

The Historicality and Purpose of Guardian Rules in Indonesian Islamic Family Legislation and Muslim Countries

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ABSTRACT

Marriage is one of the phases in life that a Muslim can live after finding his life partner. Marriage is not just lust, but establishes affection among families and creates peace in the family. If the family is peaceful and harmonious, a safe and secure family will be created. In a marriage, it is required to have a marriage guardian, whereas according to jumhur ulama, a marriage guardian is a condition and pillar of a valid marriage contract. If there is no marriage guardian, then the marriage is considered void. Meanwhile, other scholars argue that an adult woman may marry herself without having a marriage guardian, as long as she is married to a man who is equal (sekufu'). The two groups have the same clear foundation, both from the naqli argument and the aqli argument. In this debate, it is only limited to the debate of scholars, so researchers are interested in studying marriage guardians in the perspective of Indonesian state legislation and compared with the rules of world Muslim countries.

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1. INTRODUCTION

One of the teachings of Islamic law is marriage. With marriage, the continuity of life from one generation to the next will not be broken. Marriage is not only a means of channeling sexual desire, but rather aims to establish affection, and create peace and tranquility for those who carry it out. If family life is peaceful, then a safe and peaceful community life is created. To carry out an Islamic marriage makes rules that must be met, which are usually known as conditions and pillars of marriage. Fulfillment of this is intended so that marriage is in accordance with Divine norms. Therefore, in Islamic legal thinking, there are conditions and pillars of marriage that have been agreed upon, and some are still being debated. Among the issues that are still being debated among Islamic legal thinkers is the issue of marriage guardians.

Broadly speaking, there are at least two opposing groups. The first group argues that marriage guardians are a condition and pillar for the validity of a marriage contract. This opinion was put forward by the majority of scholars. So that women are not allowed to marry themselves even though they are adults. Meanwhile, group two argues that an adult woman may marry herself without having to go through her guardian, as long as it is with a man who is equal (kufu). Each of the two groups put forward their arguments, both naqli and aqli. In the first group, the position of subordination to the existence of women is seen by them as weak and incapable of carrying out marriages, so they must be brought under the authority of their

guardian. Therefore, it needs to be reviewed so that it can place men and women proportionally. This study examines the historicity and purpose of guardianship rules in Islamic family legislation in Indonesia and Muslim countries. So find a point of similarity between men and women in the issue of guardians.

2. METHOD

The method used in this case is generally of a qualitative type, because the procedure in this case provides descriptive data results in the form of written sentences. This research method includes the approach method of data collection techniques, data processing techniques or data analysis, and techniques for drawing conclusions. While data collection techniques are through library research, while the main source in this case is books on the role of Islamic religious education teachers and related books.

3. RESULTS AND DISCUSSION

3.1. Historicity and Purpose of Marriage Guardians

The term "marriage guardian" is a combination of two syllables originating from Arabic which, when separated, have their own meanings. The word "guardian" means "caretaker" and the word "marriage" means "agreement between husband and wife". The expression "marriage guardian" has been assimilated into Indonesian and at the same time has the meaning as "the caregiver for the bride at the time of marriage (ie the one who makes the marriage vows to the groom)".

The word "guardian" etymologically comes from the word *area* which, among other things, means friendship, help, strength and power. So that the guardian itself means a person who helps, supports, protects and loves or someone who has power. Meanwhile, according to the term, a guardian is a person who has the power to carry out a legal action without depending on the permission of another person. From this definition it implies that a guardian is someone who is able to carry out legal actions either for himself or for others.

However, in general, a person is said to be a guardian if he performs an act on behalf of a person under his guardianship, while if he performs an act on behalf of himself, he is usually not referred to as a guardian.

The role of the marriage guardian in Islamic family law regarding the marriage process is an important prerequisite. Therefore, the existence of a guardian in the process of marriage or contract, basically aims to maintain the benefit and protect the rights owned by people who are under guardianship. Therefore, in Islam regarding the marriage process which becomes invalid if there is no guardian. Because it leads to the validity of marriage and the position of guardian may not be replaced by a woman.

The role of guardian for women is basically intended to provide benefit and protection of their rights. However, in reality, this protection often turns into an institution that dominates and limits the freedom that women should have. This is evidenced by the view of the majority of scholars who state that a woman who is about to marry must go through the intercession of a guardian. In fact, according to them, there is a concept called *wali mujbir*, namely a guardian who has the right to marry his daughter to whoever he wants without first asking for the daughter's approval.

Regarding the extent of women's active role in the marriage process, the scholars differed. This difference of opinion is broadly related to two things, namely whether women can marry themselves or must be through a guardian and whether women can become marriage guardians or not. The women referred to here are adult women, because for immature children, both boys and girls, the scholars agree that they must go through the intercession of a guardian when entering into a marriage contract.

Ulama who require guardians for women because they show masculine gender by subordinating women. History has recorded that before Islam came, the position of women in the eyes of Arab society was very low. Women are not worth anything at all. When a baby girl is born, the parents' faces turn bright red. In fact, they also did not hesitate to bury him alive. This is enshrined by God in His Book. Therefore the Prophet Muhammad SAW has changed the fate of women a lot. His dignity is raised, his existence is acknowledged. Although many of the Prophet's hadiths editorially require marriage guardians to exist, this must be seen in its historical context. If an Arab woman is secluded, it is only natural that a guardian is needed to marry her off. Therefore, what the Prophet Muhammad SAW did was aim to legislate Islamic law relating to marriage guardians in particular, and those related to women in general, is a final form of legal reform. This is *tadrij al-tasyri* (stages of legal legislation) which are local temporal so that it needs to be harmonized with changing situations and conditions. Therefore regarding marriage guardians for women is still debatable among Muslim thinkers.

3.2. Views of Ulama on Marriage Guardians

Among *fiqh* experts, the issue of the role of marriage guardian raises debates in determining the terms and pillars of marriage. In general, there are at least two groups that differ in opinion regarding marriage guardians. The first group argues that guardianship is one of the keys to determining the validity of a marriage. According to this group, it is not legal for a woman to marry herself or someone else, even though she is an adult. This opinion was expressed by *Malikiyyah*, *Syafi'iyah*, *Hanabilah* and *Zahiriyyah*.

Meanwhile, the second group was spearheaded by Hanafiyah who argued that guardians were only needed for immature women. Meanwhile, adult women who have common sense have the right to marry themselves to a man of their choice, as long as they are equal (*kafa'ah*).

According to Imam Malik, as explained by Al-Zarqani, the consent of a girl in marriage is only a *sunnah* or as a complement, without her consent, marriage can also be carried out by her guardian. While the consent of the legal widow is mandatory. In line with that, the right of a widow to herself rather than a guardian at marriage is the right to give consent not to marry. The person entitled to marry is the guardian. In other words, a widow is still not allowed to marry herself. So the existence of a guardian is one of the conditions for the validity of a marriage.

Meanwhile, according to Imam Syafi'i's view, the presence of a guardian is one of the pillars of marriage, which means that without the presence of a guardian when carrying out a marriage contract, the marriage is invalid. Along with the obligation of a guardian in marriage, a guardian is also prohibited from complicating the marriage of a woman under his guardianship as long as the woman has the same partner.

As for the arguments of the scholars that it is not permissible for a woman to marry herself or someone else, and if she marries without a guardian, then her marriage is void or invalid as follows:

Q.S. an-Nur (24): 32 and Q.S. al-Baqarah (2): 221. According to them, the book in the two verses is addressed to men, not women.

The hadith of the Prophet narrated by Abu Musa reads *لانكاح الا بولي* and the hadith of the Prophet narrated by Aisha reads " ايما امرأة نكحت بغير اذن وليها فنكاحها باطل... ".

The background of the decline of Q.S. al-Baqarah (2): 232. Based on the history of Bukhari and Hasan it is told that the verse was revealed regarding the case of Ma'qil Ibn Yasar who married his sister to a man, but then the man divorced her. After her *iddah* period was over, the man returned to ask for her hand. But Ma'qil forbade the man to return with his sister forever. Then Allah sent down the verse.

Marriage has several goals, while a woman usually submits to her feelings, because of that she is not good at choosing, so she cannot achieve the goal of marriage. Therefore he may not perform the marriage contract directly. The *nukah* contract must be carried out by the guardian so that the purpose of the marriage can be achieved perfectly.

The arguments put forward by Abu Hanifah and Abu Yusuf are: 1) Surat al-Baqarah (2): 230, 232 and 240. In these three verses, the contract is assigned to women, this shows that women have the right to marry directly (without a guardian). 2) Women are free to enter into contracts of sale and purchase and other contracts, therefore she is free to enter into marriage contracts. Because there is no legal difference between the marriage contract and other contracts. 3) Hadiths relating the validity of marriage to the guardian's permission are specific, namely when the woman who is going to marry herself does not meet the requirements to act alone, for example because she is still immature or does not have common sense. The opinion of Hanafiyah scholars is closer to the concept of bilateral society and equality between men and women.

3.3. Marriage Guardian According to the Legislation of Indonesia and Muslim Countries

Islamic law in Indonesia has developed from time to time. In the first four decades after independence, Islamic law experienced rapid progress. This progress is marked by efforts to concretize the three pillars for the effective enactment of the law, namely (1) law enforcement officials are starting to improve or improve themselves; (2) clear legal regulations issued one by one; and (3) the community's legal awareness began to be triggered. The process of progress of Islamic law finally reached a bright spot after the issuance of the Compilation of Islamic Law (KHI), whose legal basis was Presidential Instruction (Inpres) No. 1 of 1991 concerning the Dissemination of Compilation of Islamic Law. With these legal instruments, KHI officially becomes Indonesian Islamic positive law. In the KHI, marriage guardians are expressly included as one of the pillars of marriage. Article 14 states as follows:

To carry out the marriage there must be; (1) Candidate husband; (2) Candidate Wife; (3) Marriage Guardian; (4) two witnesses; and (5) consent and consent. Furthermore, article 19 states, "marital guardian in marriage is a pillar that must be fulfilled for the prospective bride who acts to marry her"

However, in various Muslim countries marriage guardianship is one of the things that gets quite a variety of responses among Muslims. Legislation in various Muslim countries also shows that Muslims are quite dynamic in understanding this matter of guardianship. In contemporary legislation, the following typologies can be made: 1) The Tunisian Law explains that marriage guardians are no longer a requirement or pillar of a marriage contract. Articles 54-57 of the 1956 Tunisian Law in detail regulate the rights and obligations of parents and guardians regarding child care. So based on this, women can become guardians. 2) Act of Cyprus, guardian's permission is required, but not a pillar or condition. 3) Jordan distinguishes between girls and widows, while Syria and Somalia distinguish between immature girls and adult girls, where widows or adults do not need permission/approval from a guardian. The law that regulates it is Law Number 25 of 1977 known as *al-Qanun al huquq al-Aila* (the law of Family Rigt). 4) Lebanese and Lebanese Druze although a guardian must exist but it is too loose to be replaced by a guardian judge when he is an

adult. 5) Brunei, Philippines, Druze Lebanon, Morocco, Algeria, Libya, Cyprus and Sudan require the consent of the bride and groom. The law governing it is the assembly law. In this law, Islamic family law issues are regulated in only 29 articles. 6) Iraq does not require a guardian, therefore it is punishable for someone who forces a marriage contract with someone under his guardianship. As Law Article 9 Paragraph 2 of 1983 issued by Iraq.

By using this typology, Indonesia and Malaysia are in the fifth group, which makes the guardian a pillar of the marriage contract, and requires the consent of the bride and groom. Besides that, Malaysia is also in group six, the same as Iraq, which punishes coercion. In addition, the *sekufu* requirement still dominates in Middle Eastern countries for an adult woman to marry without the approval of a *nasab* guardian. The problem of marriage guardians in Indonesia is found in Law No. 1 of 1974 concerning Marriage and PP No. 9 of 1975 concerning the implementation of Law No. 1 of 1974 concerning Marriage.

Various Guardians

Fiqh scholars divide guardianship in terms of the power to marry someone who is under guardianship in two forms, namely *al-territory al-ijbariyah* (compulsive power) and *al-territory al-ikhtiyariyah* (voluntary power). Meanwhile, from the point of view of the guardian itself, Fiqh scholars divide the guardian of *al-mujbir* (lineage guardian), the guardian of judges and the guardian of *muhakkam*. *Wali al-mujbir* is a guardian who has direct authority to marry people under his guardianship even without parental permission. The persons who may be forced into marriage by the *wali al-Mujbir* are as follows:

People who do not have or have lost the ability to act legally, such as small children and crazy people: 1) Women who are still virgins but are mature and wise. 2) Women who have lost their virginity, either because of illness, being beaten, falling or committing adultery. 3) the male guardian's choice must be as strong as the girl he is marrying. 4) between *wali mujbir* and women are not hostile. 5) between men and women are not hostile. 6) the prospective husband must be able to pay the dowry in cash. 7) the man chosen by the guardian must be able to properly fulfill his obligations to his wife, and he does not imagine that he will do something that will cause his wife to suffer.

The judge's guardian has the right to become a guardian if he fulfills the following conditions: 1) there is no *nasab* guardian. 2) the *nasab* guardian travels far or is not at the place but does not give power of attorney to a closer guardian who is at the place. 3) the *nasab* guardian loses his guardianship rights. 4) lineage guardian is on pilgrimage/*umrah*. 5) *nasab* guardian acts as guardian. 5) the *nasab* guardian becomes the bridegroom of the woman under his guardianship. This happens when a woman is married to a cousin who is in the same blood or from the same father.

Whereas a *muhakkam* guardian may become a guardian if a *nasab* guardian cannot act as a guardian because he does not meet the requirements or refuses, and a judge's guardian cannot act as a *nasab* guardian for various reasons, then the bride concerned can appoint someone to be her guardian to fulfill the legal requirements of a marriage for which requires a guardian. Therefore the guardian who is appointed is the *muhakkam* guardian.

3.4. The Philosophical Value of the Guardian

The presence of a marriage guardian is very much needed at the time of marriage because if something is not desired then there is a guardian as a back up who can be used as a reference. And the existence of a marriage guardian must be associated with the purpose of marriage, namely the realization of a *sakinah mawaddah wa rahmah* family because marriage guardians contain several philosophical values.

As for the philosophical values contained in the role of marriage guardian, including: 1) Benefit value, maintaining benefit and safeguarding the rights owned by people who are under guardianship. 2) Equal Value, no discrimination on the basis of gender. Men and women have the right to be guardians, as well as men and women who are about to marry have the same opportunity to choose and determine their future spouse. 3) Value of Deliberation. Guardians do not have the right to force their will to determine a life partner for the child. Both must consult to choose the best for the child. 4) Value of Wisdom. To determine a life partner, it is very wise if the child still presents his guardian for consideration. Because the marriage also unites the two families. 5) Value of Freedom. By giving children the freedom to determine their future partner. So that the child can appreciate and respect his guardian more because he is given the trust to determine his potential partner.

4. CONCLUSION

Broadly speaking, there are at least two groups that have opposing opinions regarding marriage guardians. The first group argues that marriage guardians are a condition and pillar for the validity of a marriage contract. This opinion was put forward by the majority of scholars. So that women are not allowed to marry themselves even though they are adults. Meanwhile, group two argues that an adult woman may marry herself without having to go through her guardian, as long as it is with a man who is equal (*kufu*). The two alternative ideas can be supported by the argument that marriage is not a personal matter between the two candidates, but rather concerns the interests of the family and even the community. Marriage guardian is

something that becomes the validity of marriage and is very important in marriage because there is a guardian as a way to deliver a family that is *sakinah mawaddah warahmah*. And as a reference for problems when there is a problem in his marriage. but on the other hand it is considered as a form of restraint on the freedom of a woman. Therefore, which is formulated rigidly and formally. In the KHI it is stated that marriage guardians are expressly included as one of the pillars of marriage as Article 14 of Law No. 1 Tahun 1974 states.

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