle of syara' which is not accompanied by specific textual evidence, but in accordance with syara' actions. So this principle is valid as a legal basis and can be used as a reference as long as it has become a principle and is used by sya Abu Zahra defines maslahah mursalah as all benefits that are in line with the objectives of shari'a (in spreading Islamic law) and for which there is no specific argument that indicates whether it is recognized or not. Meanwhile, according to Yusuf Musa gives the understanding that maslahah mursalah is all the benefits that are not regulated by syara' provisions 'by admitting it or not, but admitting it can benefit and reject harm.

Maslahah mursalah is something that is good according to reason with the consideration of being able to realize good or avoid bad for humans, what is good according to reason is also in harmony and in line with syara' goals in establishing law, what is good according to reason and also in harmony with syara' goals there are no specific syara' guidelines that reject it, nor are there any syara' guidelines that acknowledge it. Maslahah mursalah is also part of the

¹⁴*Ibid*

¹⁵Op.Cit

¹⁶Abd. Rahmat Dahlan, *Ushul Fiqh*, (Jakarta: Amzah, 2014) cet ke 3, hlm. 209

Shari'a that cannot be ruled out. Even though it is not mentioned in the text textually, it is substantially needed by humans, especially those that come into direct contact with their basic needs. Therefore, *maslahah mursalah* is one of the important foundations of *tasyri'* and makes it possible to give birth to good values if experts are able to examine them sharply in relation to sharia science. In summary, it can be said that *maslahah mursalah* is focused on problem areas that are not contained in the texts, both in the Al-Quran and Sunnah which explain laws that have reinforcement through an *i'tibar*. It is also focused on things that are not obtained by *ijma'* or *qiyas* related to the incident.

Maslahah mursalah will answer new issues that arise which need to be stipulated by law, while there is no text explaining the law of the matter. Second, *maslahah mursalah* can also answer demands for changes in law on old issues that already have legal provisions, due to changing conditions and social situations. Some of the problems that often arise, for example, in the economic and financial fields, traffic management, medicine, marriage and endowments. The *maslahah mursalah* method has been applied by several mujtahids and institutions in enacting new laws, both for entirely new issues, and for old issues that require new legal provisions

D. *Maslahah of Consideration as the Basis for Implementation of Forced Money (Dwangsom)*

The suitability of *maslahah mursalah* with the renewal of Islamic law is because this method relies on *maslahah* which is the aim of religious law. The relevance of this *maslahah* to the renewal of Islamic law lies in the nature of *al-maslahah*, namely something that brings benefits and rejects harm. With this in mind, various activities that bring benefits in general and refuse harm can be considered as legal requirements as long as there are no texts that explicitly denounce or reject them.

In realizing Islamic law that is in accordance with the situation and conditions, *maslahah mursalah* becomes an alternative. Some *fiqh* principles relating to *maslahah mursalah* that can be applied in this matter are *fiqh ainama wujudat al-maslahah fatsamma hukmullah* which means where there is benefit, there is Allah's law.¹⁷ In other rules it is also stated that *jalbul mashalih wadaf'ul mafasid* which means to achieve benefit and reject harm and *Adhdhararu yuzalu* means harm must be eliminated.

In line with the *maslahah mursalah* concept described above, in the application of *dwangsom* regulated in Rv. in judicial practice in Indonesia so far, especially in the Religious Courts, it turns out that it is indeed needed because *dwangsom* basically brings benefits to judicial practice considering the provisions of the RBg. and HIR as well as various other sources of procedural law (formal law)

¹⁷M. Arfin Hamid, "Reinterpretation of Contemporary Islamic Law." *JL Pol'y & Globalization* 61 (2017): hlm. 46. Abdurrahman Kasdi, "Maqashid Syari'ah Perspektif Pemikiran Imam Syatibi dalam Kitab Al-Muwafaqat." *Yudisia: Jurnal Pemikiran Hukum dan Hukum Islam* 5, No. 1 (2016): hlm. 56.

that are in fact not sufficient to accommodate legal issues that continue to grow, live and develop in practice and this is considered not to be in conflict with the HIR and RBg systems.

The benefits obtained by applying forced money (*dwangsom*) in a judge's decision so that the judge's decision does not become non-executable and psychological pressure on the convicted party makes him comply with the judge's decision in the form of a basic sentence as it should be voluntarily at the time determined by law. This means that the application of forced money (*dwangsom*) provides many benefits for the judge's decision and with the many benefits obtained from the application of forced money (*dwangsom*).

The application of the *dwangsom* institution in the Religious Courts can be carried out in an effort to eliminate difficulties or difficulties with the judge's decision so that it does not become non-executable. Eliminating difficulties or difficulties is one of the principles of Islamic law.¹⁸ In addition to this, the determination of the law must also pay attention to human benefit and realize justice.

According to several legal experts, including Mertokusumo, even though HIR and R.Bg do not regulate *dwangsom* institutions, because this *dwangsom* is important for the plaintiff to force the defendant to carry out the decision, the claim should be granted as long as it is requested by the plaintiff.

This is in line with what was stated by Sutanto and Oeripkartawinata that although Article 393 paragraph (1) HIR jo. Article 721 R.Bg prohibits all forms of procedural law other than HIR and R.Bg, but if it is really deemed necessary in a civil case other regulations such as Rv can be used.¹⁹

Likewise according to Harifin Tumpa (Former Chief Justice of the Supreme Court) that although Rv. is no longer valid as a guideline for civil procedural law in Indonesia, but due to the need for certain circumstances, where existing regulations are inadequate, our judicial practice still sometimes has to use procedural law provisions in Rv. as a guide including in terms of this *dwangsom* institution.

4. Conclusion

The application of the *dwangsom* institution in the Religious Courts can be carried out in an effort to eliminate difficulties or difficulties with the implementation of judge's decisions so that they do not become non-executable. Eliminating difficulties or difficulties is one of the principles of Islamic law. In addition to this,

¹⁸Adapun Prinsip-Prinsip Dalam Hukum Islam Adalah: A. Meniadakan Kesempitan Dan Kesukaran; B. Menyedikitkan Beban; C. Bertahap Dalam Menetapkan Hukum; D. Memperhatikan Kemaslahatan Manusia; Dan F. Mewujudkan Keadilan. Lihat Muhammad Syukri Albani Nasution, *Filsafat Hukum Islam*, (Jakarta: Raja Grafindo Persada, 2013), Hlm. 113-118. Baca Juga Penjelasan Fathurrahman Djamil, *Filsafat Hukum Islam* (Jakarta: Logos Wacana Ilmu, 1997), Hlm. 66-75.

¹⁹Retnowulan dan Iskandar Oeripkartawinata, *Hukum Acara Perdata dalam Teori dan Praktek*, (Mandar Maju, Bandung, 2002), hlm. 8

the determination of the law must also pay attention to human benefit and realize justice. In line with the concept of *masalah mursalah*, in the application of *dwangsom* regulated in Rv. in judicial practice in Indonesia so far, especially in the Religious Courts, it turns out that it is indeed needed because *dwangsom* basically brings benefits to judicial practice considering the provisions of the RBg. and HIR as well as various other sources of procedural law (formal law) that are in fact not sufficient to accommodate legal issues that continue to grow, live and develop in practice and this is considered not to be in conflict with the HIR and RBg systems. The benefits obtained by applying forced money (*dwangsom*) in a judge's decision make the judge's decision enforceable and not non-executable because psychological pressure on the convicted party makes him comply with the judge's decision in the form of the principal sentence as it should be voluntarily at the time determined by law. This means that the application of forced money (*dwangsom*) provides many benefits to the implementation of the judge's decision.

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