

PROBLEMS OF MARRIAGE GUARDIANS IN SUPREME COURT DECISIONS: GENDER PERSPECTIVE ANALYSIS

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ABSTRACT

Family law in some countries regulates guardianship in marriage as a pillar that applies absolutely, that a marriage is considered invalid and can be canceled if it is carried out without a guardian or with an unauthorized guardian. A handful of women activists consider guardianship over women to obstruct the realization of their rights and discriminate against women, including male guardianship over women in this marriage. Long before the issue of guardianship heated up again, the Supreme Court had actually faced cases of parents trying to cancel their child's marriage because it was done with an unauthorized guardian. The court of first instance and appellate level had annulled the marriage, but the Supreme Court at the cassation level actually viewed the marriage as legal according to Islamic law. The author in this article will analyze this decision using the method of explanative analysis and describe it with thematic content. Analysis of this decision leads us to discuss the problem of women marrying themselves off, women representing their marriages and women being guardians of marriage from a gender perspective. This finding shows the dynamics of guardianship law over women in marriage. Based on the principle of *al-musāwah*, the basic principle in marital guardianship is that men and women are equal; may not distinguish legal provisions between men and women based solely on their gender, except based on benefit.

Keywords: *gender, guardianship, women, marriage.*

ABSTRAK

Hukum keluarga di beberapa negara mengatur perwalian dalam perkawinan merupakan rukun yang berlaku mutlak, bahwa suatu perkawinan dianggap tidak sah dan dapat dibatalkan apabila diselenggarakan tanpa wali atau dengan wali yang tidak berhak. Segelintir aktivitis perempuan menganggap perwalian atas perempuan menghalangi perwujudan hak-hak dan mendiskriminasi perempuan, termasuk perwalian laki-laki atas perempuan dalam perkawinan ini. Jauh sebelum isu perwalian ini kembali menghangat, Mahkamah Agung sebenarnya telah pernah menghadapi kasus orang tua hendak membatalkan perkawinan anaknya karena dilakukan dengan wali yang tidak berhak. Pengadilan tingkat pertama dan tingkat banding telah membatalkan perkawinan tersebut, tetapi Mahkamah Agung pada tingkat kasasi justru memandang perkawinan tersebut telah sah menurut hukum Islam. Penulis dalam artikel ini akan menganalisis putusan ini dengan menggunakan metode analisis eksplanatif dan menguraikannya dengan konten tematik. Analisis terhadap putusan tersebut membawa kita untuk mendiskusikan masalah perempuan menikahkan dirinya, perempuan mewakili perkawinannya dan perempuan menjadi wali nikah dalam perspektif gender. Temuan ini menunjukkan dinamisnya hukum perwalian atas perempuan dalam perkawinan. Berdasarkan asas *al-musāwah*, prinsip dasar dalam perwalian nikah adalah setara antara laki-laki dan perempuan; tidak boleh membedakan ketentuan hukum antara laki-laki dan

perempuan berdasarkan jenis kelamin mereka semata, kecuali berdasarkan kemaslahatan.

Kata Kunci: *gender, perwalian, perempuan, perkawinan.*

INTRODUCTION

The absolute guardianship of women in various fields of life, including in marriage, has recently become a hot topic of discussion. The feminist social movement in Saudi Arabia recently campaigned via Twitter to end this guardianship system (Alsahi, 2018). A system, which among other things stipulates that adult women must obtain permission from a male guardian to travel, marry, or leave prison (Human Rights Watch, 2016). This guardianship system is considered by some to be an obstacle in realizing women's rights (Syed, Ali, & Hennekam, 2018), as the basis for women's legal and social subordination (Almala, 2014), and is a conservative rule that discriminates against women (Nagar, & Tønnessen, 2017; Zainah and Jana, 2007).

Family law in various other countries, apart from Saudi Arabia, actually still regulates guardianship over women, especially in marriage. But it does not get as great opposition as in Saudi Arabia. Marriage law in Malaysia, for example, stipulates that a woman, regardless of age, can only marry with the consent of a guardian, in contrast to men (Zainah and Jana, 2007). United Arab Emirates, through Qanun Al-Ahwal Asy-Syakhshiyah Number 28 of 2005 confirms the cancellation of marriage contracts that are held without guardians (Ma`had Dubai Al-Qadha`i, 2017). Guardianship arrangements in Turkish family law are determined for child marriage, where a guardian has the right to cancel a marriage held without his consent, unless he is pregnant or the guardian has ratified his marriage (Mahmood, 1972). However, besides that there are also several countries, such as Morocco in 2004 which abolished this male guardianship rule (Nagar, & Tønnessen, 2017).

The Marriage Law (UUP) in Indonesia itself still regulates the provisions of this trust, whether the trust is within the framework of marriage or trusteeship outside of that interest. In marriage, Article 26 paragraph (1) of the UUP stipulates that the marriage should be held with a legal guardian, if the marriage is held in the presence of an invalid marriage guardian, then the marriage can be cancelled. It was this provision that was applied by the Brebes Religious Court and the Surakarta Religious High Court when annulling the marriage between Astida bint Suma and Rois Qodim bin Qodim because it was proven that their marriage was held in the presence of an unauthorized guardian. However, the decision was canceled by the Supreme Court because

according to the cassation panel, their marriage was valid according to Islamic law, because the issue of guardianship in this case was not absolute.

The case was revealed in the Supreme Court Decision No. 02 K/AG/1985. It was stated that a mother named Siti Ariyah bint Wadran and an uncle named Sarja bin Hadi requested an annulment of the marriage between Astida bint Suma and Rois Qodim bin Qodim to the Brebes Religious Court. This marriage for Astida bint Suma is the second marriage after being officially widowed and has been 24 years old. She and her husband were married at the Office of Religious Affairs (KUA) Tanjung Priuk and in the Marriage Book it was recorded that the guardian of the marriage was an uncle named Supardi bin H. Zaenal. In the *judex facti* court it has been proven that Supardi bin H. Zaenal has no family ties at all with Astida. Astida's real uncle is Sarja who is one of the plaintiffs in this case.

Regarding this case, the Brebes Religious Court in Decision Number 471/1984 dated March 15, 1984 AD coinciding with the 12th Jumadil Akhir 1404 H, decided to grant the lawsuit for annulment of this marriage. The Brebes Religious Court approved the marriage contract between Astida bint Suma and Rois Qodim bin Qodim based on its considerations on Article 28, Article 2 paragraph (1), Article 26 paragraph (1), and Article 25 of Law Number 1 of 1974 concerning Marriage, as well Articles 37 and 38 of Government Regulation Number 9 of 1975 and Article 2 of Minister of Religion Regulation Number 1 of 1952. The Surakarta Religious High Court in its decision Number 27/1984 dated 4 September 1984 AD coinciding with the 8th Dzulhijjah 1404 H amended the Brebes Religious Court Decision. The court of appeal decided to cancel the marriage between Astida bint Suma and Rois Qodim bin Qodim but gave both of them the right to enter into a marriage contract again. In its consideration, the high religious court (PTA) considered that the marriage did not fulfill the pillars of marriage. This consideration is based on the hadith of the Prophet that marriage is not valid except with a guardian and two witnesses, and that a woman who marries without the permission of her guardian then her marriage is void.

Astida bint Suma and Rois Qodim bin Qodim did not accept the decisions of the two courts which had annulled their marriage, therefore they took cassation efforts. In one of their objections, they expressed their strong objection to the decision of the High Religious Court which annulled their marriage because the marriage had been carried out in a manner permitted by Islamic Religious law and the applicable laws and regulations. The Supreme Court upheld this objection and argued that the Brebes Religious Court and the Surakarta Religious High Court had misapplied the law. So in the Supreme Court Decision Number 02 K/AG/1985 dated 25 June

1985, the cassation panel granted the cassation request and annulled the decisions of PTA Surakarta and PA Brebes. In its legal considerations, the Supreme Court was of the opinion that the marriage between Astida bint Suma and Rois Qodim bin Qodim was valid according to Islamic law, because Astida bint Suma was 24 years old and had the status of a widow, so permission to marry from parents or guardianship issues was not absolute/not needed. Again.

It can be said that this legal consideration by the Supreme Court has unraveled some of the tangled threads of guardianship issues in family law discussions. The Supreme Court equated the issue of parental consent and the issue of marital guardianship, which would have implications for not having guardianship for women who are 21 years old. Furthermore, this will have implications for allowing women to marry themselves, women representing their marriages and women becoming marriage guardians when they are 21 years old. These issues are very contrary to the provisions in the Compilation of Islamic Law and the legal practice of marriage so far, and are opposed by some members of the public because they are accused of opening a veil of covert prostitution. But on the other hand, as stated earlier, this regulation is considered to discriminate against women. In addition, confirmation of the Supreme Court's consideration of the status of the woman's widow, which was not found in the UUP or in the Compilation of Islamic Law (KHI) which was issued several years later after this decision. Precisely from a feminist perspective, the categorization of women based on their marital status is a form of stereotypes against women, it only applies to women but not to men, even though this kind of categorization is often found in fiqh books.

METHODS

The author will examine the Supreme Court Decision Number 02 K/AG/1985 dated 25 June 1985 using a gender analysis approach because this issue is closely related to the status of women. How should this issue of guardianship be upheld based on the basic objective of the guardianship itself as a form of protection for women. The study will be conducted using explanative analysis method. The use of this analytical method aims to explain or strengthen the legal provisions that serve as the basis for considering decisions.

In this article, a theoretical framework will be presented which will be used as an analytical tool for the object of study in this article, including the flexibility of guardianship law in Islam, the maqashid of guardianship in Islamic law, and how the issue of male guardianship over women in gender-oriented studies. By using these theories, the author will present findings and discussion covering three main themes related to the issue of women marrying themselves,

women representing their marriages and women becoming marriage guardians. In the end, the author will consider this problem based on the principle of *al-musawah* in *maqashid sharia*.

RESULT AND DISCUSSION

Flexibility in Marriage Guardianship Law

Strictly speaking, the guardianship rules for women in marriage originate from a decree believed to be a hadith of the Prophet, that there is no marriage except with a guardian. Absence in this hadith is discussed further by fiqh scholars, where the majority of them are of the view that this absence means invalidity, meaning that a marriage is not valid unless there is a guardian (Syaukani, 2006). This view then forms a paradigm that the guardian is one of the pillars of marriage, and this view has been adopted by various marriage laws in the Islamic world, including in the Compilation of Islamic Law.

In the context of marriage law in Indonesia, Article 26 paragraph (1) of the UUP stipulates that a marriage is carried out with a legal marriage guardian, if the marriage is carried out without a legal marriage guardian, then the marriage can be cancelled. The Compilation of Islamic Law (KHI) even more clearly states the position of the guardian as one of the pillars of marriage that must be fulfilled for the prospective bride who acts to marry him (Article 19 KHI). In Article 71 KHI it is explained, a marriage can be annulled if the marriage is carried out without a guardian or carried out by a guardian who has no right.

However, the disagreement of all scholars regarding these provisions at least shows that the teaching of guardianship in marriage does not apply *qath'i*, meaning that it must be accepted in a *dharuri* way and as it is and cannot be tampered with. It is evident in the Hanafi school of thought, that the guardianship rules for a widow are very lax, that even an adult and reasonable woman may marry herself or her daughter or become a marriage representative (Tulab, 2017). Recently, there have been countries that have removed the rule of male guardianship over women in this marriage from their marriage laws (Nagar, & Tønnessen, 2017).

This further proves that the guardianship law for women in marriage is flexible as is the nature of Islamic law itself for cases that are in the realm of *ijtihad*iyah. Ibn Qayyim (1432 H) said in a very popular expression in fiqh, that "*taghayyur al-fatwa bi hasab taghayyur al-azminah wa al-amkinah wa al-ahwal wa an-niyat wa al-'awa'id*", changes to the fatwa according to changes in time, place, conditions, intentions and habits. But these changes must remain in order to realize benefit. Shari'a, according to Ibn Qayyim (1432 H), its foundation and basis is based on the wisdom and benefit of the servant in the life of this world and the life hereafter. Everything is

fair, mercy, benefit and wisdom, so any issue that deviates from the principles of justice, mercy and benefit is not Shari'a.

***Maqasid* of Guardianship of Marriage in Islamic Law**

What was stated by Ibn Qayyim (1432 H) was previously the maqashid sharia or the main goal of the sharia, namely to create benefit and prevent evil. The arrangement for guardianship over women in marriage is essentially also aimed at maintaining the benefit and preventing the occurrence of *mafsadatan*. Guardianship itself in Arabic etymologically means *al-mahabbah* (love) and *an-nushrah* (help), and can also mean *al-qudrab* (ability) and *as-sultha* (power) (Zuhaili, 2010). Observing the basic meaning of this word, guardianship is an expression of love and assistance of a guardian towards his guardian because of their weakness or incapacity, so that in order to protect their rights, the guardian is given certain powers to replace their position in caring for them.

In fiqh terms, guardianship is:

القدرة على مباشرة التصرف من غير توقف على اجازة أحد

Most of the fiqh literature defines guardianship or territory as legal authority given to someone who is qualified and competent to protect the interests and rights of others who are unable to do so independently (Almala, 2014).

Basically, guardianship is prescribed for the marriage of people who are considered incompetent and insane in order to protect their benefit and protect their rights because they are weak and powerless (Zuhaili, 2010). Then if that's the case, are women considered as people who are less competent or less capable in matters of marriage? The author tries to explore the opinions of fiqh scholars on this issue.

According to Ibnu Asyur (2001), Al-Qaffal (2007) and Yusuf (2017), and also as alluded to by An-Nawawi in his Al-Majmu', one of the main objectives of this guardianship system is to differentiate (*at-tafriqah*) marriage with other prohibited relationships between men and women such as adultery. Which is also alluded to in the hadith of the Prophet that an adulteress marries herself. However, this goal cannot be said to be the main objective of this trusteeship because the shari'a provisions outside of trusteeship can also serve as a differentiator between marriage and other relationships.

A marriage is closely related to regeneration to produce offspring, therefore parents and relatives have the right to their marriage so that it does not bring badness and tarnish the honor of a family and can mix lineage (Al-Qaffal, 2007; Yusuf, 2017). Thus it can be said that the purpose of guardianship is also closely related to *hifzh an-nasl*, protecting offspring and *hifzh al-farj*, protecting the genitals so that they avoid forbidden relationships. In addition, this guardianship is in the context of maintaining the kinship between the child and his parents or guardian.

The existence of guardians is a form of protection for women, who are often in a weak condition and deliberately weakened in social life. Women because they have desires for men as men have desires for women, while they are weak, it is very possible to get caught up in things that harm themselves and their families, so their marriage matters are left to their parents (Al-Qaffal, 2007). By being with a guardian when having a relationship with a man in marriage, the woman seems to be showing that she has a family that is ready to defend and help her in dealing with problems (Ibn Asyur, 2001).

So it can be said that guardianship in this marriage is a form of caution and vigilance so that women are not trapped in bad relationships, let alone forbidden ones. A guardian is expected to be able to choose a husband who is suitable for the woman and protect her from bad men (Yusuf, 2017). The closest people, the closest family are usually more caring, more loving, and more willing to endure hardships (Al-Qaffal, 2007). If someone does not have a guardian from his relatives to carry out all these functions, then his guardian is the sultan, which according to the Shari'a's actions is *manuth bil mashlahah*.

Gender Perspective on Male Guardianship over Women

In Supreme Court Regulation Number 3 of 2017 concerning Guidelines for Trying Women Against the Law, gender is explained as a concept that refers to the roles, functions and responsibilities of men and women that occur as a result of and can change by social and cultural conditions in society. Gender was recently developed as an analytical tool to understand injustice that occurs due to different treatment of men and women (Faqih, 1996). The difference in treatment referred to here is a distinction that is not natural or created by God, but is the result of cultural and social construction. Marriage law is an object that gets attention in upholding gender equality and justice because it is closely related to the status and function of men and women in social life.

In general, family law emphasizes marriage as a physical and spiritual bond between a man and a woman (Marriage Law, 1974), or a legal contract in which a man and a woman

mutually agree to unite in a life of husband and wife that is together and lasting (Human Rights). Education Associates (HREA), 2004; Rights, 2006). Women in this case become an important part, as a subject in a marriage. Several family laws determine that women, as wives, are one of the pillars of marriage (KHI, 1991; Qatar Family Qanun, 2006). Women in these rules are placed equal to men in marriage.

However, women as one of the pillars of marriage, in marriage practice, are not involved in the marriage contract. The Qatari family law, through Qanun Number 22 of 2006 concerning Family Qanun, does not make guardians a pillar of marriage, but makes guardians a legal requirement for a marriage contract, that in marriage the person who will pronounce the contract is the female guardian. The UAE family law (Ma`had Dubai Al-Qadha`i, 2017) actually stipulates that women are not pillars of marriage because they are not involved in the marriage contract (al-'aqidan). Marriage practices always place women as objects in the marriage contract as someone who is married or married.

In addition, the Syafii, Maliki and Hanbali schools agree that a guardian must be a man, different from the Hanafi school of thought which opens opportunities for women to become guardians (Jaziri, 1986). This provision is considered based on the hadith which confirms that "Women do not marry a woman, and women do not marry themselves." Imam Syafii (t.t), as well as Zuhaili (1985), wrote that if a woman wants to marry her female slave, neither she nor her representative may marry her. For example, in other cases, a guardian cannot appoint a guardian who is a woman to marry a woman, because the woman is not authorized to become marriage guardian, because of that she still does not get that authority even through a representative.

Furthermore, the agreement of women on the marriage contract for some fiqh scholars, the provisions are detailed according to the category or status of the woman and who is the guardian in organizing the marriage. Asy-Syirazi (1992) and Asy-Syabini (2009) for example argue that fathers and grandfathers, who are the guardians of a woman's marriage, may marry off a girl even without their consent, whether the girl is young or an adult. In contrast to the opinion of Auza'i, Thauri, Hanafi School and others, which states that a girl cannot be married except with her permission. So if a girl is married off without her permission, the marriage is invalid (Syaukani, 2006).

In the Hanafi school, guardianship rules only apply to a child, an adult and reasonable woman may marry herself or her daughter or become a representative in marriage (Tulab, 2017). Muslim family laws in the Arab world generally include provisions giving a guardian (usually a male blood relative) guardianship rights over a woman. However, there are countries that limit

this right until a woman reaches a certain age (for example, in Jordan women are placed under guardianship until the age of 30) or for life (for example, in Yemen and Saudi Arabia) (Almala, 2014).

Analysis of the Supreme Court's Decision on the Problem of Marriage Guardians

The author analyzes the Supreme Court Decision Number 02 K/AG/1985 which has legalized a marriage even though it has been proven that the marriage was held with a marriage guardian who has no right. The Supreme Court in its legal considerations emphasized that because Astida bint Suma is 24 years old and has the status of a widow, permission to marry from her parents or guardianship issues is not absolute/no longer needed". Regarding this legal consideration, several things need to be explained. First, regarding permission to marry from parents. Article 6 paragraph (2) of the Marriage Law includes permission from both parents as a condition for marriage for someone who has not reached the age of 21 (twenty) years. This provision is also reaffirmed in KHI Article 15 paragraph (2) by referring to the provisions of the Marriage Law. Regarding parental consent, the Supreme Court is of the opinion that because Astida bint Suma is 24 years old, there is no need for parental consent in her marriage. There is no need to question this because the law only requires parental consent for someone who is not yet 21 years old, meaning that according to mukhalafah, a person who is 21 years old does not need parental consent anymore.

The second issue is related to guardianship issues. Guardianship issues in marriage are different from parental consent to marriage. Regarding parental consent, the provisions apply to both men and women. In contrast to guardianship in marriage which only applies to women and does not apply to men. Guardianship also consists of the male family (Jaziri, 1986), as explained in KHI Article 20 and Article 21. Meanwhile, parental consent includes permission from the mother and father of the person who is about to marry. Another difference is that the issue of guardianship is related to the pronouncement of the marriage contract, while the consent of the parents is not related to this issue. In KHI Chapter XV, the issue of guardianship is indeed included, but by looking at the articles in it, guardianship in that chapter is not related to the issue of marriage guardians, because guardianship in Islamic law is not only a matter of a marriage contract (Almala, 2014).

So it can be said that it would be inappropriate to use the article on the person's permit in the case above, unless the Supreme Court gives a new interpretation to it, that what is meant by the permit in the provisions of the article includes guardianship issues. However, the Supreme Court did not seem to mention the interpretation of the article. The Supreme Court actually

distinguished parental consent and guardianship issues in its legal considerations. So this is where the Supreme Court's *ijtihad* lies, which has not been listed either in the Marriage Law or in the KHI, by creating a new norm that guardianship issues are not absolutely necessary in the marriage of a widow who is 24 years old. The results of Nst's research (2022), show that the judges of the Religious Courts themselves do not have a uniform opinion regarding this marriage guardian, whether it is enforced absolutely or limitedly applied to women up to a certain age limit.

The third problem is related to the Supreme Court's emphasis on the status of the 24-year-old woman. Regarding the number 24 years listed in the consideration of the Supreme Court, this comes from the fact of the woman's age in this case. Then, will this rule only apply to women who are 24 years old? If we examine the Marriage Law and KHI, there are four types of figures related to the status of women, namely age 16 years (in the Marriage Law before the amendment), which in the amendment to the Marriage Law is 19 years the same as men, 21 years old, 18 years old and 12 years old. There is no article that specifically mentions the number 24 years.

Thus, if an interpretation is made of the mention of adopting 24 years in the rule issued by the Supreme Court, by relating it to the categorization of women in laws and regulations, the number 24 is not absolute, but can be interpreted or interpreted at least at the age of 21, moreover The Supreme Court in its consideration alluded to parental consent. So that this rule can be applied to women who are 21 years old, not absolutely to women who are 24 years old.

The fourth problem is related to the status of widows. The categorization of widow status in matters of marital guardianship is in line with the views of *fiqh* scholars. In *fiqh* there are scholars who distinguish between girls who have never been married (*al-bikr*) and widowed women who have been married (*ats-tsayyib*). This distinction is actually also contained in positive law, where a person who is married can be categorized as an adult even though he is not yet 19 years old. Scholars who distinguish the status of a girl or a woman's widow, among other things, argue that a girl does not need to be asked for consent regarding her marriage, unlike a widow who must be asked for her consent (Syaukani, 2006).

Apart from the opinion of the majority of *fiqh* scholars, there are scholars who differentiate the status of women in guardianship of children or adults only. This distinction actually does not only apply to women but also to men. A child, both male and female, if married must go through a guardian, whereas if they are mature and intelligent, then they may declare their own marriage contract without having to go through a guardian. This is the opinion of Abu Hanifah and Abu Yusuf (Zuhaili, 1985; Tulab, 2017).

Seeing the principles outlined by the Supreme Court in its decision, the cassation panel still adheres to the opinion of the fiqh scholars who differentiate the status of a woman's widow or girl. Although in fact the Supreme Court has come out of the opinion of the majority of scholars who still require that even if a widow is married, she must be with a guardian. This rule can be said to be in the midst of the opinions of scholars, which on the one hand obliges guardianship for both girls and widows, and on the other hand it frees women, both girls and widows, as long as they are of mature age and are intelligent from guardianship issues. Thus, it can be said that the Supreme Court gave birth to its own school of thought in this matter of trusteeship. However, it is not impossible to adhere to Abu Hanifah's opinion to allow mature and intelligent women to marry themselves, as has also been implemented in Moroccan family law (Nagar, & Tønnessen, 2017).

From a gender perspective, the Hanafi school touches more on the principle of equality for at least two reasons. First, the Hanafi school of thought does not discriminate between a woman's marital status, between a widow and a girl. Some fiqh scholars differentiate this status with respect to a woman's right to express opinions and to be asked for permission to marry. In the Supreme Court Decision itself this distinction is still maintained. This view from a gender perspective is a gender stereotype bias that assumes widowed women understand marriage better than girls who have never been married. With more open access to education for women, of course this view no longer needs to be defended. Second, the Hanafi school of thought does not differentiate the urgency of guardianship between men and women. This school considers that guardianship applies to both male and female children. In contrast to some schools of thought which continue to enforce guardianship over women even though they are of mature age, but do not enforce it on men after adulthood.

Furthermore, in the case that occurred above, the marriage contract between Astida bint Suma and Rois Qodim bin Qodim was not carried out by Astida bint Suma, as the prospective wife, but carried out by someone else with Rois Qodim bin Qodim as the prospective husband. With the Supreme Court deeming this marriage legal, this fact gave birth to another norm, that women can represent their marriage to other people. Because the Supreme Court has been of the opinion that in the case above the issue of guardianship is not absolute, the woman certainly has the right to hand over the affairs of her marriage contract to another person, just as an adult prospective husband can represent his marriage contract to another person.

The majority of fiqh scholars are of the opinion that a woman has no right to represent her marriage to another person because she herself is not entitled to the contract (Syafi'I, t.t.;

Zuhaili, 1985). In contrast to the opinion of the Hanafi school of thought, which allows both men and women who are Muslim converts to represent their marriage to other people (Zuhaili, 1985; Tulab, 2017). Furthermore, according to the Hanafi school, a representative in marriage is the same as a representative in all forms of contract, a representative may not represent another person unless the person who first provided the representation permits it, for example he has delegated his marriage affairs to the person he wants, or he has surrendering his affairs or surrendering his marital affairs to him (Zuhaili, 1985).

The Supreme Court in its decision above, has adhered to the opinion of the Hanafi school of thought, so it did not grant the Plaintiff's lawsuit for annulment of marriage. The Supreme Court is not alone in this. Thus, the Supreme Court's considerations should not be limited to widows who are 24 years old. The Supreme Court can expand its rules as the opinion of the Hanafi school of thought applies to all mature and intelligent women.

However, it should be noted, as is the rule of flexibility in Islamic law, that Islamic law can indeed change according to changing times and conditions. The current position of women can be said to be different from the past. But any of these changes must remain within the framework of benefit. In the Supreme Court Decision, the benefit side of legalizing the marriage in this case is more important, because in the trial itself it has been proven that the motives of the parents who want to annul their child's marriage are not good.

In the concept of representative law, anything that a person may do directly by himself, then he may represent it to another person in relation to that case if the case does permit replacement (Az-Zuhaili, 2010). Thus the permissibility of representing a marriage as in the case of the Supreme Court Decision above can be said to be due to the opinion of the Supreme Court that a woman in that case can also be a marriage guardian. The position of a woman as marriage guardian is debated in fiqh.

The Syafii, Maliki and Hanbali schools or the majority of scholars agree that a guardian must be male (Az-Zuhaili, 2010) KHI adheres to this opinion, as stated in Article 20 paragraph (1) that a person who acts as a marriage guardian is a man who fulfill the requirements of Islamic law, namely Muslim, aqil and baligh. From the nasab guardian consists of four groups, namely the group of male relatives straight up, the group of relatives of biological brothers or father's brothers, and their male descendants, the group of relatives of uncles, namely biological brothers fathers, paternal brothers and their male descendants, and groups of grandfather's, half-brothers and their male descendants. This provision is considered based on the hadith which confirms that

"Women do not marry a woman, and women do not marry themselves." (Narrated by Ibn Majah and Ad-Daruquthni)

Whereas in the Hanafi school, because they themselves allow women to marry themselves when they are mature, sane and intelligent, they do not require that the guardian must be a male (Jaziri, 1986; Az-Zuhaili, 2010). Thus according to this school, a mother who gives birth to her child may marry him, not necessarily through a male relative. This school also answers the concerns of some mothers in Saudi Arabia in a report by Human Rights Watch (July 2016). In the perspective of gender analysis, the view of the Hanafi school of thought is very gender-just because it does not discriminate between a man and a woman based solely on gender.

From an Islamic perspective, it is known as the principle of *al-musawab* or the principle of equality, as stated by Ibnu Asyur (2001). *Al-musāwāb*, or equality, in the view of Ibn 'Asyur, is a basic principle in sharia law. Based on this principle of equality, every Muslim has an equal/equal position before sharia; should not be distinguished based on gender, social status, ethnicity and so on. This principle is based on Islamic principles as a natural religion. Humans who are equal in nature or in terms of creation, then they are also equal in law. So that from the basyariyyah aspect, humans, regardless of gender, are equal, where they all come from the Prophet Adam. So in this way, it is clear that humans are the same in terms of *syara'*, both from the aspect of *dharūriyat* and *hajiyat* needs. There are no points of difference between humans in the *dharūri* aspect and there are very few differences in the *hajiyat* aspect.

According to Ibn 'Asyur, enforcement of the principle of *al-musāwāb* should not be violated unless there are obstacles. Conditions that may impede the enforcement of this principle of equality are factors, which if neglected to uphold this principle are aimed at bringing about greater benefit or preventing harm from occurring. Ibn 'Asyur defines *mashlahab* as an act that brings goodness or benefits forever or that touches the majority or some people. Whereas *mafsadah* is the opposite of *mashlahab*, which is an act that causes damage or harm, whether it lasts forever or not, is felt by the majority of people and some people (Yaqin, 2016).

Based on this *al-musāwāb* principle, if it is related to the provision of marriage guardians, then the basic principles or basic rules in marriage guardianship should be equal between men and women; may not distinguish legal provisions between men and women based solely on their gender. This provision is very much in line with the provisions for marriage guardians in the Hanafi school of thought; where they do not differentiate between men and women, they are equally entitled to carry out their own marriage if they are of age and legally competent.

CONCLUSIONS

The legal breakthrough made by the Supreme Court regarding the absoluteness of guardianship issues has not been fully followed by current judges. This rule can actually be applied in other cases other than cases of annulment of marriage, such as the case of *itsbat nikah*. In the case of *itsbat nikah*, the fact is sometimes found that the person who is getting married is not a person who has the right to be a guardian, but this fact should refer to the Supreme Court rule above not to reject *itsbat nikah*, but must be checked again whether the status of the woman in the marriage has been adult, or 21 years old, or widow status, and so on. However, the emphasis on the status of widows in this decision also needs to be criticized because it creates gender stereotypes.

Guardianship in marriage is basically a form of protection for women, this principle must be upheld in guardianship arrangements, not to leave the *maqasid* guardianship itself. Based on the principle of *al-musāwāh*, the basic principle in marital guardianship is that men and women are equal; may not distinguish legal provisions between men and women based solely on their gender, except based on benefit. The legal findings above show the dynamics of guardianship law over women in marriage, so that judges and officials who administer marriage must apply it more wisely and must remain within the framework of benefit development.

Reference

- Al-Jauziyyah, Ibnu Qayyim. (1432 H). *I'lam Al-Muwaqqi'in 'an Rabb Al-'Alamin*. Dammam: Dar Ibnul Jauzi.
- Almala, A. (2014). *Gender and guardianship in Jordan: femininity, compliance, and resistance* (Doctoral dissertation, SOAS, University of London).
- Al-Qaffal, Muhammad bin Ali. (2007). *Mabasin Asy-Syari'ah fi Furu' Asy-Syafi'iyah*. Beirut: Dar Al-Kitab Al-Ilmiyah.
- Alsahi, H. (2018). The Twitter Campaign to End the Male Guardianship System in Saudi Arabia. *Journal of Arabian Studies*, 8(2), 298-318.
- Asy-Syafi'I, Muhammad bin Idris. (t.t). *Al-Umm*. Beirut: Dar al-Ma'rifah.
- Asy-Syaukani, Muhammad bin Ali. (1427 H/2006 M). *Nail al-Awṭhar min Asrar Muntaqa al-Akḥbar*. Arab Saudi: Dar Ibn al-Jauzi.
- Az-Syirazi, Abu Ishak. (1992). *Al-Muhadzdzab fi Fiqh Al-Imam Asy-Syafi'I*. Damaskus: Dar Al-Qalam.

- Az-Zuhaili, Wahbah. (1985). *Al-Fiqh al-Islami wa Adillatub*. Damaskus: Dar al-Fikr.
- Az-Zuhaili, Wahbah. (2010). *Mausu'ab Al-Fiqh Al-Islami wa Al-Qadhaya Al-Mu'ashirah*. Damaskus: Dar Al-Fikr.
- Departemen Agama, R. I. (2001). *Kompilasi Hukum Islam*. Jakarta: Direktorat Jenderal Pembinaan Kelembagaan Agama Islam.
- Fakih, Mansour. "Posisi Kaum Perempuan dalam Islam: Tinjauan Analisis Gender." *Tarjih: Jurnal Tarjih dan Pengembangan Pemikiran Islam* 1.1 (1996): 22-37.
- Human Rights Education Associates (HREA). (Februari 2004). *THE MOROCCAN FAMILY CODE (MOUDAWANA), An unofficial English translation of the original Arabic text*. Diakses melalui: <http://www.hrea.org/wp-content/uploads/2015/02/Moudawana.pdf>. Tanggal 15 Januari 2021.
- Human Rights Watch. (Juli 2016). *Boxed in: women and Saudi Arabia's male guardianship system*. Diakses melalui <https://www.hrw.org/report/2016/07/16/boxed/women-and-saudi-arabias-male-guardianship-system>, Tanggal 12 Januari 2021.
- Ibnu Asyur, Muhammad Tahir. (2001). *Maqashid Asy-Syariah Al-Islamiyah*. Amman: Dar An-Nafais.
- Jaziri, Abdur Rahman. (1986). *Al-Fiqh 'ala al-Mazahib al-Arba'ah*. Beirut: Darul Fikr.
- Ma'had Dubai Al-Qadha'I. (2017). *Qanun Al-Ahwal Asy-Syakhsbiyyah Nomor 28 Tahun 2005*. Dubai: Al-Ma'had.
- Mahmood, T. (1972). *Family law reform in the Muslim world*. New Delhi: Indian Law Institute.
- Nagar, S. E., & Tønnessen, L. (2017). Family law reform in Sudan: competing claims for gender justice between sharia and women's human rights. *CMI Report*.
- Nst, M. I. (2022). *PERWALLAN NIKAH ATAS PEREMPUAN MENURUT KHI DAN PUTUSAN MAHKAMAH AGUNG (Tesis, UNIVERSITAS ISLAM NEGERI SUMATERA UTARA MEDAN)*.
- Rights, G. (2006). *The Moroccan Family Code (Moudawana) of February 5, 2004: An unofficial English translation of the original Arabic text*. Rabat: Global.
- Syed, J., Ali, F., & Hennekam, S. (2018). Gender equality in employment in Saudi Arabia: a relational perspective. *Career Development International*.
- Tulab, T. (2017). Tinjauan Status Wali dalam Perkawinan Berdasar Pendekatan Feminis. *Ulul Albab: Jurnal Studi dan Penelitian Hukum Islam*, 1(1), 152-164.
- Undang-Undang Republik Indonesia Nomor 1 Tahun 1974 Tentang Perkawinan.

- Yaqin, A. (2016). Revitalisasi Maqashid Al-Syari'ah dalam Istinbath Hukum Islam: Kajian atas Pemikiran Muhammad Al-Thahir Ibnu 'Asyur. *Asy-Syir'ah: Jurnal Ilmu Syari'ah dan Hukum*, 50(2), 315-340.
- Yusuf, Sarthuth. (2017). Maqashid Asy-Syari'ah Al-Islamiya Al-Muta'alliqah bi Al-Ushrah. *Diklat. University Center of El Bayadh Nour El Bachir*. Dikutip dari <https://www.cu-elbayadh.dz>.
- Zainah Anwar and Jana S. Rumminger. (2007). Justice and Equality in Muslim Family Laws: Challenges, Possibilities, and Strategies for Reform', *64 WASHINGTON & LEE LAW REVIEW* 1529. Diakses melalui <https://scholarlycommons.law.wlu.edu/wlulr/vol64/iss4/12>.