

“FAIR” STATUS OF MARRIAGE WALI ACCORDING TO SHAFI'I MAZHAB AND HANAFI MAZHAB

Fadhil Mubarak¹ & Januddin²

¹Universitas Islam Malang, fadhilmubarakaisma@gmail.com

²STIS Ummul Ayman, Pidie Jaya, januddinyusuf@stisummulayman.ac.id

ABSTRACT

This research is motivated by the existence of a marriage carried out by a virtuous wali in a society where the majority adhere to the Shafi'i school of thought. The purpose of this research is to find out what the opinion of the Shafi'i and Hanafi schools is about the just status of marriage wali today, and find out how the opinion of the Syafi'i and Hanafi schools compares the status of marriage wali. This research is library research. Data analysis method used comparative method. The object of this study is the comparison of the Syafi'i and Hanafi schools regarding fair wali as a condition for the validity of a marriage contract. In addition, KHI does not require that wali in marriage must be fair. The Syafi'i school of thought explains that the requirements for a wali are fair with six criteria, namely Islam, puberty, sound mind, independence, male and fair. When viewed from the opinion of the Shafi'i school of thought, the implementation of marriage by a virtuous wali, the marriage is void. However, Islamic law is not rigid. Even though according to Islamic law the marriage of a person whose wali is wicked is void, there is still a loophole for his child's marriage to remain valid according to Islamic law. By following the opinion of other scholars such as the Hanafi school of thought, the marriage is still valid with the following reasons; First, namely, someone's Islam is considered sufficient to become a marriage wali, so it doesn't look at whether the person is fair or not. The two wicked wali may become wali, namely looking at the element of benefit for others.

Keywords: Fair State, Marriage Wali, Shafi'i Mazhab, Hanafi Mazhab

A. PRELIMINARY

Getting married is something that is highly recommended for everyone who has had their wish for him (Abi Syuja', n.d.a). In addition to channeling biological needs, marriage also aims to maintain and continue offspring and increase the number of Muslims. Marriage in Islam is also in harmony with the main principles of Islamic teachings which oblige every Muslim to guard five things. What is meant is protecting religion (faith), mind,

property, soul, and offspring (Ibrahim al-Bajuri, n.d.a).

This is where Islamic criminal law was born in which every Muslim will be punished if he deliberately damages these five things. Those who undermine religion by apostasy are punished by death. The destroyer of reason by drinking khamr is lashed 80 times. Theft of other people's property was punished by cutting off the hands. People who eliminate souls by

killing will be subject to qisas law. Even so, those who damage their offspring (lines) by committing adultery will be subject to stoning or 100 lashes.

Protecting offspring is a significant thing in Islam considering that the punishment given to adulterers is very severe. That's why getting married is something that every Muslim urgently needs to know by studying the conditions, pillars, and other things that make a marriage valid or not. The Marriage Law states that a marriage is considered valid if it is carried out in accordance with the respective religious procedures (Article 2 paragraph 1 of the Marriage Law). So that every Muslim who gets married must follow the procedures that have been regulated in Islam. Islam, as regulated in the Compilation of Islamic Law, requires that there are five pillars that must be fulfilled in a marriage, namely: prospective husband, prospective wife, marriage wali, two witnesses, consent and qabul (KHI Article 14).

Each of the pillars above has its own qualifications to be legal as pillars, including marriage wali. The wali himself is a term for the male side of the family or others who are in charge of supervising the condition or condition of a woman, especially in the aspect of marriage. Marriage wali is one of the pillars of

marriage in Islam and has several criteria that must be met in order for him to become a marriage wali. The criteria referred to include, the marriage wali must be Muslim, mature, intelligent, independent, male, and fair (Ibrahim al-Bajuri, n.d.b). One of the most urgent things from some of these qualifications is that the marriage wali is required to be fair (has the trait of '*adalah*').

In Arabic, '*adalah*' included in the word *musytarak* (Ibn Mandzur, 1990). The meaning of the word '*adalah*' that it has various meanings, the meaning of '*adalah*' far from one another depending on where it is used. Scholars have presented various definitions of '*adalah*' which is a requirement for marriage wali. But in simple terms, '*adalah*' in the case of a marriage wali is never committing a major sin at all and not committing a minor sin persistently (Ibrahim al-Bajuri, n.d.b).

During his lifetime, the salaf scholars, there was no difference of opinion regarding the status of '*adalah*' as one of the conditions for walihip of marriage. Salaf scholars are scholars who lived in the first, second and third centuries of the Hijri. But as time goes by, it is increasingly difficult to find a marriage wali who has the trait of '*adalah*'. So Imam al-Ghazali opened his voice that '*adalah*' is no longer part of the qualifications that

must be met by marriage wali (Ibrahim al-Bajuri, n.d.b). Imam al-Ghazali's opinion opened a new way of thinking in the Islamic world regarding the just status of marriage wali. So that the pros and cons were born about this.

This opinion has very significant consequences for the continuity of a marriage. As explained above, *'adalah* is one of the requirements for marriage wali where a person is not legally married as wali if he does not have this trait. In addition, marriage wali is one of the pillars of marriage. This means that if the marriage does not include a wali, then the marriage is invalid. So the premise obtained is: if a marriage wali is unfair, then the marriage is invalid.

If a marriage is not valid in the eyes of Islamic law, but the perpetrator of the marriage still considers it valid and the bride and groom have intercourse, then according to the law it is considered adultery. However, if there are scholars who argue that *'adalah* is not a requirement that a marriage wali must have, then the consequences will be inversely proportional to the premise above which will lead to adultery.

As has been known above that this matter is urgent because it can result in adultery. So there is a need for further

explanation about how the fair status of marriage wali is actually according to the Syafi'i and Hanafi schools.

Of the fair requirements for a wali, there is a long *ihktilaf*. According to strong schools of thought, one cannot become a marriage wali, the same as being a wali in matters of property. In addition, because of the words of Rasulullah SAW:

"From Ibn Abbas he said, that Rasulullah Shallallaahu 'alaihi wa Sallam said: There is no marriage except for the wali who is Mursyid." (Muhammad al-Husein al-Baghuwi, 2013).

Because a wicked person can invalidate his position as a witness, so can his position as a wali, similar to the nature of slavery. With the exception of a wicked master, the master may marry a female slave even though he is wicked because he marries because he owns the slave, not because of walihip.

According to Imam Nawawi: Imam Ghazali was once asked about the walihip of a wicked person. Imam Ghazali said: Actually, if we remove the walihip of a ungodly person, the walihip will surely be transferred to a judge who does the work of a wali who we accuse him of being wicked too. So if the wicked wali does not become a wali, there will be no other wali besides him. Imam Nawawi said: What

Imam Ghazali said was good. So it should practice this opinion (Taqiyuddin Abu Bakar, 1993).

The Syafi'i school of thought believes that a wicked person other than an *imam a'dham* (Head of State) has no right to become a wali because that wickedness is a deficiency that makes testimony disgraceful. Some of the scholars say: Wicked people can become wali. The preferred opinion of Imam Nawawi, like Ibn Shalah and as-Subki, is Imam Ghazali's fatwa that walihip remains in the hands of an evil wali, if it is transferred, it is instead held by an evil judge (Abu Bakr al-Masyhur, n.d.). If the wicked wali repents with Saheeh's repentance, he can immediately marry her, according to the opinion guided by Abu Ishaq ash-Shirazi like other scholars besides him. But according to the opinion of Imam Nawawi and Imam Rafi'i that it is not possible to get married except after *istibra'* (for one year) and this opinion is guided by as-Subki (Zainuddin, 1979).

The Syafi'i school believes that the requirements for a wali must be fair. However, there are still many female wali who want to marry off their daughters who do not understand this requirement. Even though, of course, a fair wali is a condition for a valid marriage. If the marriage is not valid then what their daughter commits is

adultery. If there are opinions in other schools of thought that have a variant of the opinion of the clergy who are more tolerant of the issue of the fair status of marriage wali, then this could be a solution so that a marriage remains valid even though the fair status of marriage wali is not in accordance with what is in the Shafi'i school of thought. In this case, the other schools of thought are taken by the author from the Hanafi school.

This is the reason for the author to raise this issue for further research on the just status of marriage wali according to the Shafi'i and Hanafi schools of thought. This research is an urgent and significant matter to study so that it is clear how the fair status of marriage wali is in comparison to the two major schools of thought.

The purpose of this study is to find out how the opinions of the Shafi'i and Hanafi schools regarding the fair status of marriage wali today and to find out how the opinion of the Syafi'i and Hanafi schools compares the status of marriage wali.

B. LITERATURE REVIEW

There are several studies that have the same context as this research. However, even though they have the same context, namely around marriage wali,

there is a significant difference in terms of the focus of the problem with these studies. In the following, several previous studies will be listed so that readers can see and know where the differences lie between this research and several other studies. Thus it can also be known the authenticity of this research. Several studies that have been examined include:

Research conducted by Nunung Rodliyah (2013) with the title *“Fungsi Wali Nikah dalam Akad Nikah Menurut Hukum Islam”* discusses how the function of a marriage wali in a marriage contract, how is the urgency of a marriage wali in a marriage, how are the differing opinions of Fiqh scholars regarding the function of a marriage wali in a marriage contract, and also discusses the criteria for a valid marriage wali in Islamic law.

There is also research from the Sharia Faculty of IAIN Raden Intan Lampung (2011), entitled *“Kedudukan Wali dalam Pernikahan: Studi Pemikiran Syafi’iyyah, Hanafiyah, dan Praktiknya di Indonesia”*. In this study discussed the position of marriage wali according to the two schools of thought.

Furthermore, this study explains that marriage is a dharuri benefit, namely to maintain honor and offspring. If this benefit is not maintained, it will cause

damage. One of the things that can maintain honor and lineage is a wali. Scholars have different understandings of wali. Not only differences of opinion in each scholar, but also in practice in various Muslim countries, including Indonesia. The similarity of opinion between the two scholars is that the wali must be a Muslim, mature, and intelligent, while the difference according to the scholars of Shafi’iyyah salaf is that the wali must be male and fair. While the Hanafiyah scholars allow a wicked person and a woman to be a wali.

Then there is research from Hidayati and Taufika in (2014) entitled *“Analisis Yuridis Peranan Wali Nikah Menurut Fiqh Islam dan Kompilasi Hukum Islam (Studi Putusan Mahkamah Agung Republik Indonesia NO.261/K/AG/2009)”*. This study also explains the role and function of the marriage wali in a marriage. However, this research also makes KHI an object of comparison with Islamic law. This research includes field research where the research is based on events in the field, namely the decision of the Supreme Court of the Republic of Indonesia NO.261/K/AG/2009.

While the research that will be carried out is different from some of the research that has been described previously. This research will focus more

on how the comparison of the two schools of thought (Syafi'i and Hanafi) responds to the issue of marriage wali with the qualification of having the character of '*adalah*'. This research applies a comparative study based on literature research on how the Shafi'i and Hanafi schools view the fair status of a wali in marriage.

1. Marriage Guardian (Wali)

Guardianship in marriage is a syar'i power or authority over a group of people, which is delegated to a person who is perfect, because of certain deficiencies in the person who is controlled, for his own benefit. (Muhammad Jawad Mugniyah, 1994).

Guardian is a legal provision that can be imposed on other people in accordance with the field of law. In general, the guardian is interpreted in two meanings, namely, in a general sense and a special meaning. Guardian in the general sense is guardianship relating to humans and objects, while guardian in a special sense is guardianship of humans in marriage. What is discussed here is the guardianship of humans, namely the issue of guardianship in marriage (Sayyid Sabiq, 1981).

In marriage, the guardian is someone who acts on behalf of the bride in

a marriage contract. The marriage contract is carried out by two parties, namely the male party which is carried out by the groom himself and the female party which is carried out by his guardian (Amir Syarifuddin, 2006).

Both Islamic law and the juridical basis contained in article 19 of the Compilation of Islamic Law (KHI) on marriage guardians in marriage are pillars that must be fulfilled for the prospective bride who acts to marry him off.

According to Imam Syafi'i, Imam Malik, and Hambali, guardianship in marriage is a condition for the validity of a marriage, meaning that without a guardian the marriage is considered invalid.

Marriage is not just an engagement between the two partners, but more or less will have an impact on relatives and their families including guardians. Therefore, guardians must be selective in choosing partners for people under their guardianship.

Indeed, there is not a single verse of the Qur'an that is clear in a similar way to al-nash which requires the existence of a guardian in the marriage contract. but in the Qur'an there are textual instructions which figuratively do not point to the necessity of having a guardian, but from

this verse in terms of texts, it can be understood as requiring a guardian.

Among the verses of the Qur'an which indicate the existence of a guardian are the following:

وَلَا تَنْكِحُوا الْمُشْرِكَةَ حَتَّىٰ يُؤْمِنَ ۚ وَلَا مَٔمَّةً مُّؤْمِنَةً خَيْرٌ مِّنْ مُّشْرِكَةٍ وَلَوْ أَعْجَبَتْكُمْ ۚ وَلَا تُنكِحُوا الْمُشْرِكِينَ حَتَّىٰ يُؤْمِنُوا ۚ وَلَعَبْدٌ مُّؤْمِنٌ خَيْرٌ مِّنْ مُّشْرِكٍ وَلَوْ أَعْجَبَكُمْ ۚ أُولَٰئِكَ يَدْعُونَ إِلَى النَّارِ ۚ وَاللَّهُ يَدْعُو إِلَى الْجَنَّةِ وَالْمَغْفِرَةِ بِإِذْنِهِ ۖ وَيُبَيِّنُ آيَاتِهِ لِلنَّاسِ لَعَلَّهُمْ يَتَذَكَّرُونَ

And do not marry the idolatresses until they believe, and certainly a believing maid is better than an idolatress woman, even though she should please you; and do not give (believing women) in marriage to idolaters until they believe, and certainly a believing servant is better than an idolater, even though he should please you; these invite to the fire, and Allah invites to the garden and to forgiveness by His will, and makes clear His communications to men, that they may be mindful. (Q.S. al-Baqarah: 221)

The legal basis for the existence of a guardian is often identified with witnesses in marriage, among the words of Allah in the Quran which describe witnesses are:

وَالَّذِينَ لَا يَشْهَدُونَ الزُّورَ وَإِذَا مَرُّوا بِاللَّغْوِ مَرُّوا كِرَامًا

“And [they are] those who do not testify to falsehood, and when they pass near ill speech, they pass by with dignity.” (Q.S. al-Furqaan: 72)

2. The Nature of ‘Adalah

The first thing that will be discussed first is ‘*adalah* (fair) universally. The nature of justice is one of the aspects that absolutely exists in the nature of every human being, and is very appropriate to be implemented in every aspect of the life of every social being, especially in a social environment.

Basically, justice is one of the things or characteristics that is based on every human being who has his own principles in his life, so that they do not apply or even never prioritize the attitude of taking sides with each party, or on certain subjects who are experiencing a dispute.

In addition to its anti-partisan nature towards one person against another, in general, a fair attitude is a reflection that can be used as an appropriate inspiration to be applied in the community environment.

As for justice, what is meant in the case of marriage guardians is not the nature of justice as stated above. However, the intention of being just here is the

opposite of being wicked. There is a fair term that is the opposite of *al-jawr*. Linguistically it means the middle in matters, namely the middle between exaggeration and underestimation. While what is meant here is the character of '*adalah*' which means the character of someone who always maintains his *murū'ah* or authority from things that can bring him down. Usually this trait is a trait that appears outwardly. There is also the notion of '*adalah*' according to the *fūqahā*, that is someone whose good is more dominant than his bad.

Antonym of '*adalah*' is wicked. Wicked means one who comes out of obedience. The meaning of wicked, its origin is the discharge of something from something in the form of corruption. Wickedness can be a sin for committing shirk, it can also be for committing a big sin even if it is a little, it can also be for committing other sins. Or in simple terms, "wicked is a person who commits a big sin or a person who continuously commits a small sin." (Wahbah Zuhaili, 1984).

A guardian must be able to be fair or able to determine whether the marriage is good or not, as is the case to prevent incestuous marriages. The guardian must be able to be fair to the women who are in his guardianship and may not use coercion which can harm the bride. People who

have fair character usually have a firm stance in obedience to the practice of religious teachings, have noble morals, have self-respect (*murū'ah*) in their family.

C. RESEARCH METHODS

The method used in this research is a qualitative approach with the type of library research. This research is a comparative study that compares the opinions in the Shafi'i and Hanafi schools. The approach used is a normative approach, namely an approach that views religion in terms of its basic and original teachings from God in which there is no human thought.

The data collection stage uses the documentation method by collecting document materials such as collecting books and records that have relevance to the research being carried out for further analysis. In this study, the data collected were related to the just status of marriage guardians according to the Shafi'i and Hanafi schools.

Data analysis uses a descriptive analysis method, which is a method that is carried out by explaining the problems that have been collected through the documentation method. Then, these problems will be analyzed and further elaborated, so that a conclusion that is in

accordance with the normative approach can be found.

D. RESULTS AND ANALYSIS

1. Status of Fair Marriage Guardian in Syafi'i Mazhab

Sheikh Muhammad bin Qasim al-Ghazi explained that the conditions for each guardian and two witnesses required six conditions, namely: Islam, maturity, sound mind, independence, male, and fair (Muhammad bin Qosim asy-Syafi'i, 1982). Fasiq people cannot be guardians. Then Muhammad bin Qasim al-Ghazi made an exception from the last condition, namely everything that was stored in his words, that unless a tyrannical infidel woman's marriage does not need the Islam of the guardian, likewise slaves, do not need the justice of the *sayyid* (slave owner). Then it is permissible (legally) for the guardian of a woman to be a fasiq person. All of these issues in relation to guardians (in marriage) are raised in the matter of two marriage witnesses (Ibrahim al-Bajuri, n.d.b).

Shaykh Abu Syujak is of the opinion that the marriage contract is invalid if there is no male guardian and two male witnesses who are fair (straight). As according to Taqiyuddin Abu Bakar, there are six conditions needed for a person to become a legal guardian, namely: Islam, maturity, intelligence,

independence, and fairness. However, dhimmi infidel women do not need Islamic guardians, and for amah marriages they do not require the requirements of the just character of the guardian. (Taqiyuddin Abu Bakar, n.d.).

In We, I'natutthalibin, it is also explained that the guardian must be fair, that is, it is also required that the guardian must be fair, free, not a slave, and the situation is that of a mulatto. So, fasiq people other than heads of state are not entitled to become guardians, because fasiqan is a deficiency that makes testimony disgraceful, which hinders guardianship, as is slavery, this opinion is the Shafi'i school of thought as based on the Sahih Hadith: Marriage is invalid unless there is a guardian who is murshid, that is fair (Abu Bakar al-Masyhur, n.d.).

Wahbah az-Zuhaili (1984) explains that there are six conditions to become a guardian, namely: *first*, the existence of expert perfection, namely being mature and intelligent. So, there is no right to territory for people who are crazy or small children because both of them do not have territory over themselves so that both of them also don't have territory over other people because people who don't have it can't possibly give.

Second, the religion of the guardian and the person being guarded are the same. Thus, there is no territorial right of a non-Muslim to a Muslim, just as there is no territory for a Muslim to a non-Muslim, because religious similarity is usually the main motivation and factor for compassion and concern for benefit.

Third, fair, meaning firm and upright in religion, morals, and self-esteem. So, there is no territory owned by someone who is wicked because his wickedness raises doubts whether he can pay attention to the welfare of others.

Fourth, being able to carry out various tasharruf with full trust, because the aim of the area is to realize the benefit of the person being guarded and this will not be achieved if the guardian is weak and not trustworthy.

Fifth, pay attention and pay attention to the benefit of the person who is passed on in carrying out tasharruf.

Of the many conditions and pillars for a valid marriage (marriage) according to Islamic law, the guardian of marriage is very important and decisive. Imam Syafi'i is of the opinion that marriage is illegal without a guardian or the guardian does not meet the criteria for the bride; whereas for the groom, a marriage guardian is not

required for a valid marriage (Muhammad Idris Ramulyo, 1974).

The majority of scholars, including Imam Syafi'i and Ahmad bin Hanbal, are of the opinion that a woman (especially one who is beautiful and comes from a respected family, according to Imam Malik) is not justified in marrying herself or other women. Thus, marriage cannot take place by the actions or words of the woman herself. This is because guardianship is a condition that must be met for the validity of a marriage contract. And, that the person making the contract must be a guardian who is entitled and fair in the status described above (Muhammad Bagir Al-Habsyi, 2002).

According to Imam Syafi'i, a guardian in marriage for girls is a must and becomes part of the pillars of marriage, so marriages carried out without guardians are invalid.

2. Status of Fair Marriage Guardian in Hanafi Mazhab

In order to become a guardian, one must meet the following requirements: be independent, have reason and mature age, without distinguishing whether the person under his guardianship is a Muslim or a non-Muslim. Therefore, slaves, madmen and small children cannot be guardians, because they cannot take care of

themselves, let alone be guardians of others. The fourth condition is that he is Muslim, if the person under his guardianship is a Muslim. Non-Muslims cannot be guardians for Muslims (Sayyid Sabiq, 2008). The requirements to become a marriage guardian according to other literature consist of: mukallaf, independence, maturity in the contract, religious conformity, and fairness (Amir Syarifuddin, 2014).

In the book *Al-Mabsuth* by Shams Al-Din Al-Sarkhasi, the Hanafi school argues that a woman who marries herself or orders someone else who is not her guardian to marry her, the law is permissible, this still applies, whether it is for women who are still girls or women who have been married (widows), whether the man married by the woman is equal in rank to the woman or not, it's just that if the man married to the woman is not equal in rank to the woman, the guardian of the woman can cancel the girl (Al-Syarkhasiy, 1989).

Furthermore, still in the book *Al-Mabsuth*, the Hanafi school of thought says that it is permissible for a woman to marry herself. As explained in the hadith of the Prophet SAW. said: *"The widow has more rights over herself than her guardian."* Widow here means a woman who is not married, whether she is still a

girl or a widow, the meaning of the hadith above is that both girls and widows can marry themselves.

The hadith above shows that the right to perform a marriage contract is entirely in the hands of the woman herself, and if this Hadith is deemed to be contrary to the hadiths put forward by a group that prohibits marriage without a guardian, then this Hadith can be *tarjih* (featured) from the hadiths. because his narrations are more numerous and he is safer from being confused about his authentic status (Muhammad Ibn Abdul al-Wahid Al-Hammam, 1894). Thus, according to the Hanafi school of thought, the requirements for marriage without a guardian are as follows: *sekufu*, appropriate dowry, *baligh*, and reasonable (Abdurrahman Ghozali, 2012).

Abu Hanifah is a free-minded person and highly respects the freedom of others (*ratio*) and Abu Hanifah uses theorem, from the Al-Qur'an, Sunnah, Hadith, Ijmak, Qiyas, Ihtisan, and 'uruf (Abdul Aziz Asy-Syinawi, 2013). The opinion chosen by Abu Hanifah in this matter is not a new opinion in Islamic law. This opinion has evidence from the Qur'an, Sunnah and qiyas. Of course, this is the argument that is in accordance with the free-thinking tendency of scholars who like to think freely.

Based on some of the explanations above, the authors conclude that Abu Hanifah uses the qiyas method in matters of marriage requirements without guardians. Qiyas according to language measures or compares something with something else then equates the two. Meanwhile, according to the term, it is connecting or equating something that does not have a textual provision in a syar'i way with something that already has a textual provision based on the existence of 'illat between the two (Satria Effendi, 2014).

According to the Hanafi school of thought, a woman, whether a girl or a widow, who is mature and intelligent, can carry out her marriage directly to herself, either with a man who is equal or not, but if the man she marries is not equal, the guardians can cancel her marriage on the marriage. The requirements regarding marriage without a guardian according to Abu Hanifah are sekufu or equal (comparable) between the groom and the bride, the proper dowry is the dowry in the form of valuable property and it is clear that the property is there at the time of the marriage contract, the dowry is divided into two parts namely dowry musamma and dowry mitsil, baligh and provisions, the last of which is also seen from the independent side, meaning that the man

she marries is not a slave and she is well-established to marry both physically, mentally and materially.

According to the Hanafi school of thought, marriage guardians are not a condition for the validity of a marriage contract for mature women (girls) and women who are widows (adult women). Therefore, the marriage process can be carried out with his own consent or the woman may marry herself, but kafaah is sufficient for both of them and if not then the guardian has the right to cancel the marriage. According to the Hanafi school, a person who is wicked may marry his daughter or nephew from his brother, because his wickedness does not preclude the compassion he has which makes him look after the benefit of his relatives and also because the right of guardianship is general. During the time of Rasulullah SAW and after His era, no one narrated that a guardian was prohibited from marrying someone who was initiated due to his wickedness (Wahbah az-Zuhaili, 2011).

The Hanafi school of thought says that fairness is not a requirement. And if there is a person who is married off by an ungodly guardian and several just witnesses, then the marriage is valid, therefore the guardianship of a wicked person can be accepted because he can

legalize his own marriage, on this basis the wicked person can authorize another person.

Wicked people are able to be guardians in marriage. The Hanafi school allows a wicked guardian to become a guardian in marriage, for women who are young or immature, according to him, guardianship in marriage is the same as guardianship in child rearing. To be clearer, Hanafi in one of his books writes that for a wicked person it is permissible to marry off their young son or daughter. According to the Hanafi school of thought, the permissibility of a ungodly marriage guardian is further strengthened based on the word of Allah:

وَأَنْكِحُوا الْأَيَامَىٰ مِنْكُمْ وَالصَّالِحِينَ مِنْ عِبَادِكُمْ وَإِمَائِكُمْ
إِنْ يَكُونُوا فُقَرَاءَ يُغْنِهِمُ اللَّهُ مِنْ فَضْلِهِ وَاللَّهُ وَاسِعٌ عَلِيمٌ

“Marry those among you who are single, or the virtuous ones among yourselves, male or female: if they are in poverty, Allah will give them means out of His grace: for Allah encompasseth all, and he knoweth all things.” (QS. Surat an-Nur: 32).

The verse contains several matters in marriage, such as the obligation of a guardian to marry off his child, it is recommended for those who are able to immediately carry out the marriage to look

after and maintain the genitals, are not allowed to marry themselves because of their status as 'abd (slave), and allow themselves to marry unless there is strong evidence stating its permissibility.

Based on the description above, that in the Hanafi school, marriage guardians are only required for women who are still small (not yet mature), people who are crazy, and slaves. Apart from these people, a guardian is not required in a marriage process. In addition, in the Hanafi school, justice is not a requirement for guardianship in a marriage, meaning that the wicked person can be the guardian of the marriage for his children or those under his guardianship.

3. Comparison in Author Analysis

In article 20 paragraph 1 of the Compilation of Islamic Law, it is stated that: The person acting as marriage guardian is a man who fulfills the requirements of Islamic law, namely Muslim, aqil and baligh. The article only mentions four conditions which are mandatory criteria for marriage guardians. This is different from what is stated in the Shafi'i school where the Syafi'i school requires that there are six requirements for a guardian, namely: Islam, puberty, sound mind, independence, male, and fair. Fairness is the most significant

requirement in the Shafi'i school of thought.

In the writer's opinion, KHI does not mention independence as a requirement for marriage guardians because it is no longer needed considering that today there is no slavery anymore. So that KHI considers everyone to be free for sure. As for fair criteria, KHI also does not mention them in article 20 above. That is because KHI itself is a compilation of Islamic laws which are very diverse and cover four schools of thought: the Hanafi, Maliki, Shafi'i and Hanbali schools. In addition, the fair requirement for guardians is considered burdensome for a marriage to occur because today it is very difficult to find a marriage guardian who is fair.

While fiqh scholars decide that an unjust or wicked person may not marry a believing woman and her guardianship rights must be transferred to a trustee below her. That is one of the opinions cited by Doctor Mustafa al-Khin (Al-Musthafa Al-Khin, 1992).

Scholars have different opinions regarding guardians who do not meet the fair requirements regarding the validity of their marriage. Al-Habib Muhammad bin Salim, although he supports the opinion of guardian justice, tends to be looser. According to him, the requirements for fair

guardians are enough to be seen from the point of view of birth, no need to prove too detailed. Thus, a person who is known by a few people as a just person is enough to be a guardian or witness.

The opinion expressed by Al-Habib Muhammad bin Salim was motivated by the view of Imam An-Nawawi who stated that the guardianship of the wicked remained attached to him. If the guardianship of the lineage guardian due to wickedness is transferred to the judge's guardian, it is possible that the magistrate's guardian may also commit the same wickedness as the lineage guardian earlier, maybe even more severe. This opinion is also supported by Imam Al-Ghazali, as quoted by Ibn Qasim Al-'Izzi on the grounds that wickedness is rampant in society. Even though guardianship is transferred to the judge, the judge is not necessarily fair so that the judge's ungodliness does not let him relinquish his guardianship rights (Ibrahim al-Bajuri, n.d.b).

Mushthafa Al-Khin himself, although mentioning the first opinion, is more inclined to the second opinion which mentions the reason for the factor of affection. He is of the opinion that justice (wali) is not required in marriage. Because, guardianship is built on the relationship of 'ashabah (lineage from the father).

Whereas 'ashabah brings the guardian to outpouring of affection to seek benefit for people under his guardianship. And this compassion makes no difference between a just and an unjust person. Besides that, being fair is sometimes too burdensome, because there are so few fair people, especially nowadays. It didn't end there, nor was it known at one time, there were wicked people who were prohibited from marrying off their daughters (Al-Musthafa Al-Khin, 1992).

With reference to the explanation above, in the Shafi'i school, a fair guardian is something that is required based on the words of the Prophet. But on the other hand, fair conditions for guardians and witnesses are something that is burdensome, even difficult, especially in an era of rampant wickedness. Because of this, some scholars choose to maintain the guardianship of the wicked, apart from the increasing scarcity of just people, also the guardianship of nasab guardians is built on the basis of ashabah affection or lineage from the father's side. Love knows no one who is just or not. As a result, as long as the closer lineage guardians are still there, let alone the mujbir ones, namely fathers and grandfathers, then the guardianship remains with them. Thus, marriages with unfair guardians are still valid according to the Shari'a. However, of course,

prioritizing good people or taking people who are seen as fair is the priority.

Even if one really wants to be careful in religion (ihtiyat), then the guardian must really have fair character to be able to marry off. If he is wicked, then he must repent of his wickedness by stopping sinning and regretting it. People who repent from sins are like people who have not sinned at all. So that makes a person who repents from sins included in the just people. This is in accordance with the word of God:

فَمَنْ تَابَ مِنْ بَعْدِ ظُلْمِهِ وَأَصْلَحَ فَإِنَّ اللَّهَ يَتُوبُ عَلَيْهِ ۗ

إِنَّ اللَّهَ غَفُورٌ رَحِيمٌ

“But if the thief repents after his crime, and amends his conduct, Allah turneth to him in forgiveness; for Allah is Oft-forgiving, Most Merciful.” (Q.S. Al-Maidah: 39)

Meanwhile, according to the Hanafi school of thought, the requirements that must exist for a marriage guardian are more likely to be relevant to what is stated in article 20 of the KHI. In the Hanafi school, to become a wali must fulfill the following conditions: be independent, have reason and maturity, and be Muslim. Here we see that the Hanafi school of thought does not include justice as one of the criteria for guardianship in marriage.

In the Hanafi school, marriage guardians are only required for young women (not yet mature), people who are crazy, and slaves. Apart from these people, a guardian is not required in a marriage process. In addition, in the Hanafi school, justice is not a requirement for guardianship in a marriage, meaning that the wicked person can be the guardian of the marriage for his children or those under his guardianship. The Hanafi school does not require guardianship for widows and girls, but it does require guardianship for young women, crazy people and slaves.

Meanwhile, according to the Syafi'i school of thought, the position of the marriage guardian is as pillars. So that the guardian plays a very important role in a marriage, both for adult women (widows), girls, small children and for every other woman who wants to enter into a marriage contract. So according to the Hanafi school of marriage guardianship is a legal sunnah, and the Syafi'i school says that marriage guardian is one of the conditions for a valid marriage.

E. CLOSING

From the explanation above, it can be concluded that the Shafi'i School explains that the requirements for a guardian are fair with six criteria, namely: Islam, puberty, sound mind, independence, male, and fair. When viewed from the

opinion of the Shafi'i school of thought, the implementation of marriage by a virtuous guardian, the marriage is void.

By following the opinion of other scholars such as the Hanafi school of thought, the marriage is still valid with the following reasons; *first*, someone's Islam is considered sufficient to become a marriage guardian, so it doesn't look at whether the person is fair or not. *Second*, the wicked guardians may become guardians, namely looking at the element of benefit for others. However, it is better for every Office of Religious Affairs to accustom the marriage guardian to take the shahada and make istighfar before the marriage contract is held. Marriage guardians are told to repent and ask for forgiveness for past sins and mistakes. The Hanafi school requires a marriage guardian as stated in article 20 KHI. In the Hanafi school, to become a wali must fulfill the following conditions: be independent, have reason and maturity, and be Muslim. Here we see that the Hanafi school does not include justice as one of the criteria for guardianship in marriage.

In the Hanafi school, marriage guardians are only required for young women (not yet mature), people who are crazy, and slaves. Apart from these people, a guardian is not required in a marriage process. In addition, in the Hanafi school

of thought, justice is not a requirement for guardianship in a marriage, meaning that the wicked person can become the guardian of the child or the people under his guardianship. The Hanafi school does not require guardianship for widows and girls, but it does require guardianship for young women, crazy people and slaves.

Comparison of the legality of marriage guardians according to the Hanafi school of thought and the Syafi'i school of thought, namely the Hanafi school of law says that it is valid to marry a wicked guardian, but the Syafi'i school requires that the guardian must be fair and the marriage guardian of a wicked person is invalid.

The factors that influence the differences are the differences in the legal istinbath methods of the Hanafi and Shafi'i schools regarding wicked marriage guardians, namely differences in determining the position of marriage guardians, differences in determining the requirements for guardians, in this case both use the sunnah basis, the Hanafi school uses a weak hadith basis, while the Shafi'i school of thought uses a hadith base that has strong sanad, matan, and narrator strengths.

The author has several suggestions for this research, among other things, that

the public should be aware of the importance of religion-based sciences, especially those related to the issue of munakahat fiqh. People who already know about Fiqh munakahat apply the knowledge they have in the context of their role as marriage guardians. Before the marriage ceremony is carried out, the guardians who act as marriage guardians should be guided and given knowledge about Fiqh munakahat a few days before the marriage ceremony. Society should get rid of the bad habit of committing small, eternal sins because of the slightest sin, and also not commit major sins at all. Community leaders must study and teach the contents of the Compilation of Islamic Law as a guide in implementing marriage. Besides that, a comparison between the Shafi'i school and the Hanafi school of thought can be a way out of problems related to the just status of marriage guardians.

F. REFERENCES

- Abdul Aziz Asy-Syinawi. (2013). *Biografi Empat Imam Mazhab*. Jakarta: Ummu Qura.
- Abdurrahman Ghozali. (2012). *Fiqh Munakahat*. Jakarta: Kencana Prenada Media Group.
- Abi Syuja'. (n.d.). *Matn al-Ghayah wa at-Taqrīb*. Medan: Sumber Ilmu Jaya.
- Abu Bakar al-Masyhur. (n.d.). *Hasyiah I'anatutthalibin*. Jilid III. Jeddah: al-Haramain.

- Abu Muhammad al-Husein al-Baghuwi. (2013). *Syarhussunnah*, Jilid V. Beirut-Libanon: Darul Kutub al-Ilmiyah.
- Al-Musthafa Al-Khin. (1992).
- Al-Syarkhasiy. (1989). *Al-mabsuth*. Jilid 5. Beirut: Dar Al-Fikr.
- Amir Syarifuddin. (2006). *Hukum Perkawinan Islam di Indonesia: Antara Fiqh Munakahat dan Undang-Undang Perkawinan*. Jakarta: Kencana.
- Amir Syarifuddin. (2014). *Hukum Perkawinan Islam di Indonesia*. Jakarta: Kencana.
- Hidayati & Taufika. (2014). *Analisis Yuridis Peranan Wali Nikah Menurut Fiqh Islam dan Kompilasi Hukum Islam (Studi Putusan Mahkamah Agung Republik Indonesia NO.261/K/AG/2009)*.
- Ibnu Mandzur. (1990). *Lisan al-Arabi*. Jilid 1. Kairo: Dar al Fikri.
- Ibrahim al-Bajuri. (n.d.a). *Tuhfah al-Murid ala Syarh Jauharah al-Tauhid*. Beirut: Dar al-Kutub al-Ilmiyah.
- Ibrahim al-Bajuri. (n.d.b). *Hasyiah al-Bajuri*. al-Haramain.
- Kompilasi Hukum Islam.
- Muhammad Bagir Al-Habsyi. (2002). *Fiqh Praktisi*. Bandung: Penerbit Mizan.
- Muhammad bin Qosim asy-Syafi'i. (1982). *Fathu al-Qorib*. Jilid II. Terj. Imron Abu Bakar. Kudus: Menara kudus
- Muhammad Ibn Abdul al-Wahid Al-Hammam. (1894). *Syarah Fath Al-Qadir*. Jilid 3. Kairo: Mathaba'ah al-Khubra.
- Muhammad Idris Ramulyo. (1974). *Hukum Perkawinan Islam*. Jakarta: Bumi Aksara.
- Muhammad Jawad Mugniyah. (1994). *Fiqh Lima Mazhab*. Jakarta: Basrie Press.
- Nunung Rodliyah. (2013). *Fungsi Wali Nikah dalam Akad Nikah Menurut Hukum Islam*.
- Rohmat, R. (2011). Kedudukan Wali dalam Pernikahan: Studi Pemikiran Syâfi'iyah, Hanafiyah, dan Praktiknya di Indonesia. *Al-'Adalah*, 10(2), 165–178. <https://doi.org/10.24042/ADALAH.V10I2.253>
- Satria Effendi. (2014). *Ushul Fiqh*. Jakarta: Kencana.
- Sayyyid Sabiq. 1981. *Fiqh Sunnah*. Jilid 7. Bandung: Al-Ma'arif.
- Taqiyuddin Abu Bakar. (1993). *Kifayatul Akhyar*. Surabaya: Bina Iman.
- Taqiyuddin Abu Bakar. (n.d.). *Kifayatul Akhyar*. Semarang: Usaha Keluarga.
- Undang-Undang No. 16 Tahun 2019 tentang Perkawinan.
- Wahbah Zuhaili. (1984). *Fiqh Islam wa Adillatuhu*.
- Zainuddin. (1979). *Fathul Mu'in*. Terj. Aliy As'ad. Yogyakarta: Menarakudus.