

## Guardian Navigation in Islamic Family Law: From History to Implementation in Indonesia and Muslim Countries

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### **Abstract**

*This study examines the role and function of guardians in Islamic family law by emphasizing the historical aspects and their implementation in Indonesia and other Muslim countries. Guardians are responsible for the implementation of marriage, which is a long-standing tradition in Islamic law. This study investigates how the concept of guardians has evolved in various schools of thought and how these interpretations have impacted legal practice in various Muslim countries. In addition, this study discusses how the concept of guardians is used in Indonesian national law, considering how they are used in other Muslim countries. This study shows that, although the basic principles are the same, the implementation and interpretation of laws related to guardians vary greatly due to cultural factors, national laws, and social dynamics. The method used in this study is library research. Data and sources were used from both printed and electronic literature, namely books, journals, and laws, and analyzed comparatively. The results of this study provide us with an understanding of the complexity of the role of guardians in Islamic family law and how this role affects the contemporary system. The main purpose of the guardianship rules remains consistent to maintain welfare and justice in marriage.*

**Keywords:** Rule, Guardian, Muslim Countries.

### **Abstrak**

Studi ini meneliti peran dan fungsi wali dalam hukum keluarga Islam dengan mengutamakan aspek historis dan pelaksanaannya di Indonesia dan negara-negara Muslim lainnya. Wali bertanggung jawab atas pelaksanaan pernikahan, yang merupakan tradisi lama dalam hukum Islam. Penelitian ini menyelidiki bagaimana konsep wali berkembang dalam berbagai mazhab dan bagaimana interpretasi ini berdampak pada praktik hukum di berbagai negara Muslim. Selain itu, penelitian ini membahas bagaimana konsep wali digunakan dalam hukum nasional Indonesia, dengan mempertimbangkan bagaimana mereka digunakan di negara-negara Muslim lainnya. Studi ini menunjukkan bahwa, meskipun prinsip dasar sama, implementasi dan interpretasi hukum terkait wali sangat berbeda karena faktor budaya, hukum nasional,

dan dinamika sosial. Metode yang digunakan dalam penelitian ini adalah penelitian pustaka. Data dan sumber yang digunakan dari kepustakaan baik cetak maupun elektronik yaitu buku, jurnal, undang-undang dan dianalisis secara komparatif. Hasil penelitian ini memberi kita pemahaman tentang kompleksitas peran wali dalam hukum keluarga Islam dan bagaimana peran ini berpengaruh pada sistem kontemporer. Tujuan utama dari aturan wali tetap konsisten dalam upaya menjaga kesejahteraan dan keadilan dalam pernikahan.

**Kata Kunci:** Aturan, Wali, Negara Muslim.

## INTRODUCTION

According to human nature, marriage is the only legal way to get married and have children. Human life and civilization depend on the continuity of marriage from every generation of mankind.<sup>1</sup> Marriage is done to create a harmonious family that can meet their innate and inner needs and generate happiness and affection between family members.<sup>2</sup>

Social, religious, and legal relationships have a very important role. Therefore, marriage is only considered valid if it meets the conditions and principles set. In the fiqh of *munakahat*, one of the important requirements is to get the blessing of the bride-to-be's parents.<sup>3</sup> This is by Articles 3 and 7 of the Compilation of Islamic Law (KHI),<sup>4</sup> and Law No. 1 of 1974 Article 1 states the formation of a happy family or household, based on the One Godhead,<sup>5</sup> and very important parental consent.<sup>6</sup>

The guardian rule has a long history, ranging from the classical Islamic era to the modern era, where the rule has undergone adaptation and change along with social, political, and cultural changes. Initially, guardianship rules were created to ensure that the marriage was carried out with the full consent and understanding of the woman and to prevent forced or unpleasant marriages. Over time, some Muslim countries have adapted these rules to their local contexts and needs.

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<sup>1</sup> Hasbi Indra, *Potret Wanita Shalehah* (Jakarta: Penamadani, 2004), hlm. 61.

<sup>2</sup> Abd Rahman Ghazaly, *Fiqh Munakahat* (Bogor: Kencana, 2003), hlm. 22.

<sup>3</sup> Ah. Soni Irawan, (2022). “Eksistensi Wali Dalam Akad Pernikahan Perspektif Teori Double Movement Fazlur Rahman,” *El-Ahli : Jurnal Hukum Keluarga Islam* 3, (2): 227–43, <https://doi.org/10.56874/el-ahli.v3i2.968>.

<sup>4</sup> Abdurrahman, *Kompilasi Hukum Islam Di Indonesia*, 1st ed. (Jakarta: Akademika Pressindo, 1992), hlm. 114.

<sup>5</sup> Lihat Undang-Undang Nomor 1 Tahun 1974, Pasal 1.

<sup>6</sup> Ahmad Rofiq, *Hukum Islam Di Indonesia*, 6th ed. (Jakarta: Raja Grafindo Persada, 2003), hlm. 74.

One of the requirements for prospective brides in the Indonesian Muslim community is to have a marriage guardian. In other words, a person cannot get married without the presence of his marriage guardian. Article 19 of the Compilation of Islamic Law (KHI) regulates how the bride-to-be must ask the guardian to attend the wedding feast.<sup>7</sup>

The novelty of this study lies in a comprehensive approach that connects historical, normative, and contextual aspects in the analysis of the role of guardians in Islamic family law. Such as research conducted by Qurraotul Ainiyah.<sup>8</sup> Rohmat<sup>9</sup> The position of the guardian in marriage is about whether it is included in the legal marriage or not. This is important to know because it will affect the validity of the marriage contract. Based on the same text, Imam Shafi'i and Imam Hanafi have different thoughts. Imam Shafi'i stated that the wali is one of the pillars of marriage that must exist and the legal requirements are met, while Imam Hanafi stated that the wali is not a harmonious person in marriage, so its absence does not affect the validity of the marriage.

Article written by Jefry Tarantang.<sup>10</sup> The position of the marriage guardian is based on the perspective of placing the guardian as a guardian who can protect the bride-to-be from psychological aspects related to her emotions and psychology, related to public views, to the bride-to-be that can cause sociological losses. The guardian of marriage in the context of hadith is an obligation, this is relevant to the development of modern times today. From the perspective of marriage law in Indonesia, it has reduced the need for guardians, so in the context of the relevance of the hadith about guardians in modern times, it is a form of need as a form of legal protection for dignity (*hifzul irdh*). It is very important that the guardian in marriage as a form of sincerity and has sacred value, the bride-to-be and groom must ask permission from their guardian as a form of blessing to undergo marriage.

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<sup>7</sup> Mughni Labib Ilhamuddin Is Ashidiqie, (2021) "KRITIK ATAS PERATURAN WALI NIKAH DALAM KHI DAN FIKIH PERSPEKTIF GENDER Mughni," *Al-Mazaahib: Jurnal Perbandingan Hukum* 9, (1): 23–44.

<sup>8</sup> Qurrotul Ainiyah, (2020) "Kedudukan Wali Dalam Pernikahan (Perspektif Imam Syafi'i Dan Imam Hanafi)," *Mukammil: Jurnal Kajian Keislaman* 3, (2): 107–22.

<sup>9</sup> Rohmat, (2011) "KEDUDUKAN WALI DALAM PERNIKAHAN : STUDI PEMIKIRAN SYĀFI' IYAH , HANAFIYAH ,," *AL-'ADALAH* 10, (2): 165-178.

<sup>10</sup> Jefry Tarantang, (2022) "Relevansi Hadis Tentang Wali Nikah Di Zaman Modern," *Ahkam: Jurnal Hukum Islam* 10, (1): 1–17, <https://doi.org/https://doi.org/10.21274/ahkam.2022.10.1.1-26>.

In addition, the study offers a comparative perspective that has not been explored much, by analyzing how the concept and practice of guardianship is implemented differently in different Muslim countries. It provides new insights into the factors that influence variations in implementation, such as sectarian differences, local traditions, and state policies. This research also considers the social and legal dynamics that affect the interpretation and implementation of the role of guardians in contemporary times, making them relatable to the challenges and needs of the times.

Studies conducted in Muslim countries, such as Indonesia, Malaysia, Saudi Arabia, Egypt, and Pakistan, show that, despite differences in the way guardianship rules are applied and interpreted, the main purpose remains the same. By establishing guardianship rules to protect women's rights, maintain family stability, and ensure that marriage is carried out with legal consent. But the rules are different in every Muslim country due to the differences in culture, society, and rules.

## **RESEARCH METHODS**

This research is a literature study, also known as a literature review. The study will look at guardianship in a past context and compare guardianship provisions in Indonesia and other Muslim countries. Furthermore, this study will find out the status of guardian provisions in various Muslim countries. The data and sources needed for this research were obtained from literature, both print and electronic, including books, journals, laws, and other library sources that support this research. Once the data is obtained, these sources will be analyzed comparatively.

## **RESULTS AND DISCUSSION**

### **In Review from History**

The political situation of the country was very different at the beginning of the Abbasid Dynasty, especially during the time of Imam Shafi'i. The Arabs played an important role in the government of the Umayyad Dynasty. During the Abbasid Dynasty, the Persians, especially the Khurasan, gained many strategic positions in the country in exchange for their political support, which allowed them to overthrow the previous caliph's government.<sup>11</sup> The influence of the Arabs was hampered by the political power of the Persians in government, as recorded by historians.

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<sup>11</sup> Ahmad Nahrawi Abdus Salam, *Al-Imām Al-Syāfi’ī fi Madhābihi Al-Qadīm Wa Al-Jadīd*, terj. Usman Sya’roni (Jakarta: Penerbit Hikmah, 2008), hlm. 69.

Women under Abbasid rule were divided into three types: general, special, and slave. Men and women of a certain class tended to enjoy the same freedom at the beginning of the Abbasid Dynasty. Kayzuran, al-Rashid's mother and al-Mahdi's wife was one of the many successful and influential women in the government of the time.<sup>12</sup> Men usually look for women in the market to be slaves, but women from the elite have the power to set the terms of their marriages. They reject marriages that require conditions and responsibilities that bind couples, and they also do not want to have children after they die.<sup>13</sup>

Women were considered a commodity at the time; they were sold in the market to become slaves to the lust of the Caliph, the palace family, and the wealthy man. No modern woman writes to show who they are. Texts about women written by men in a very patriarchal culture and era usually describe women's conditions, roles, and relationships with patriarchal biases. This is because at that time almost all text writers were men. There is a lack of data from books that discuss the roles and responsibilities of women in contemporary society. Leila Ahmed stated that women in the Abbasid era were not involved in significant social issues, as mentioned by Zaenul Mahmudi. Since then, upper-class and bourgeois women have been living in exile. They were required to fulfill the sexual desires of wealthy and royal men and lived in harems, isolated parts of the house for Arab women. Since it was the norm for female slaves to have many concubines, the Muslim elite was able to avoid embarrassment.<sup>14</sup>

Parents are worried about having a daughter because of the condition of women who affirmed in the Abbasid period because the phenomenon of women in their society can occur in their families, especially in lower-class families.<sup>15</sup> In the poet's phrase, death is a better fate than marrying and then becoming a concubine or sexual slave of a wealthy man.

Women were given a noble position and a higher degree after the arrival of Islam. Islam wants women's degrees to be honorable, noble, and better. This means that women are no longer discriminated against, humiliated, and unfairly exploited. Women have responsibilities and

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<sup>12</sup> Philip K Hitti, *History Arabs*, terj. R. Cecep Lukman Yasin dan Dedi Slamet Riyadi (Jakarta: Serambi, 2008), hlm. 414.

<sup>13</sup> Zaenul Mahmudi, *Sosiologi Fikih Perempuan* (Malang: UIN Malang Press, 2009), hlm. 83.

<sup>14</sup> *Ibid.*

<sup>15</sup> Hitti, *History Arabs*, hlm. 414.

rights in the household and society according to the teachings of Islam. One of the Islamic marriage laws requires the daughter to be married to attend the guardian.

### **Purpose of the Wali Rule in Islamic Family Legislation**

People in the world want to be happy. However, obeying the rules of life is not easy to achieve. Marriage, which begins with a sincere desire to build a household, is one of the processes of achieving happiness. Legally, marriage is commanded, allowed, and sometimes required.<sup>16</sup> From the Qur'an and the Sunnah, scholars make more detailed rules about the family.<sup>17</sup> In addition, Islam regulates the rights and obligations necessary for marriage. God will give the couple who are going to get married enough.

According to the fuqaha, as long as it meets certain conditions and harmony, the marriage is carried out in front of two witnesses with the words ijab and qobul. The bride's guardian usually says ijab and the man say qobul, which is a statement of acceptance.<sup>18</sup>

The purpose of the guardian rule in Islamic legislation is very important and has many aspects related to justice, protection, and social stability. The guardian rule in marriage, for example, aims to ensure that the marriage takes place with the consent and legal agreement of both parties. The guardian acts as a representative of the family or a party that has the authority to grant permission, ensuring that the bride-to-be is not forced or forced to accept the marriage. It provides legal protection for women and maintains integrity and fairness in the marriage process.<sup>19</sup>

According to the etymology, the wali carries out the marriage contract of a woman he loves and performs a mitsil dowry. If a widow wants to get married, she does not need to ask for the permission or consent of her parents, whereas a girl cannot marry without the

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<sup>16</sup> Agung Tri Nugroho, (2019). "Rekonseptualisasi Otoritas Perwalian Nikah Di Indonesia," *Jurnal Mahkamah* 4, (1): 63–82.

<sup>17</sup> Khoiruddin Nasution, *Hukum Perkawinan* (Yogyakarta: Pustaka Pelajar dengan Academia, 2005), hlm. 1.

<sup>18</sup> Abdurrahman Al-Jazairi, *Kitab Al Fiqh Ala Mazahibul Al-Arba'ah*, 4th ed. (Jakarta: Pustaka Al-Kautsar, 2015), hlm. 26.

<sup>19</sup> Nida Chaerunnisa and Mukhtar, (2017) "Studi Komparatif Kedudukan Wali Dalam Pernikahan Menurut Imam Syafi-i Dan Imam Hanafi" (Comparative Study of Marital Guardian Position According to Imam Syafi-i and Imam Hanafi," *Mizan: Journal of Islamic Law* 1, (2): 209–28, <https://doi.org/https://doi.org/10.32507/mizan.v1i2.12>.

permission or consent of the guardian.<sup>20</sup> In addition, the guardianship law aims to protect the rights of orphans and people who are unable to take care of themselves. In cases where orphans are cared for by guardians, guardians are responsible for safeguarding and managing the orphans' property and interests until they reach the age limit of majority and can take care of themselves. This guarantees that children who have lost a parent are not abandoned and get the support they need to thrive.

Islamic law and Indonesian family law are not in line, according to KHI Article 15 paragraph 2 and Law No. 1 of 1974 Article 6 paragraph 2, a child who has not reached the age of 21 must receive a certificate from his parents before starting his education. In other words, the law does not require adult students to marry without a guardian. According to the fiqh munakahat of Madhhab Shafi'I, such statements are unacceptable on a legal basis. Guardianship is an important principle in marriage. However, the content of the Law mentioned above is still by the Hanafi madhhab.<sup>21</sup>

KHI's material in the field of marriage is highly dependent on Shafi'iyah fiqh, although it is not entirely taken from the fiqh of the Shafi'I madhhab when it was compiled. Some articles, such as paragraph (1) of article 20, stipulate that a man must be the guardian of the marriage. For example, Padal 14 of the KHI establishes the conditions for marriage: (1) the groom-to-be, (2) the bride-to-be, (3) the guardian, (4) two witnesses, and (5) ijab, qabul. In the same way, madhhab Shafi'i believes that the five requirements mentioned above must exist.<sup>22</sup>

### **The Practice of Guardians in Marriage in Indonesia**

One of God's purposes is to create men and women to establish a happy, everlasting family.<sup>23</sup> Marriage must be carried out according to the conditions and harmony. All of the following requirements must be met:

- a. A man
- b. A woman

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<sup>20</sup> Sirajudin, (2015). "Konstruksi Hukum Keluarga Islam Di Indonesia: Analisis Terhadap Undang-Undang RI No . 1 Tahun 1974 Tentang Perkawinan Dan KHI," *Istinbath, Jurnal Hukum Islam* 14, (2): 169.

<sup>21</sup> Amir Syarifuddin, *Hukum Perkawinan Islam Di Indonesia: Antara Fiqih Munakahat Dan Undang-Undang Perkawinan* (Jakarta: Kencana Prenanda Grup, 2006), hlm. 30.

<sup>22</sup> Abdul Rahman Ghazali, *Fiqih Munakahat* (Jakarta: Kencana Prenanda Media, 2010), hlm. 48.

<sup>23</sup> Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan.

- c. The guardian who marries.
- d. There are 2 witnesses.
- e. Ijab and qabul.<sup>24</sup>

In addition, Chapter IV Article 14 (KHI) discusses the principles and conditions of marriage. The KHI stipulates that the conditions required to perform marriage are:

- a. Husband-to-be
- b. Wife-to-be
- c. Marriage guardian
- d. 2 witnesses,<sup>25</sup> and
- e. Ijab and qabul.

According to beliefs, people can become virtuous people if they follow the lessons and rules of their religion. Condition in this case means the requirements necessary to determine whether a job is legitimate or not, even if it does not fall into that category. Harmony in this case means the requirements needed to determine whether a job is legitimate or not.<sup>26</sup>

According to Article 19 of the Compilation of Islamic Law No. 1 of 1991, the bride-to-be must qualify as the marriage guardian. This is contrary to the opinion of Imam Shafi'i, who argued that the guardianship of a woman is the main condition for a valid marriage. Marriage Law Number 1 of 1974 also regulates guardianship. The prosecutor, his or her spouse, and their families have the right to request the annulment of the marriage in the presence of an unauthorized (P2N), an invalid marriage guardian, or in the absence of two witnesses.

This indicates that the marriage can be annulled or voided if the guardian does not submit it. However, the right to cancel it is lost if the husband and wife continue to live together. Thus, the woman is entitled to dowry. With the law and its explanation, it is clear that a guardian is required for the validity of the marriage. The statement that marriage is valid, if it is performed according to the laws of each religion and belief" shows that in the 1945 law, marriage does not exist.<sup>27</sup> The wali is the heir

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<sup>24</sup> Syarifuddin, *Hukum Perkawinan Islam Di Indonesia: Antara Fiqih Munakahat Dan Undang-Undang Perkawinan*, hlm. 61.

<sup>25</sup> Undang-Undang RI. Nomor 1 Tahun 1974 Tentang Perkawinan dan Kompilasi Hukum Islam.

<sup>26</sup> Tihami, *Kajian Fikih Nikah Lengkap* (Jakarta: PT. Raja Grafindo Persada, 2009), hlm. 12.

<sup>27</sup> Peuno Daly, *Hukum Perkawinan Islam Suatu Studi Perbandingan Dalam Kalangan Ahlus-Sunnah Dan Negara-Negara Islam*, n.d, hlm. 135.

chosen from the priority according to Imam Malik and Imam Shafi'i, which is the closest to the family relationship.<sup>28</sup>

A qarib wali is a wali. The guardianship passes to the guardian ab'ad if the guardian does not meet the following conditions: puberty, intellectual, Islamic, independent, good-minded, and fair. However, when the nearest guardian is on Hajj or Umrah, the guardianship does not move to the guardian ab'ad but generally moves to the guardian of the haki. If all the guardians are absent, the guardian of the judge is in a state of *adhal*, or the guardian of the judge refuses to marry without a valid reason, the guardian of the judge acts as the guardian of the marriage. If the guardian judge is in another place that is two *marhalah* or about 60 km away, the guardian judge will perform the marriage contract in the same way.<sup>29</sup>

As an amendment to the Regulation of the Minister of Religion of the Republic of Indonesia No. 2 of 1987, a guardian judge is a Muslim head of state who is authorized to marry a person with a guardian of a guardian judge. Regulation of the Minister of Religion of the Republic of Indonesia No. 30 of 2005 establishes this definition.

### **Guardianship Practices in Marriage in Malaysia**

Malaysia is a federal state with 13 states and one federal territory. The respective states have Islamic Family Laws (UUKI), known as the Islamic Family Law Enactment. In these enactments, the term "guardian judge" or "guardian judge" is used. Three of the fourteen enactments of Pahang, Perak, and Sarawak use the formula of guardian judges, while others use the term "guardian king". The guardian in these enactments is a guardian authorized by the Yang di-Pertuan Agong to carry out guardianship for women who do not have a nasab to marry.<sup>30</sup> "or a woman whose guardian is reluctant to marry her without a compelling reason following Sharia Law" is an additional formulation found in the enactment of the Perak UUKI. In this section, the definition of a guardian or judge only powers in the case of a prospective bride who does not

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<sup>28</sup> Tihami, *Kajian Fikih Nikah Lengkap*, hlm. 90.

<sup>29</sup> Amir Syarifuddin, *Garis-Garis Besar Fiqh* (Jakarta: Kencana Prenanda Media Grup, 2010), hlm. 94.

<sup>30</sup> Ahmad Fadly Syahputera and Ferdian, (2022 )“Konsep Wali Hakim Dalam Pembaharuan Hukum Keluarga Islam Di Malaysia Dan Indonesia,” *Jurnal Asy-Syari’ah* 24, (2): 179–92, <https://doi.org/10.15575/as.v24i2.17735>.

have a guardian or whose guardian is reluctant to marry. This arrangement follows the provisions of Islamic law.<sup>31</sup>

Only in the case of marriage can the wali judge also known as the wali raja in Malaysia replace the wali nasab according to the law. Marriage also requires a guardian. According to Malaysian law, every Muslim woman who marries must be protected. In the Islamic Family Law (Negeri Sembilan) Enactment of 2003, the guardian judge is referred to as the guardian of the king. In Negeri Sembilan, Selangor, Kelantan, Federal Territories, Malacca, and Penang, the term wali hakim is also used. Perak, Sarawak, and Pahang also use it. According to Article 7 of the Islamic Family Law (Negeri Sembilan) Enactment of 2003, only the following individuals have the authority to perform marriages.<sup>32</sup>

- 1) Marriages in Negeri Sembilan must be married by Sharia law: and must comply with the provisions of this Enactment.
  - a. The guardian in front of the Registrant or the Registrant Chairman.
  - b. The deputy guardian before the Chief Registrar or Registrant and with their permission; or
  - c. The Chairman of the Registrant or the Registrant as the deputy guardian.
- 2) Sharia law requires the guardian of the King to marry a woman who does not have a guardian from the nasab.

### **Guardianship Practices in Marriage in Saudi Arabia**

The State of Saudi Arabia uses Madzhab Hambali as the State Madhhab, therefore the laws containing sharia are based on the books of the madzhab. Guardianship in the Hambali madhhab is mandatory by law, even marriage is considered invalid without a guardian. A woman cannot marry herself without the permission of her guardian, and similarly cannot marry another woman without the permission of her guardian. Wali is a requirement for marriage guardianship in the Hambali School. If the bride herself has already entered into a marriage

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<sup>31</sup> Kholis Bidayati, Muhammad AM Alwi, and Suci Ramadhan, (2021) "Dinamika Pembaharuan Hukum Keluarga Islam Di Negara Muslim," *ADHKI: Journal of Islamic Family Law* 3, (1): 51–68.

<sup>32</sup> Zulfaqar Bin Mamat, "Tertib Wali Hakim Dalam Pekahwinan: Kajian Kes Di Negeri Sembilan," Persatuan Ulama Malaysia, 2023, [https://www.researchgate.net/publication/334361477\\_TERTIB\\_WALI\\_HAKIM\\_DALAM\\_PERKAHWINAN\\_KAJIAN\\_KES](https://www.researchgate.net/publication/334361477_TERTIB_WALI_HAKIM_DALAM_PERKAHWINAN_KAJIAN_KES).

contract, the marriage must be separated because the law is *fasid*.<sup>33</sup> However, in terms of punishment, observing the marriage has become a debate discourse so that there is no punishment for the perpetrator of the marriage. Meanwhile, for guardians, in order from father, grandfather, and then brothers. The marriage by the distant guardian, while the closer guardian still exists, causes the marriage to be annulled.<sup>34</sup>

In addition to the command from religion, women who want to get married must have a guardian because women are creatures who are given glory by Allah. They also show affection and love for their father and family to their daughter-to-be, who will be responsible for safeguarding her humanity, dignity, and sanctity. Married people are also considered to understand the guardian better, so they always expect their daughter or daughter to be a good guardian.<sup>35</sup>

### **Guardian Practices in Marriage in Sudan**

Islamic law in Sudan has been around for a long time. When Muhammad Ahmad al-Mahdi took over Khartoum in 1885, Islamic law throughout Sudan was changed. Al-Mahdi said that the teachings of Islam will be restored as in the time of the Prophet Muhammad (peace be upon him). The source of al-Mahdi's government law is the Qur'an and the sunnah, under the interpretation of al-Mahdi. This means that al-Mahdi's Islamic law differs from the Sunni Islamic law that has been applied before. As a result, the role of scholars in the time of al-Mahdi was reduced.<sup>36</sup>

Family law in Sudan is left to the law applicable to the religion of the couple. It can be a Muslim married couple, then the applicable law is Islamic law. Thus, if the married couple is a Christian, Jewish, Hindu, or local belief, then the law is applied according to their religion and belief.<sup>37</sup>

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<sup>33</sup> Neng Eri Sofiana and Dian Meiningtias, (2023) “Reaktualisasi Perlindungan Perempuan Dalam Hukum Keluarga Islam Di Arab Saudi Dan Mesir,” *Indonesian Journal of Shariah and Justice* 3, (1): 1–25, <https://doi.org/10.46339/ijjsj.v3i1.46>.

<sup>34</sup> Sofiana and Meiningtias.

<sup>35</sup> Hamzah, (2022). “KEDUDUKAN WALI NIKAH MENURUT SHAMSI ALI (STUDI KOMPARATIF ANTARA MAZHAB HANAFI DAN MAZHAB SYAFI'I),” *AR-RISALAH* 2, (1): 66–84.

<sup>36</sup> Olaf Kondgen, *Shari'ah and National Law in the Sudan, Sharia Incorporated: A Comparative Overview of the Legal System Of Twelve Muslim Countries in Past and Present* (Leiden: Leiden University Press, 2010), hlm. 185.

<sup>37</sup> Fadly Syahputera and Ferdiyan, “Konsep Wali Hakim Dalam Pembaharuan Hukum Keluarga Islam Di Malaysia Dan Indonesia.”

Islamic family law in Sudan is enforced periodically by the great *qadhi* through manshurat (*Manshuraat al-Qadhi al-Quhat*). Around 1916 during the *Anglo-Egyptian condominium rule*, the great *qadhi* had issued 57 manshurs relating to family law in the view of the Hanafi madhhab. The reform of family law continues to be sustainable with the continuous issuance of manshurat on family law, especially in the view of the Hanafi madhhab.<sup>38</sup>

An analysis conducted by Khairuddin Nasution states that the Sudanese state needs a guardian for marriage. This is by Article 2 of Manshur No. 54 of 1960, which states that "the person appointed as guardian must be a Muslim, mature, and sane. If the person concerned does not meet the requirements, then another guardian will be called to replace him". According to the Maliki School, guardians can be sequential according to their order.<sup>39</sup> Manshur No. 54 of 1960 Article 6 regulates the procedure for the approval of the bride-to-be. If an adult woman or a widow agrees to marry, then her consent must be with a firm statement. If a woman is not of legal age, then her consent is silent.<sup>40</sup>

The marriage contract between a man and the female guardian must be officially recorded.<sup>41</sup> The age of the bride and groom, the number of the letter of expenditure, and the amount of cash dowry or debt are all listed in the marriage record. According to Sudanese marriage law, "*urf*" marriages, known in Indonesia as sirri marriages or marriages under the hands, are considered valid. However, a wife who is married without registration does not have the same rights as other couples.<sup>42</sup>

### **Guardian Practices in Marriage in Morocco**

Forced marriages are legally prohibited in Morocco, and marriages must be performed with the consent of the guardians and the bride-to-be. However, the right to *ijbar* is still recognized by the state if there is a

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<sup>38</sup> Ahmad Bunyan Wahib, (2014) "Reformasi Hukum Keluarga Di Dunia Muslim," *Ijtihad : Jurnal Wacana Hukum Islam Dan Kemanusiaan* 14, (1): 1-19, <https://doi.org/10.18326/ijtihad.v14i1.1-19>.

<sup>39</sup> Qodir Zaelani, (2012). "PEMBAHARUAN HUKUM KELUARGA: KAJIAN ATAS SUDAN-INDONESIA," *Al-'ADALAH* 10, (42):331-42.

<sup>40</sup> Zaelani.

<sup>41</sup> Ahmad Tholabie Kharlie and dkk, *Kodifikasi Hukum Keluarga Islam Kontemporer: Pembaharuan, Pendekatan Dan Elatisitas Penerapan Hukum* (Jakarta: Kencana, 2020), hlm. 176.

<sup>42</sup> Kondgen, *Shari'ah and National Law in the Sudan, Sharia Incorporated: A Comparative Overview of the Legal System Of Twelve Muslim Countries in Past and Present*, hlm. 206.

concern that marriage will cause suffering to the child.<sup>43</sup> Marriage in Morocco cannot be done without the consent of the guardian; this applies to series marriages, male marriages, and other types of marriages. Moroccan people who adhere to religious beliefs will comply with *the Mudawwanatul Usrah Law*.<sup>44</sup>

The guardian of marriage in the Moroccan Family Law is contained in articles 13, 17, 18, 24, and 25 of *Al Mudawwanah al-Akhwal al-Syakhshiyah* No. 70.03 of 2004.

### **Article 13**

"Marriage must meet several requirements, such as the ability of a man and a woman to marry, no opportunity to abort the dowry, the presence of a guardian when determined, the presence of a fair witness, and no obstructions".

### **Article 17**

"Power of attorney is required for marriage using guardians"

### **Article 18**

"Guardians are not allowed to marry under their guardianship".

### **Article 24**

"Guardianship is the right of every woman who is smart or understands her will for her good".

Since guardians are the property of women absolutely, guardians do not have the right to be guardians of women who will marry if she does not give them power. Thus, the guardian cannot force the woman who is going to marry him. However, women must have a positive goal for their marriage, which is to have a positive goal.

### **Article 25**

A woman who already understands may marry someone else or give herself up to her guardian.

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<sup>43</sup> Khoiruddin Nasution, *Status Wanita Di Asia Tenggara: Studi Terhadap Perundang-Undangan Perkawinan Muslim Kontemporer Di Indonesia Dan Malaysia* (Leiden-Jakarta: INIS, 2002), hlm. 122-123.

<sup>44</sup> Nasiri Nasiri, (2021). "Praktik Perkawinan Di Negara Maroko (Praktik Undang-Undang Mudawwanatul Usrah Di Bumi Para Wali)," *Jurnal Keislaman* 1, (2): 163–85, <https://doi.org/10.54298/jk.v1i2.3362>.

Puberty and *mumayyiz* women can submit their marriage contract to their father or one of their family members. Since the bride has control over the marriage contract, this provision has eliminated the role of guardians in marriage.

### **Guardianship Practices in Marriage in Iraq**

The selection of Islamic family law in modern Muslim countries is based on several considerations, *first*, the deliberate alteration of the material on the enactment of family law in modern Muslim countries. Such as the reform of polygamy, the existence of guardians in marriage, the limits and age difference of marriage, punishments for violating parties, and provisions for the distribution of inheritance. *Second*, geographical location when the country is a representation of countries in North Africa, West Africa, West and East Asia, and Southeast Asia. *Third*, in terms of religious and historical culture, community role models in classical fiqh schools from several countries.<sup>45</sup>

The practice of guardianship in marriage in Iraq reflects the social, cultural, and legal complexities influenced by a long history of conflict and political change. Guardians play an important role in the marriage process, especially in the context of Islamic family law applied in Iraq. The role of guardians is often governed by local religious and customary laws, and in many cases, guardians must give consent for marriage, especially for women.<sup>46</sup>

Most of Iraq's Muslim community adheres to the Hanafi school. However, the law on the family in Iraq comes from a variety of sources, not just from the Hanafi school.<sup>47</sup> In this case this issue of trust, the latest amendment to Iraqi law states that:

- i. No family or anyone can force someone, whether a man or a woman, to marry if the party concerned does not mind. Sexual harassment must occur before the marriage is annulled. Likewise, the family or other people cannot prevent a person

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<sup>45</sup> Miftahul Huda, (2018) "Ragam Bangunan Perundang-Undangan Hukum Keluarga Di Negera-Negara Muslim Modern: Kajian Tipologis," *Al-Manahij: Jurnal Kajian Hukum Islam* 11, (1): 49–60, <https://doi.org/10.24090/mnh.v1i1.1267>.

<sup>46</sup> Asst Prof, Mohammed Shakr, and Mohammed Salh, (2022) "The Guardianship of the Mother in Marriage in the Amended Iraqi Personal Status Law in the Kurdistan Region of Iraq A Jurisprudential Evaluative Study," *Journal of College of Law for Legal and Political Sciences* 11, (39): 459–69.

<sup>47</sup> Moh. Mujibur Rohman, (2021) "Hukum Keluarga Islam Irak; Menakar Historis Dan Socio Cultural Masyarakat Dalam Ber-Fiqh," *ASASI: Journal of Islamic Family Law* 1, (2): 94–112, <https://doi.org/10.36420/asasi.v1i2.6>.

who wants to get married from getting married to the extent that it is by the regulations (Article 9 paragraph 1).

- ii. If a person violates the above provisions, if he is a level 1 family member, he will be subject to a maximum sentence of 3 years in prison or a fine. If the person who commits the violation is another person (not a member of the 1st level family), the maximum penalty is 10 years in prison or a minimum of 3 years in prison (Article 9 paragraph 2).
- iii. Article 9 paragraph 3 states that the Sharia Court or the Personal Status Court stipulates punishment.

However, the implementation of the role of guardian in Iraq varies, especially between Sunni and Shia communities, each of which has different legal traditions. For example, in Sunni communities, guardians usually have greater authority over marriages, while in Shia communities, there is more freedom for individuals to choose a partner. These differences reflect the growing influence of political and social sectarianism in Iraq. Conflict and massive migration over the past few decades have also affected the dynamics of marriage in Iraq, including the role of guardians. In some cases, guardianship practices can become looser or more stringent depending on socio-economic conditions and political pressures in a particular area. This shows that the role of the guardian in marriage in Iraq is not only a religious issue, but also greatly influenced by other factors such as conflict, migration, and changes in social structures.<sup>48</sup>

### **Guardianship Practices in Marriage in Pakistan**

Pakistan is one of the countries that follows the Hanafi madhhab as a reference in legal matters, especially in the legal context related to Islamic family law. Most of Pakistan's population embraces Islam. Pakistan has experienced three constitutional changes, while the new Muslim Family Law was enacted in 1961.<sup>49</sup>

According to Article 2 of the Muslim Family Law of 1961 Number 8, the minimum age for marriage is 18 years old, and the age for women

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<sup>48</sup> Lucine Taminian, "Marriage in Times of War and Political Conflict: The Case of Iraq," The Center For Social Sciences Research & Action, n.d., <https://civilsociety-centre.org/paper/marriage-times-war-and-political-conflict-case-iraq>.

<sup>49</sup> Dina Sakinah Wijaya Pratiwi Uly Romadholi, (2024) "Pencatatan Pernikahan Dan Batas Usia Pernikahan Di Negara Muslim: Studi Kasus Di Mesir, Maroko, Tunisia, Yordania, Turkiye, Pakistan, Malaysia, Indonesia," *As-Syar'i: Jurnal Bimbingan & Konseling Keluarga: Jurnal Bimbingan & Konseling Keluarga* 4, (1): 321, <https://doi.org/10.47476/assyari.v6i1.375>.

is 16 years old.<sup>50</sup> The parent or guardian of a person under the age of 18 who marries a minor is liable to imprisonment for one month or a fine of one thousand Rupees or both, except for women who commit jihad.<sup>51</sup> In addition, officers who violate the Marriage Registration Regulations will be subject to penalties. Marriage can only be performed on adult women without coercion, even if they are sent for a contract by their guardian in this situation.

In practice, the status of the guardian of the marriage seems to be an attempt to eliminate the concept of madhhab fiqh. In Pakistan, where the majority of people adhere to the Hanafi school, the marriage process is stricter and requires a guardian of the marriage, although the provisions of siyasah syar'iyyah apply.

However, in recent decades, the legal interpretation of the role of guardians in Pakistan has changed, along with increased advocacy for women's rights and adjustment to modern law. For example, under the applicable law, an adult woman who has reached the age of marriage has the right to marry without the consent of the guardian, known as *khila* or *nikkah without a guardian*. These changes reflect the influence of legal reforms and pressure from human rights groups that promote gender equality.<sup>52</sup>

### **Guardian Practices in Marriage in Tunisia**

Along with the social and legal changes that have occurred, the practice of matrimonial guardianship in Tunisia has undergone a significant transformation. Tunisia is known as one of the most progressive Islamic countries in reforming family law, including changing how guardians marry.

Gradual efforts to establish a comprehensive marriage law continued after independence in 1956. Tunisian marriage laws are still being created and regulated. The material combines legal thought from the Hanafi and Maliki schools. After the *Majallat al-Ahwal al-*

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<sup>50</sup> Tahir Mahmood, *Personal Law in Islamic Countries: History, Text, and Comparative Analysis* (New Delhi: Academy of Law in Religion, 1987), hlm. 242.

<sup>51</sup> Akbar Saputra, *Konsep Perwalian Dan Poligami Dalam Sistem Hukum Perkawinan Indonesia Dan Pakistan* (Jakarta: Fakultas Syariah dan Hukum UIN Syarif Hidayatullah, 2018), hlm. 44-45.

<sup>52</sup> Amna Hassan, (2021) "Women in Pakistan – A Comparative Analysis of Women's Rights on the Basis of Anglo-Saxon and Muslim Legal Traditions," *Vesnik Pravne Istorije* 1, (1): 283–322, [https://doi.org/10.51204/hlh\\_20110a](https://doi.org/10.51204/hlh_20110a).

Shahsiyyah marriage law was enacted in 1956, the effort was successful.<sup>53</sup>

First, the role of the guardian in Tunisia is more symbolic than practical. Tunisia's Personal Status Law, created in 1956, eliminated guardianship obligations for adult women who wanted to marry. This means that Tunisian women over the age of 18 can marry without the need for guardian consent, provided they have the legal power to do so. According to Article 3 of the Tunisian Law, a marriage can only be performed with the consent of both brides, witnessed by two witnesses, and with a dowry paid by the prospective wife. The new guardian is treated as if the bride-to-be is still a minor. This means they have to be present and reach a consensus. Guardians can submit their consent to the court if they refuse.

Second, for women who are still under the age of 18, the existence of a guardian is still necessary. In this case, the guardian serves to ensure that the marriage does not harm the interests of the child and is by the law. However, child marriage requires the consent of a judge, who acts as an additional watchdog to protect the rights of children.

In a historical context, the role of the wali in Tunisia initially follows the Maliki tradition, where the wali has great authority in determining a woman's marriage. However, along with social and political developments, Tunisia adopted a more progressive approach. Today, although the role of guardians is still recognized, adult women have the freedom to choose a partner without the need for guardian intervention, which signals a shift from traditional practices to the fulfillment of individual rights.<sup>54</sup>

The implementation is also motivated by Tunisia's efforts to balance Islamic values with the need for modern social reforms. The move is seen as part of a broader effort to empower women in the realm of family law, where Tunisia has taken a more advanced position than many Muslim-majority countries.<sup>55</sup>

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<sup>53</sup> Suchamdi, (2013). "HETEROGENEOUS PERUNDANG-UNDANGAN HUKUM PERKAWINAN NEGARA-NEGARA MUSLIM MODERN," *Kodifikasi* 7, (1): 31.

<sup>54</sup> Maaike Voorhoeve, (2018) "Law and Social Change in Tunisia: The Case of Unregistered Marriage," *Oxford Journal of Law and Religion* 7, (3): 479–97, <https://doi.org/https://doi.org/10.1093/ojlr/rwy027>.

<sup>55</sup> Muhammad Sabir Rahman et al., (2022) "Implementation of Marriage Through Wali Hakim (Marriage Guardian) in the Office of Religious Affairs," *International Journal of Multicultural and Multireligious Understanding* 9, no. (4):

## CONCLUSION

The navigation of the role of guardians in Islamic family law is a reflection of the interaction between religious texts, legal interpretations, and socio-cultural dynamics. It is important for every Muslim country, including Indonesia, to continue to review and adjust the implementation of the role of guardian under the times without neglecting the fundamental and progressive values needed to ensure that Islamic family law remains relevant and able to protect the rights and interests of all parties involved in marriage.

These reforms show variations in the implementation of Islamic family law in different countries, depending on the local social, cultural, and political context. While some countries have retained the traditional role of guardians, others have reduced or even eliminated the reliance on guardians in the decision to marry adult women. Thus, the navigation of the role of the guardian in Islamic family law continues to evolve, reflecting the need to strike a balance between preserving tradition and meeting the demands of social change.

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