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AUTHORITY REFORMULATION OF GENDER EQUAL MARRIAGE GUARDIANS: 4 JURISPRUDENCE SCHOOLS LAW OF MARRIAGE GUARDIANS

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ABSTRACT

Backgrounds: The existence of a guardian in the marriage contract within the framework of Islamic law in Indonesia is a condition that must be met by the bride. This means that the marriage contract is not valid if in the process there is no guardian accompanying the bride. The problem is that guardianship listed in the legal framework in Indonesia only gives full authority to fathers who are male. This is because the views of fiqh in Islamic marriage law in Indonesia take the Imam Syafi'i school of thought.
Aim: The research would like to analyze the authority reformulation of gender equal marriage guardians through the lens of 4 jurisprudence schools.
Methods: The article used the literature review method by utilizing secondary data from 3 Islamic yellow books and other supporting ones like journals and books.
Findings: This study shows that the four schools of fiqh indicate the existence of opportunities or potential for female heads of households to become marriage guardians for their daughters.

KEYWORDS

marriage guardian, female guardian, marriage, single mother, Illah al-hukm

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INTRODUCTION

In marriage life, it is not always certain that husband and wife partners have compatible relationships (Jarwan & Al-Frehat, 2020; Narayan et al., 2021; Pellander, 2021). There are many cases that underlie a person getting divorced. In 2022, the number of divorces in Indonesia reached 516,334 (Annur, 2023; Rizaty, 2023). This figure was dominated by divorces filed by wives of 75.21%, namely 338,358 cases where the main factors causing the divorce were quarrels and disputes such as domestic violence, one party leaving, economic problems, and polygamy. This number reached 284,169 cases or the equivalent of 63.41% of the total reasons for divorce cases (Hidayah, 2023). In addition, data analysts predict a higher number of divorce cases this year and years ahead (Burhanudin, 2023).

For divorced couples with children, the Religious Courts (PA, *Pengadilan Agama*) tends to give custody to the mother and are often not matched by the father's responsibility to meet the economic needs of the child (Hakim & Nasution, 2023; Kamba, 2022; Rinaldo et al., 2023). Therefore, a widow will bear the double burden of having to fully care for her daughter, as well as meeting her daughter's financial needs, which is actually the father's responsibility. This is evident in the findings of KPPA (2020) that female heads of households in Indonesia account for 15.50%.

The double burden on single mothers does not necessarily give mothers marital guardianship rights (Bernardi et al., 2018; Levine, 2009). This is evident from several cases in Indonesia related to the guardianship polemic highlighted on news pages. For example, the guardianship case reported by Suara.com. The biological father does not want to marry off his son unless he is paid. Sadly, it was the mother who then granted the request to pay the father as guardian with the consideration that the marriage could still take place (Gunadha & Opita, 2022). Other news reported by the Tribun Medan also mentions almost the same problem regarding guardianship, in which a woman must be married off by her 18-year-old younger brother because their father died (Hasibuan, 2022). Not to mention that age 18 has not even reached the legal age to marry (Jones, 2017; Melnikas et al., 2021; Prameswari & Agustin, 2018). This means that the boy who acts as guardian may not marry where the marriage law stipulates that the minimum age of the bride and groom is 19 years.

The implementation of the regulation clause does not seem problematic, but reflecting on this regulation being implemented by women with different experiences, it will be very uncomfortable. For example, when the mother of a family is facing the marriage phase of her daughter and uses guardianship practices in accordance with mainstream *fiqh* rules, this will present her own difficulties.

Mubarok (2012) explained that Islamic marriage rules in Indonesia take the Syafi'i school of jurisprudence. He mentioned that there are at least thirteen yellow books of material reference for the making of Islamic marriage law in Indonesia, including *Fathul Mu'in, Al-Bajuri, Al-Fiqh ala Madzahibul Arba'ah, Shamsuri fi al-Faraid, Bughyat al-Mustarshidin, Al-Mahalli, Sharqawi 'ala al-Tahri, Taghrib ibn Yahya, Tuhfah, Mughni al-Muhtaj, Qawain al-Shariyyah Sadaqah Di'an, Fathu al-Wahab, Qawani al-Shariyyah Uthman ibnu Yahya,* and *Taghribul Mushtaq*. Guided by these books, the requirements for guardianship in the compiled Islamic law in Indonesia give full authority to a man - the father or a relative of the father. This opinion is the most well-known. It is evident that two other schools of thought also provide the same information in guardianship practices.

Changes in the current cultural context place the position of women who cannot become guardians starting to become irrelevant, apart from the reasons used to this day only refer to one *fiqh* viewpoint, but also because this *fiqh* choice is influenced by patriarchal labeling and construction "women are weak creatures". Because of this, Gus Dur criticized it by stating that there were many religious interpreters who interpreted women's reasoning as half that of men's. one example is seen in the understanding of the verse about inheritance (*lidzakari mitslu hadzil untsayain*). This very unfair conclusion is also one of the basic arguments in making fiqh. If so, this interpretation will have implications for the results of *fiqh istinbath* (efforts to explore arguments to produce a legal product) which always places women as second-class human beings. Because of that, Gus Dur emphasized that there must be reformulation of a more just interpretation of the text.

Gus Dur's message is important to be reflected in the context of a single mother's guardianship of her daughter as a pillar of marriage. One of the ways to be able to reformulate a jurisprudence is to know *the illat of the law* or the basis of making the law. In the jurisprudence of women's marriage guardians, what is the philosophical or legal basis of *the* role of a guardian in a marriage contract? Do all the views of the madhhab imams refer to the same conclusion of jurisprudence? Is it true that only those who are male and from the

father's line of kinship can be the bride's guardian? or is there an alternative view that can be a reference in answering the question of single mothers from the 4 Imams of the Syafi'i, Hambali, Maliki and Hanafi madhhabs?. These are some of the questions that underlie the main discussion in this article.

Through a literature review on three of the thirteen main references in jurisprudence, namely *Al-Fiqhu fi madzahibi al-arba'ah, Fathul Muin* and *Fathul Wahab,* the researchers focus on the legal reasons in the law of female guardianship in marriage jurisprudence. The diversity of jurisprudence views from the four imams of this school is expected to be an alternative jurisprudence in the specific context of women who carry out their role as a single mother with a daughter that she raises alone.

METHOD

The writing of this article used the literature review method by utilizing secondary data or sources in the form of journals, books, documentation, the internet and various libraries that are relevant to the issues and topics of this article. As implied before, the sources used were the 13 yellow books of Islamic references for Indonesian law, mainly the 3 aforementioned ones, supported by other data from Google Scholar and relevant books. The researchers collected the data, read them thoroughly, evaluated each one of them, organize the selected data, identify each one of them, outline the structure, then built a literature review.

RESULTS AND DISCUSSION

Marriage Guardian and *Illah al-Hukm*

In understanding marriage guardian, Professor Amin Suma explained that the guardian's diction is also called *Al-Walayah* or *Al-Wilayah* which lexically contains several meanings. This word means affection (*al-mahabbah*) and a help *(an-nashrah)* or some also mean full authority or power. Like the word *Al-wali* is a person who uses power to take care of a matter.

Abdurrahman Jaziri explicitly explained that the guardian in marriage is the person on whom the validity of a marriage contract is based in Islam. So, a marriage without a guardian becomes invalid (Al-Jaziri, 2003).

Profiting from the Book of Classical Jurisprudence *of Madzahibul Arba'ah*, guardians are divided into two types: *Ijbar* guardians and non-*ijbar* guardians (Al-Jaziri, 2003). According to the Arabic Dictionary, *jabara* means forced. According to Islamic jurisprudence studies, it is explained that the guardian has the right to *Ijbar* or the right to pledge a woman's consent without having to get permission from the woman concerned. In this case the four well-known schools of thought in Indonesia have different opinions about the limits of Ijbar.

The guardian in the compilation of Islamic law in Indonesia is only based on the role of the father or father's relative. This happens in an orderly sequence. Thus the fiqh practice adopted by the state is the Shafi'i fiqh practice. If no marriage guardian is found according to the father's lineage, guardianship can be delegated to a judge appointed by the state.

In Arabic, *illat* means disease. Meanwhile, according to *ushul fiqh* scholars, the word *illat* means the dominant trait that is in an original law, so that this trait can later be constant in new laws or laws that are currently being sought (Al-Sulmi, 2006).

Marriage Guardians and Women's Experience According to Imam Syafi'i

وَلَا يَصح النِّكَاح عِنْد الشَّافِعِي إِلَّا بولِي, وَإِن كَانَت ثَيِّبًا صَحَّ

"And according to Shafi'i, the marriage is not valid without the presence of a guardian, but if she is a woman *or* a widow, then the marriage is valid without the presence of a guardian" (Syamsuddin, 1996).

Imam Syafi'i explicitly explained that for a *bikr* (virgin) woman, she could only be represented by a male (father or father's relative). Unlike the case with the *tsayyib woman,* Imam Syafi'i is of the opinion that the woman may be the guardian of the marriage contract by herself (Al-Jaziri, 2003).

According to Imam Shafi'i, in allowing guardians to force marriages on young women or crazy adult women, no special reasons for its permissibility were found. Further, he allows a woman to be her guardian when she is a widow. So this is an indication of the *illat* of Syafi'i's law when establishing a fatwa on guardianship law. In our opinion, the existence of a woman's "experience" becomes the standard for determining the law whether the woman needs a guardian or not. Women who have been through marriage are considered to have an experience to decide on further marriage matters. Of course, the fatwa put forward by Imam Syafi'i cannot be separated from the context of how he was formed and how he saw women's lives at that time.

This opinion is also based on an analysis of the dynamics of fatwa changes made by Imam Syafi'i. It has *qaul qadim* (old sayings) and *qaul Jadid* (new sayings). This renewal of fiqh views occurs because of differences in places when doing ijtihad. This indicates that Imam Shafi'i's fatwa is still unfinished. This means that we can critically continue this Syafi'i view of guardianship in accordance with the context and needs of society.

The Importance of the *Kafalah* (Livelihood) A Guardian in the View of Imam Maliki

In short, Imam Maliki's views are not much different from Imam Shafi'i. Moreover, Imam Maliki is one of the teachers from the *scientific rihlah process* of Imam Syafi'i. But there is something interesting. In a footnote to the book *Madzahibul Arba'ah,* Imam Maliki adds the issue of *kafalah* (bearing a living) in guardianship.

Guardianship by bail, so whoever sponsors a woman who has lost her father and her family is absent from her, then he raises her for a special period, he has the right to guardianship over her in her marriage, and two things are required for his guardianship: one of them is that she stays with him for a time that necessitates his tenderness and pity for her usually, so she mixes with him as children to their fathers, so this period does not need to be estimated at a specific time, such as four years or ten at most. "Guardian in charge of life, whoever supports a woman who has lost or experienced the absence of a father figure in her life, then this person raises the woman for a certain time, then she has the right to become her guardian, provided that the woman lives in a time that presumably requires the role of affection as he gives a life like a father and son to the woman" (Al-Jaziri, 2003).

This opinion then reinforces *the illat* of guardianship law that the dominant nature that must exist in a guardian is a person who provides a good living, both a living and a love. Of course Maliki in this case provides a limitation that this must be done within a certain period of time. Al-Jaziri (2003) explained that at least this *kafalah* needed four years or more. The second requirement explained by Imam Maliki is that the woman who is covered for this is a

woman who falls into the disadvantaged category (not beautiful and not rich). So if this woman has one of them, guardianship is returned to the judge. This indicates that there are concerns that the dependent woman is being used or sold because of her beauty. Although in this case we criticize whether the standardization of beauty referred to by Imam Maliki can be understood specifically.

Apart from that, in fact we can understand that what is meant by a guardian by Imam Maliki must meet the standard of being a person who bears the life of the woman. The guarantee does not stop at meeting physical needs, but he also said that there must be a good relationship filled with love like a child and a parent. If so, as for the lineage father who is the guardian of the *mujbir*, of course he must meet the standards set by Imam Maliki. So, when the woman is not given a good life by her *mujbir* guardian, it can be critically conclude with the question of understanding *mukholafah* (reversed understanding) "Didn't the guardianship role in the marriage also fall?"

In this search we found Imam Maliki who began to be moved to discuss if the subsistence was borne by women. According to Imam Maliki, the guardianship is recognized, however, in the practice of the marriage contract, the woman who acts as the guardian should give guardianship to the representative he appoints, and that is a man. As the following text:

وهل إذا كفلتها امرأة تكون لها ولاية؟ الصحيح لا إذ ولاية للنساء، وقيل: تكون لها ولاية ولكن ليس لها مباشرة العقد بل توكل عنها رجلاً يباشره.

“What if the person who is responsible for the livelihood is a woman? the truth is that there is none if the guardian is female. However, there are those who say it is still legal but the person acting as guardian is not directly carried out by him, instead the woman appoints the man who becomes her representative when the marriage contract takes place” (Al-Jaziri, 2003).

The researchers observed that it was indeed difficult to get out of the cultural construction at that time, where women did not generally play a role in guardianship contexts. But even so, this opinion is actually a strong guideline for us that the guardian is not only a symbol. a guardian is he who is burdened with a responsibility for livelihood in the process of his child's life.

Guardian of Marriage in the Glasses of a Hanbali Priest

Guardianship in the view of Hanabila scholars is almost the same as Shafi'i. throughout our search on classical literature, we did not find much difference in the views of Ulama' Hanabila. According to him, marriages carried out by *bikr* (grooming) women are obligatory for her to have a guardian present, even the guardian can marry her by force without going through the permission and consent of the daughter even though the *bikr* has *'aqilan wa balighan* (smart mind and reaches adulthood).

This is indeed similar to Imam Shafi'i's view. What makes it different is Imam Hanbali's standard when he asserts that the woman can be married by force or her guardian becomes a guardian *if* the virgin woman has not yet become *mukallaf*, that is someone who has met the criteria to bear the burden or obligation from God. As for the age of *mukallaf* set by Imam Hanbali is nine years. If a woman has reached the age of nine and she is a divorced person, it is obligatory for her not to apply the law of forced marriage. But again, according to Hanbali, as for a marriage without a guardian for a woman, then the marriage is not valid.

ويختص أيضاً بإجبار البكر البالغة عاقلة كانت أو مجنونة، فللأب أن يزوجهن بدون إذنهن ورضاهن

"Both in *bikr* (virgin) women who have reached maturity and are intelligent or sensible also in crazy women apply *ijbar* marriage law. Then the father may marry her without the permission or sincerity of the son."

The Maturity of Female Thinking in Imam Hanafi's View

وينعقد نكاح الحرة العاقلة البالغة برضاها وإن لم يعقد عليها ولى بكرا كانت أو ثيبا عند أبي حنيفة

"The marriage contract is for an independent woman who is intelligent and mature with her conscience even though the contract is without a guardian, either a *bikr* (virgin) or a *tsayib* (widow) woman, according to Abu Hanifah is valid" (Syamsuddin, 1996).

Among the four schools of thought declared by the High Fiqh Imams, Hanafi is the only *Ulama* (Scholar) who dares to have a different view on the role of guardianship in marriage. The view of the Hanafiyah *Ulama* explains the permissibility of guardianship over women. He provided further information that the requirement for women to become guardians was to fulfill the criteria of *'aqil* (smart/intelligent) and *baligh* (adult) (Al-Jaziri, 2003). This view is taken from the following text

ولاية الإجبار على البنت والذكر في حال الصغر، أما في حال الكبر فليس لهم ولاية إلا على من كان مجنوناً من ذكر أو أنثى

"Wali *Ijbar* (forced marriage) is only for women and men who are babies or are still small, while if the situation is mature then it is not permissible for the guardian to force a marriage unless he is crazy both male and female"

Imam Hanafi said that all guardianship in marriage is definitely *mujbir*, provided that the women who are in the guardianship are young children who have not yet reached maturity where in Islam it is called *baligh*. In fact, the statement above stated that this also applies to young men. Does this guardianship apply to adult women? The answer is yes, if the adult woman is in a state of madness as well as an adult male who is crazy then this guardianship also applies the same way. As for if the woman is a woman who has reached maturity and is also conscious or intelligent, healthy or intelligent which in Arabic literature is called aqilan , regardless of whether the woman is someone who has not married at all or has been married for the umpteenth time, then she has authority over himself. This means that for those who adhere to the Hanafi Madzhab, women can and have the right to legally carry out their own marriage contract without being under guardianship (Azhari, 2015).

The researchers analyzed at a glance this view in contrast to Shafi'i. However, this study tried to find common ground between the views of Hanafi and Shafi'i. In our opinion, both of them want to protect women's rights. The difference is that Syafi'i's effort to safeguard women's rights is by concluding through the experience of a woman's marriage. Those who are married are considered to have experience, so for a *tsayib* (widow) she has more rights over herself than her guardian (*ahaqqu binafsiha min waliyyiha*) to enter into a marriage contract. While Hanafi in this case is more progressive. A woman's experience can be judged by her maturity and common sense or intelligence. That is, even without ever being married, a woman is still considered capable of deciding a case if she is wise, healthy and mature. So that Hanafi enforces permissible or legal laws if women marry without guardians.

Hanafi also answered a hadith which prohibits marriage from being carried out without a guardian or by a female guardian. Hanafi argues that the marriage contract is the same as the

buying and selling contract. For him, women who are free and have common sense absolutely can buy and sell like men. Hanafi has given women the right to autonomy over women's bodies and choices that are equal to men's. As a result, according to his view, the marriage contract carried out by the female guardian and/or carried out by the woman herself is legally just as lawful as women are free to buy and sell in general (Al-Jaziri, 2003).

Potential Ability of a Mother as Marriage Guardian

The first difference of opinion regarding guardianship of the four Imams of Madzhab is the difference in interpretation of Al-Quran verses regarding guardianship. They differed on the matter of *the khitob* (the person spoken to) in the guardianship verses (QS Al-Baqarah: 221; QS An-Nur: 32) which tend to speak to men rather than women (Aziz, 2012). That's because in these verses *dlmir* or the pronoun used is to designate a man. In fact, in the Al-Qur'an, men's *words* often apply to women, as in the verses that command fasting or prayer.

Second, there are differences of opinion regarding the permissibility and inability of women to become guardians, possibly arising from a hadith narrated by 'Aisyah:

رواه الزهري عن عائشة وهو أن النبي صلى الله عليه وسلم قال: "أيما امرأة نكحت بغير إذن وليها فنكاحها باطل" ومنها ما رواه ابن ماجة

It is narrated from Zuhri from 'Aisha that the Prophet Muhammad (peace be upon him) said "Any woman who marries without the permission of her guardian is void", this hadith is also narrated by Ibn Majah.

As well as other hadiths narrated by Daruquthni:

والدارقطني عن أبي هريرة أن النبي صلى الله عليه وسلم قال: "لا تزوج المرأة المرأة، ولا تزوج المرأة نفسها"

“From Daruquthni from Abu Hurairah that the Prophet SAW said "A woman does not marry with a woman's guardian, nor does a woman marry her (herself's guardian)."

From this, lexically, this hadith seems to eliminate the autonomy over the existence and right to vote for women, which is actually very basic. Women are not given the right to be guardians in a marriage contract. This hadith was then understood and used as a legal basis by Imam Maliki, Hanbali and Shafi'i. Actually Imam Maliki has mentioned when a woman bears the *kafalah* or guarantee of life for a daughter. Maliki does acknowledge the existence of the role of guardianship of women as guardians of life, but this does not necessarily change the position or symbol of the guardian being a man, in the marriage contract.

The situation is different with Hanafi. In the footnotes in the Book of *Madzahibul Arba'ah*, we found the basis of Imam Abu Hanifah's thinking in giving an answer to the hadith. That what is referred to as women in the hadith is relying on the guardianship of young women, not adult women. Of course, in understanding this hadith, Imam Abu Hanifah also studied the context of *the asbabul wurud* (the transmission of the hadith) (Al-Jaziri, 2003; Al-Malibariy, 2004).

Imam Abu Hanifah is consistent in holding the concept that women who are independent and mature and intelligent or have common sense can absolutely decide for themselves the important matters that have implications for their lives. This absolute right should be given to men. Imam Abu Hanifah provides a common view of the rights of men and women which is analogous to the legality of buying and selling carried out by adult women.

So the dominant characteristic or philosophical foundation of guardians of some of the Imams of these Madzhabs is to bear life and ensure that there is security for the person being

supported or guardiand, in this case is a woman. Indeed, in terms of setting boundaries - whether women can be said to be safe and protected - the four Imams have differing opinions. There are those who focus on the experience of marriage, such as Imam Shafi'i, Imam Maliki and Imam Hanbali. There are those who focus on the age or maturity as well as the intelligence of the woman herself, like Imam Hanafi's opinion. This can be seen how these four agree on the absolute guardianship of women who are in a state of madness even though they are adults, as well as guardianship of women who are still small.

CONCLUSION

Over time, with different contexts of women's needs and rights, of course, fiqh must also adapt itself so that it can change in a more just direction. The opinion of the ulema that young women should be given guardianship is of course no longer relevant because it is contrary to the law on child marriage. Meanwhile, for adult women, the rights or autonomy over their personal choices must also begin to be considered as declared as equal human rights with men. Not to mention that in certain cases, the role of livelihood or the main breadwinner nowadays has been taken up by women.

Philosophically, after conducting a study of three of the thirteen main reference books for marriage guardians in Indonesia, we can see that the basic or dominant nature *(illat)* of guardianship that we have discussed above finds enlightenment about the potential abilities of mothers as marriage guardians. We can conclude that Imam Syafi'i Hanbali and Maliki wanted the experience of marriage to be allowed for women to take the role of guardian over themselves. This is proven by the agreement of the three imams on the guardianship rights of a widow's marriage and the obligatory guardianship of an adult woman or man who is insane. Likewise with Imam Hanafi, the ability of a woman to become a guardian is marked by the maturity of the woman's thinking and maturity (*aqilan* and *balighan).* Both are meeting points where a maturity of thinking is considered important to become the dominant nature of a person to have the right to autonomy over his self-mastery.

Further research must be carried out to look at how complex the experiences of women as life bearers have been carried out. From this research it is hoped that it can inspire the existence of a re-legal *istinbath* for guardianship practices for women.

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