

## **Marriage Guardians in Indonesian and Algerian Legislation: A Comparative Analysis of the Concept of Maslahat and Gender Justice**

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### **ABSTRACT**

**Purpose** – The existence of guardians as a pillar of marriage has been regulated in family law in Muslim countries, two of which are Indonesia and Algeria. These two countries base each other on maslahat in formulating regulations regarding marriage guardians, but with different sociological realities and mazhab tendencies. This is due to the absence of qathi' nash that can be used as a basis for its determination. This study aims to comparatively analyze the provisions of marriage guardians in family law in Indonesia and Algeria in the concept of maslahat theory.

**Methods** – This research uses normative juridical research methods with a statutory approach (statue approach) and comparison (comparative approach). Data sources come from secondary data sources consisting of primary legal materials in the form of Law No.1 of 1974 concerning Marriage, Compilation of Islamic Law (KHI), and Family Code 1984 (Qanun Al Usrah). Meanwhile, secondary legal materials are obtained from books and scientific articles.

**Findings** – The results of this study indicate that the principle of the problematical provisions of marriage guardians is aimed at maintaining and safeguarding the rights of women under their guardianship. The Indonesian Marriage Law and KHI stipulate that the marriage guardian is a pillar in the marriage contract, and explains in detail the provisions relating to guardianship in marriage in line with the opinion of the majority of scholars on this matter. Meanwhile, in the Qanun Al Usrah Family Code 1984, the marriage guardian is also a pillar of the marriage contract, but it does not elaborate in detail on matters relating to guardianship in marriage. The Family Code 1984 also gives adult women the freedom to choose their guardian to be present in the marriage contract. This seems to make guardianship not one of the pillars of marriage in accordance with the Hanafiyah opinion. It appears that Algeria attempted to adopt all of the scholarly opinions in the Family Code 1984.

**Research implications/limitations** – Looking at the modern realities in the two Muslim countries, it is appropriate to make reforms to guardianship regulations that prioritize gender equality.

**Keywords:** *Algeria, Indonesia, Maslahat, Marriage Guardians.*

### **Introduction**

Marriage comes from the root word “kawin”, which comes from the Arabic language with the meaning of “marriage” or “nikah”. The term marriage can be known as marriage,

which has its roots in the Arabic word nikah (نكاح). Literally, nikah means to gather or insert each other, with the meaning of intercourse (wathi). However, in a legal context or figurative meaning, nikah refers to a contract or agreement that results in sexual relations between a man and a woman legally as husband and wife.<sup>1</sup> In Islam, marriage is considered an integral part of religious teachings. Refusing to get married is actually ignoring an important aspect of religious teachings, as Allah SWT created humans in pairs, namely male and female.<sup>2</sup>

Marriage, or matrimony, is a decree of Allah and the teachings of His Messenger, not just based on human desires or lust. To get married is to fulfill half of the rules of Islam.<sup>3</sup> Islam considers marriage to be the main foundation for the formation of a family. Humans are obliged to marry with the aim of achieving benefits in life, in accordance with Sharia. Therefore, marriage is considered an act aimed at achieving tranquility and peace. More than that, Allah SWT recommends marriage and the Prophet Muhammad SAW also practiced it.<sup>4</sup>

In line with the urgency of marriage, Islam provides clear guidelines regarding marriage procedures. In this context, Islam stipulates the pillars of marriage that must be fulfilled, including the willingness of the groom, bride, guardian of the bride, marriage contract, and two witnesses. The presence or absence of these elements can determine the validity of a marriage from an Islamic perspective. One of the pillars of marriage that still causes debate is the role of the guardian in the marriage of the bride. Differences in interpretation occur due to variations in the understanding of several verses and hadiths by a number of scholars. Some scholars conclude that the verses and hadith emphasize the obligation of the existence of a marriage guardian, so that marriage is considered invalid without the presence of a marriage guardian. However, there are other scholars who see the verses and hadith as not forcing the existence of a marriage guardian, considering the role of the guardian as an element that strengthens the perfection of marriage.<sup>5</sup>

The concept of guardianship is an aspect that has been compiled in detail in the marriage regulations in Indonesia. Law No. 1/1974 on Marriage in Article 6 paragraph (1)

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<sup>1</sup> Nabiela Naili dkk., *Hukum Perkawinan Islam Indonesia* (Jakarta: Prenada Media Group, 2019), 2.

<sup>2</sup> Hikmatullah, *Fiqh Munakahat Pernikahan dalam Islam* (Jakarta: EDU Pustaka, 2021), 20.

<sup>3</sup> Sidi Nadzar Bakri, *Kunci Kentuban Rumah Tangga (Keluarga yang Sakinah)* (Jakarta: Pedoman Ilmu Jaya, 1993), 3.

<sup>4</sup> Basiq Djalil, *Tebaran Pemikiran Keislaman di Tanah Gayo* (Jakarta: Qolbun Salim, 2007), 86.

<sup>5</sup> Qurrotul Ainiyah, "Kedudukan Wali Dalam Pernikahan (Perspektif Imam Syafi'i dan Imam Hanafi)," *Mukammil: Jurnal Kajian Keislaman* III, no. 2 (2020): 108.

states that “marriage must be based on the consent of the prospective bride and groom,” which means that the practice of marriage must be voluntary and without coercion. In the context of guardianship, the Marriage Law states that a guardian bears the responsibility to marry off the woman under his power of attorney. However, the principle of guardianship must still include women when asking for their permission, so the practice of forced marriage cannot be justified.

In addition to the Marriage Law, the validity of marriage in Indonesia for Muslims is determined by the Compilation of Islamic Law (KHI). Article 14 of KHI explicitly emphasizes the requirements and pillars of marriage, which include the prospective husband, prospective wife, marriage guardian, two witnesses, and *ijab* and *kabul*. This article emphasizes that the marriage guardian is one of the five elements that must be fulfilled in conducting a marriage. Even Article 19 KHI states, “The marriage guardian in marriage is a pillar that must be fulfilled for the prospective bride who acts to marry her”.<sup>6</sup> The necessity of the existence of a guardian is basically intended to maintain and safeguard the rights possessed by someone who is under his guardianship.<sup>7</sup>

The concept of guardianship in marriage is also generally applied by Muslim countries through legislation. For the country of Algeria, the existence of a marriage guardian is still required. If the guardian does not want to marry, then it can be replaced by a judge with the condition that it is *sekufu* (equal). Article 7 of the Algerian Family Law (Marriage Ordinance) confirms that the guardian authorized to marry off his imperfect daughter (*al-qashirah*) is the father or one of the closest relatives or *qadhi* for those without a guardian. While article 11 states that an intelligent woman can be married as long as her guardian is present, namely her father, one of her relatives or anyone chosen.<sup>8</sup>

Regarding women's freedom in marriage, Algerian legislation is less strict because on the one hand it prohibits forced marriage, but on the other hand, it still applies the right of *ijbar*. However, in essence, the consent of the candidate is required and implicitly assumes the principle of prohibiting forced marriage. The permissibility of forcing marriage (*ijbar*) is

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<sup>6</sup> Rohmat, “Kedudukan Wali dalam Pernikahan: Studi Pemikiran Syâfi’iyah, Hanafiyah, dan Praktiknya di Indonesia,” *Al-’Adalah* X, no. 2 (2011): 176, <http://dx.doi.org/10.24042/adalah.v10i2.253>.

<sup>7</sup> Mughni Labib Ilhamuddin Is Ashidiqie, “Kritik Atas Peraturan Wali Nikah dalam KHI dan Fikih Perspektif Gender,” *Al-Mazaahib: Jurnal Perbandingan Hukum* 9, no. 1 (2021): 25, <https://doi.org/10.14421/al-mazaahib.v9i1.2304>.

<sup>8</sup> Engkos Kosasih, “Pemikiran Fikih Maliki Tentang Pernikahan dan Implementasinya dalam UU Perkawinan Aljazair,” *Jurnal Bimas Islam* 9, no. 11 (2016): 232.

not the sole reason for the subjectivity of the guardian (father), but because there are other arguments, namely that if not married off, it will fall into an attitude of fasad.<sup>9</sup>

The paradigm used in formulating provisions regarding marriage guardians in Indonesia and Algeria has differences. The provisions of marriage guardians in Indonesia, as stated in KHI tend to be adopted from the thinking of the Syafi'i school of thought.<sup>10</sup> Meanwhile in Algeria, the marriage provisions contained in the legislation are purely based on sociological considerations, because these provisions are not taken from the views of madhhabs outside Maliki.<sup>11</sup> This difference in legal extraction has implications for the concept of maslahat applied to the provisions of marriage guardians, especially maslahat for women.

Based on this legal reality, researchers are interested in examining the provisions of marriage guardians in Indonesian and Algerian marriage laws. The research question to be answered is how is the application of the concept of maslahat in the provisions of marriage guardians in Indonesia and Algeria?

## **Methods**

This research is normative juridical research using a statutory approach (statue approach) and a comparative approach (comparative approach). Data sources come from secondary data sources consisting of primary legal materials in the form of Law No. 1 of 1974 concerning Marriage, Compilation of Islamic Law, and Family Code 1984 (Qanun Al Usrah). While secondary legal materials are obtained from books and scientific articles. Data collection methods include library research and descriptive-comparative data analysis. The collected data is then analyzed using Maslahah theory with the content analysis method.

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<sup>9</sup> Miftahul Huda, "Ragam Bangunan Perundang-Undangan Hukum Keluarga di Negara-negara Muslim Modern (Kajian Tipologis)," *Al-Manahij: Jurnal Kajian Hukum Islam* 11, no. 1 (2018): 40, <https://doi.org/10.24090/mnh.v1i1.1267>.

<sup>10</sup> Alang Sidek, Diani Syahfitri, dan Fatmawati, "Penunjukan Wali Nikah Bagi Anak di Bawah Umur Menurut Imam Mazhab dan KHI pada Penerapannya di Pengadilan Agama Stabat," *Action Research Literate* 4, no. 1 (2020): 12, <https://doi.org/10.46799/ar.v4i1.81>.

<sup>11</sup> Yusrina Nur Dianati dan Tika Ifrida Takayasa, "The Politics of Marriage Law in Al Jazair (Between Modernizing Family Law and Maintaining Conservative Values)," *Quru': Journal of Family Law and Culture* 1, no. 3 (2023): 270, <http://dx.doi.org/10.59698/quru.v1i3.120>.

## **Result**

### **The Concept of Marriage Guardians in Islamic Law**

Guardianship is the authority to perform various types of contracts and transactions without the need for approval or dependence on other parties. The origin of the word “wali” comes from Arabic, namely “الولي” with its feminine form “الولية”, and its plural form “الأولياء” comes from the words “ولاية and ولي-يلي”,<sup>12</sup> which have the meaning of loving, close friends, companions, allies, followers, caregivers, and people who take care of matters.<sup>13</sup> In the context of fuqaha terminology, as expressed by Wahbah Az-Zuhaili, guardianship refers to the power of authority that a person has to perform actions directly without having to rely on the permission of others.<sup>14</sup>

In the book “Fiqh Munakahat 1” by Beni Ahmad Saebani, it is explained that guardians in the context of marriage can be divided into five types, namely nasab guardians, judge guardians, tahkim guardians, maula guardians, and mujbir guardians or adol guardians. The nasab guardian is a guardian who has a nasab bond with the woman who is getting married. There are different views among fiqh scholars regarding the order of nasab guardians. According to Imam Malik, guardianship is based on parentage, except for sons. The next of kin has a higher right to be the next guardian. Imam Malik states that the son has priority, followed by the father, brothers of the same mother, brothers from the same father, and the paternal grandfather.<sup>15</sup>

Guardian hakim refers to a person appointed by the government, specifically the Minister of Religious Affairs, to act as a guardian in a marriage.<sup>16</sup> This applies when the bride-to-be faces the following circumstances:

- a. Having no nasab guardian at all.
- b. The nasab guardian's whereabouts are unknown (mafqud).
- c. The guardian is at a considerable distance, i.e. the distance of masafatul qasr (92.5 km which makes it possible to perform qasar prayer).
- d. The guardian is in prison or detention and cannot be found.

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<sup>12</sup> Ibnu Mandhzur Al-Afriqy, *Lisan al Arab*, vol. 15 (Beirut: Dar Shodir, 1414H), 407.

<sup>13</sup> Ahmad Warson Munawwir, *Al Munawwir Arab Indonesia* (Surabaya: Pustaka Progresif, 1984), 1582.

<sup>14</sup> Muhammad Amin Summa, *Hukum Keluarga Islam di Dunia Islam* (Jakarta: PT Raja Grafindo Persada, 2004), 134–35.

<sup>15</sup> Beni Ahmad Saebani, *Fiqh Munakahat 1* (Bandung: Pustaka Setia, 2001), 247.

<sup>16</sup> Dedi Junaedi, *Bimbingan Perkawinan* (Jakarta: Akademika Presindo, 2002), 110–14.

- e. Guardian *adol*, which is a guardian who is not willing or refuses to perform the marriage.
- f. The guardian is performing Hajj or Umrah.

A *tahkim* guardian is a marriage guardian who is handpicked by the prospective groom and the prospective bride.<sup>17</sup> The procedure for appointing a *tahkim* guardian involves the following steps:

1. The prospective groom makes a formal declaration to his bride-to-be by pronouncing a *tahkim*, such as “I appoint you to marry me to .... (the prospective wife) with a dowry of... and I accept your decision with pleasure”.
2. The bride-to-be makes a similar declaration to that made by her husband-to-be.
3. The prospective judge, or the party deciding the marriage, states, “I accept this *tahkim*”.

Guardian *maula* refers to the guardianship used to solemnize the marriage of a freed slave, in other words, the guardian who solemnizes the slave's marriage is his own master or owner.<sup>18</sup> A man is given permission to marry off a woman under his guardianship, provided that the woman voluntarily accepts the marriage. The woman in question is a slave under his authority. In cases where the legal guardian of a freed woman is unknown, her guardian is the person who freed her. Furthermore, the family or *ashabah* (close friends) of the person who freed her can be involved as her guardian.

Guardian *mujbir* is a guardian appointed for someone who is incapacitated, such as someone who is mentally ill, has not reached the age of puberty, or is not yet *mumayyiz*. This includes women who are still virgins. In the context of a *mujbir* guardian, the guardian has the discretion to marry off women who fall under this category without seeking their opinion first. The validity of guardian *mujbir* also applies to the person represented in this case without considering their consent or disapproval.<sup>19</sup>

There are different views on the role of the guardian in marriage according to Islamic law. According to Imam Malik and Imam Shafi'i, they agree that the guardian is a valid condition in marriage. In their view, a marriage must take place in the presence of a

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<sup>17</sup> Saebani, *Fiqh Munakahat* 1, 250.

<sup>18</sup> Muhammad bin Qasim Al Ghazy, *Fathu al Qarib* (Beirut: Dar al Minhaj, 2019), 300.

<sup>19</sup> Abdurrahman Al Jaziri, *Al Fiqhu ala Mazahibi al Arbaah*, vol. 4 (Beirut: Dar al Kutub al 'Ilmiyah, 2003), 32.

guardian to be considered valid under Islamic law.<sup>20</sup> According to them, a woman does not have the right to marry herself to marry anyone other than herself or to delegate her marriage to someone other than her guardian. If she does so, the marriage is not valid, even if she is of sound mind and maturity. This was also the opinion of the Companions such as Ibn Umar (r.a), Abu Masu'd (r.a), Abu Hurairah (r.a) and Aisha (r.ha).<sup>21</sup> This opinion is based on Surah al-Baqarah verse 232:

وَإِذَا طَلَّقْتُمُ النِّسَاءَ فَلَا تَعْضُلُوهُنَّ أَنْ يَنْكِحْنَ أَزْوَاجَهُنَّ إِذَا تَرَاضَوْا بَيْنَهُمْ بِالْمَعْرُوفِ ذَلِكَ يُوعَظُ بِهِ مَنْ كَانَ مِنْكُمْ يُؤْمِنُ بِاللَّهِ وَالْيَوْمِ الْآخِرِ ذَلِكَُمْ أَزْكَى لَكُمْ وَأَطْهَرُ وَاللَّهُ يَعْلَمُ وَأَنْتُمْ لَا تَعْلَمُونَ



Meaning: When you have divorced your wives, and their waiting period has expired, then do not prevent them (their guardians) from remarrying their future husbands, if there is consent between them in a manner that is acceptable to them. That is what is recommended to those who believe among you in Allah and the Last Day, and that is better for you and more pure. Allah knows, and you do not know (Q.S. al-Baqarah [2]: 232).

The Shafi'iyah are of the opinion that the khitab in the verse is intended for the guardians not to prevent a woman from marrying her future husband. If the right to marry does not belong to the guardians then why are they prohibited from restraining a woman from marrying her future husband.<sup>22</sup>

In contrast to the opinion of the majority of scholars, the Hanafis are of the opinion that the marriage of an adult woman of sound mind can be considered legally valid without the consent of the guardian. For adult women of sound mind, they have the right to manage their marriage without the involvement of the guardian. However, if the guardian does not consent to the marriage, the guardian still has the right to set conditions that the prospective husband must be worthy (kifah) and the dowry given must not be less than the prevailing standard. If the woman marries without the guardian's consent or marries someone he considers unfit, the guardian has the right to protest the marriage, and the judge can annul it. However, if the guardian remains silent and does not protest until the woman becomes pregnant or gives birth to a child, the guardian's right to annul the

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<sup>20</sup> Muhammad ibn Rusyd al-Andalusi, *Bidayah al-Mujtahid wa Nihayah al-Muqtasid*, vol. 3 (Cairo: Maktabah ibn-Taimiyyah, 1994), 36.

<sup>21</sup> Wahbah Zuhaili, *Fiqhu al-Islamiyy wa Adillatuhu*, vol. 7 (Suriah: Dar al Fikr, t.t.), 194.

<sup>22</sup> Muhammad ibn Rusyd al-Andalusi, *Bidayah al-Mujtahid wa Nihayah al-Muqtasid*, vol. 3 (Cairo: Maktabah ibn-Taimiyyah, 1994), 21.

marriage is no longer valid. The aim is to protect the interests of the child and prevent confusion regarding the identity of the parents.<sup>23</sup> This opinion is based on the hadith of the Prophet (SAW) from Ibn 'Abbas, that the Messenger of Allah (SAW) said:

الأيم أحق بنفسها من وليها

*Meaning: "The widow has more rights over herself than her guardian"* (H.R. Ibn 'Abbas).

The word "al-ayyim" according to some Hanafiyya Scholars, also means anyone who does not have a spouse, whether male or female, virgin or widow. The Hadith indicates that all women who do not have a husband, including virgins or widows, have higher rights over themselves than those of their guardians. This means that all women have the ability to marry without the need for a guardian due to their superior rights over themselves.<sup>24</sup>

### **Marriage Guardians in Islamic Family Law in Indonesia**

The regulation of marriage in Indonesia has been regulated in Law No. 1 of 1974 concerning Marriage and its implementing regulation, namely Government Regulation No. 9 of 1975. In addition to these state regulations, the Marriage Law also includes provisions that have been used as guidelines by judges in the Religious Courts in the settlement of marriage cases. These guidelines are part of the Compilation of Islamic Law (KHI) in Indonesia, the dissemination of which is regulated by Presidential Instruction No. 1 of 1991. Although KHI is not a statutory law equivalent to the Marriage Law, as a practical implementation, its material must be in accordance with and not contradictory to the Marriage Law.<sup>25</sup>

The marriage law mentions the existence of a guardian in marriage, as Article 50 which emphasizes that children who have not reached the age of 18 (eighteen) years or have never entered into marriage, who are not under the authority of their parents, are under the authority of a guardian. The guardianship concerns the child's person and property.

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<sup>23</sup> Zuhaili, *Fiqhu al Islamiyy wa Adillatuhu*, 7:194.

<sup>24</sup> Muhammad Jawwad Mughniyah, *Al- Fiqhu ala Madzahibi al-Khamsah* (Teheran: Muasisatu as-Sadiqah, t.t.), 322.

<sup>25</sup> Taufika Hidayati, "Analisis Yuridis Peranan Wali Nikah Menurut Fiqih Islam dan Kompilasi Hukum Islam (Studi Putusan Mahkamah Agung Republik Indonesia No. 261/K/AG/2009)," *Premise Law Journal* 3 (2014): 1–2.



Meanwhile, in the Compilation of Islamic Law (KHI), it is fully explained about marriage guardians, which broadly follows the madzhab of the jumhur ulama, especially the Shafi'iyah Madzhab. The provisions of the marriage guardian in KHI are explained in detail in Articles 19 to 23. These provisions emphasize that the marriage guardian in marriage is a pillar that must be fulfilled for the prospective bride who acts to marry her. The one who acts as a marriage guardian is a man who meets the requirements of Islamic law, namely Muslim, aqil, and baligh. Marriage guardians consist of nasab guardians and judge guardians, here are the details.

The nasab guardians consist of four groups in order of position; one group takes precedence over another according to whether or not the relatives are close to the prospective bride.

- a. First: the group of male relatives in the straight line upwards, namely the father, paternal grandfather and so on.
- b. Second: the kin group of biological or paternal brothers, and their male descendants.
- c. Third: The kin group of uncles, i.e. the father's biological brothers, brothers in law, and their male descendants.
- d. Fourth: the group of grandfather's biological brothers, grandfather's paternal brothers, and their male descendants.

In relation to this group of marriage guardians, there are some specific provisions regarding the use of nasab guardians as follows.

- a. If in one group of marriage guardians there are several people who are equally entitled to be guardians, then the one who is most entitled to be a guardian is the one who is closer in degree of kinship to the prospective bride.
- b. If there are several people in the same group who are equally entitled to be the guardian, then the one who is most entitled to be the guardian is the biological relative of the relative who is only a father.
- c. If within a group the degree of kinship is the same, i.e., both are biological or equally entitled to be a marriage guardian by prioritizing the older and fulfilling the conditions of the guardian.

If the marriage guardian who is the most entitled in that order does not meet the requirements of a marriage guardian or because the marriage guardian is deaf, deaf, or elderly, then the right to be a marriage guardian shifts to another marriage guardian

according to the next degree. Meanwhile, with regard to the judge guardian, he can only act as a marriage guardian if the nasab guardian is absent, it is impossible to present him or his residence is unknown or absent or adhal or reluctant. In the event that the guardian is adhal or reluctant, then the new judge guardian acts as a marriage guardian after there is a Religious Court decision about the guardian.

The necessity of having a guardian in the marriage contract in KHI is basically intended to maintain the interests and safeguard the rights of the person under his guardianship.<sup>26</sup> With this intention, some scholars used to require a male guardian from the bride's side when carrying out the marriage contract procession. This is because, at that time, the scholars viewed women as people who were less capable of acting perfectly. Therefore, it is not possible for a woman to be a guardian of marriage. However, if the parameter is a person who has the criteria for perfect ability to act (adult and reasonable), then even adult women can be seen as people who have these criteria.<sup>27</sup> Moreover, currently there are many women who meet these criteria.

The formulation of the marriage guardian provisions in the KHI, in its formation by Indonesian scholars, was determined by paying attention to the Indonesian fiqh climate, which is adjusted to the madhhab adopted by the majority of Indonesian Muslim communities.<sup>28</sup> Therefore, it is not surprising that the mindset and lifestyle of Indonesian Muslims related to Islamic family law that have developed in Indonesia are heavily influenced by the teachings of Islam and the Syafi'i school of thought, one of which is the marriage guardian.

However, the regulation of marriage guardians in KHI is still considered gender biased due to the absence of women's access to become marriage guardians.<sup>29</sup> Therefore, the provisions regarding the right to be a male marriage guardian in KHI have received a lot of emotional criticism from various elements. Like Sandy Wijaya in his research, he assessed that the marriage guardian paradigm in KHI, especially article 20 paragraph (1), is still less responsive to women's interests, causing it to appear gender biased and

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<sup>26</sup> Agus Moh. Najib, "Kontroversi Perempuan sebagai Wali Nikah," *Musawa: Jurnal Studi Gender dan Islam* 5, no. 2 (2007): 218, <http://dx.doi.org/10.14421/musawa.2007.52.211-225>.

<sup>27</sup> Najib, 220.

<sup>28</sup> M. Khoirul Hadi al-Asy Ari dan Adrika Fithrotul Aini, "Hak Perempuan Menikah Tanpa Wali dalam Pandangan Imam Syafi'i dan Imam Ja'fari," *Musawa: Jurnal Studi Gender dan Islam* 14, no. 1 (t.t.): 89, <http://dx.doi.org/10.14421/musawa.2015.141.87-100>.

<sup>29</sup> Ibnu Akbar Maliki dkk., "A Gender-Based Maqashid Sharia Study of Penghulu in Indonesia (A Study of Jasser Auda's Views)," *Nurani: Jurnal Kajian Syariah dan Masyarakat* 23, no. 1 (2023): 51, <https://doi.org/10.19109/nurani.v23i1.16447>.

patriarchal.<sup>30</sup> In addition, the social movement, namely feminism, also voiced a similar idea that Islamic family law is very patriarchal, one of which can be found in the provisions regarding the right to become a marriage guardian.

### **Marriage Guardians in Islamic Family Law in Algeria**

Algeria is a country officially known as the People's Democratic Republic of Algeria or Al Jumhuriyah al Jazairiyah ad Dimuqratiyah ash Shabiyah with Algier as its capital. The country gained its independence on 5 July 1962, after a period of colonization by France that began in 1827. In 2007, Algeria's population was approximately 33.3 million, with the majority, 59 percent, living in urban areas. 99 percent of Algeria's population is Arab-Barbaric, while the remainder is of European descent. Arabic is the country's official language, although Tamazigh (a Barbarian language) is also commonly spoken. The majority of the population follows the Sunni religion, which is the official state religion, while a small minority follow Christianity, Methodism, and there is also a Jewish community.<sup>31</sup>

In the legal context, Algeria applies the principles of Islamic law especially in terms of marriage and family law. However, the civil law system, criminal law, and administration of justice remain influenced by French colonial laws that were in place during colonization.

In general, the Islamic legal system adopted in the country of Algeria is based on the Maliki School, which is the majority school of thought in the country.<sup>32</sup> The various Islamic law legislations implemented in Algeria include:

- a. Marriage Ordinance 1959: This regulation governs the family law aspects related to marriage, in accordance with the concept of Islamic marriage law, with reference to the majority school of fiqh, namely the Maliki school of fiqh.
- b. Marriage Ordinance (Amendment) Law 1963: This was the first amendment to the marriage ordinance, adapting the regulation to the legal needs of society. This amendment focuses more on the civil area and does not yet cover the criminal aspect.

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<sup>30</sup> Sandy Wijaya, "Konsep Wali Nikah dalam Kompilasi Hukum Islam Perspektif Gender" (Tesis, Yogyakarta, Universitas Islam Negeri Sunan Kalijaga, 2017), 4.

<sup>31</sup> Tahir Mahmood, *Personal Law In Islamic Countries* (New Delhi: Academy of Law and Religion, 1987), 181.

<sup>32</sup> Tahir Mahmood, *Family Law Reform In The Muslim World* (Bombay: N.M. Tripathi PVT. LTD, t.t.), 176.

- c. Family Code of 1984: The Family Code covers more aspects than the Marriage Ordinance. In addition to regulating marriage, it also details inheritance law and various other aspects related to family law.

The current family law regulation in Algeria is the Qanun Al Usrah or Family Code 1984. This law has been amended with the introduction of Ordinance No. 2 of 2005 which was approved on February 27, 2005. The provisions regarding guardianship in marriage are set out in articles 9 and 11 which contain

المادة 9 مكرر): الأمر رقم 05-02 المؤرخ في 27 فبراير 2005 (يجب أن تتوفر في عقد الزواج الشروط الآتية:

-أهلية الزواج،

-الصداق،

-الولي،

-شاهدان،

-انعدام الموانع الشرعية للزواج

Based on Article 9, the marriage contract must fulfil the following conditions capacity to marry, dowry, guardian, two witnesses, free from Shari'ah impediments to marriage. So it is clear that the marriage guardian is a mandatory requirement in marriage. Meanwhile, Article 11 emphasises the following:

المادة 11: الأمر رقم 05-02 المؤرخ في 27 فبراير 2005 (تعقد المرأة الراشدة زواجها بحضور وليها وهو أبوها أو أحد أقاربها أو أي شخص آخر تختاره. دون الإخلال بأحكام المادة 7 من هذا القانون، يتولى زواج القصر أولياؤهم وهم الأب، فأحد الأقارب الأولين والقاضي ولي من لا ولي له

The article states that an adult woman enters into her marriage in the presence of her guardian, who can be her father, one of her relatives, or another person of her choosing. Without violating the provisions of Article 7 of this law, the marriages of minors are taken care of by their guardians, who can be the father, one of the closest relatives, a judge, or a guardian for those who do not have a guardian.<sup>33</sup> Therefore, Algeria requires a guardian in marriage, and a guardian may not refuse to be a guardian without a legal reason. In line with this, Algeria also requires the consent of the bride and groom, and does not recognize the right of *ijbar*.<sup>34</sup>

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<sup>33</sup> *Family Code 1984, t.t.*

<sup>34</sup> Deniansyah Damanik dan Eka Mardianingsih, "Hukum Keluarga di Dunia Islam: Eksistensi Nasab dan Perwalian di Negara-Negara Muslim," *Jurnal Akademika: Kajian Ilmu-Ilmu Sosial* 3, no. 3 (2022): 64.

The Algerian Family Code 1984 also stipulates that the guardian is one of the conditions for the validity of a marriage, but does not elaborate on the matters relating to the guardian in a marriage. Nonetheless, in Algerian family law, adult women are given the right to choose a guardian who is present according to their will without any conditions that can enforce this. This makes the guardian not the primary condition for marriage. This indicates that Algerian family law seeks to adopt all scholarly opinions on marriage guardians, particularly the Hanafiyah view which gives adult women the right to marry themselves.

The existence of a marriage guardian in marriage should be understood in a proportionate manner while still respecting the woman as a human being who is capable of performing legal acts, namely the marriage contract. The prospective husband and prospective wife are the main pillars (parties) who will bind themselves in a great and sacred bond, namely marriage in equal circumstances. Both of them as mature and reasonable people (intelligence or *rusyd*) are possessed of *ahliyatul wujub* (recipient of rights) and *ahliyatul ada* (capable of performing legal acts) at the same time. Therefore, as long as there is no impediment, they have the right to sign the marriage contract themselves or directly without having to delegate it to someone else, including their parents or other relatives.<sup>35</sup>

## **Discussion**

### **Comparative Analysis of the Provisions of Marriage Guardians in Indonesian and Algerian Legislation**

Based on the description above, it can be understood that family law in Indonesia and Algeria have similarities in determining marriage guardian as one of the conditions in marriage. Family law in Indonesia explains in detail the requirements of a guardian, the provisions of the *nasab* guardian and the role of the judge as a substitute for the *nasab* guardian. This is different from the Algerian family law which does not explicitly mention the requirements of a guardian, only mentioning several parties who are entitled to become guardians, namely father and relatives and guardian hakim. It even authorizes a woman to choose her own guardian without explaining the provisions in detail regarding this matter.

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<sup>35</sup> Tali Tulab, "Tinjauan Status Wali Dalam Perkawinan Berdasar Pendekatan Feminis," *Ulul Albab: Jurnal Studi dan Penelitian Hukum Islam* 1, no. 1 (2017): 153.

If we compare this with Islamic law regarding guardians in marriage, it is clear that Indonesian family law adopts the opinion of the majority of scholars, especially the Shafi'iah in its provisions. Meanwhile, Algerian family law attempts to adopt the opinion of all scholars in the provision of guardians in marriage. Article 9 requires the presence of a guardian in marriage, which is in accordance with the opinion of the majority of scholars. However, in Article 11, adult women are given the right to choose their own guardian to be present at the marriage, making the position of the guardian not a valid condition in marriage, this is in line with the opinion of the Hanafiyah Ulama.

Basically, the main purpose of requiring a guardian in marriage is for the benefit of women. Historically, the requirement of a guardian was basically intended to maintain and safeguard the rights of the person under their guardianship. Of course this is part of the principle of *maslahat*, because it is included as the primary element in *maqashid al-syari'ah* in the form of protecting honor (*hifzh al-'irdh*).<sup>36</sup>

However, in today's modern era and considering the social realities in Indonesia and Algeria, the provision of marriage guardians needs to be adjusted to the value of *maslahat*. Because the context of maintaining honor applied in the Arab region in ancient times with Indonesia and Algeria has a very significant difference, legal changes have become the main reference in upholding gender equality. In this case, women who have legal capacity and perfect intellect can perform marriage without a guardian. More than that, women also have the right to become guardians of marriage for other women who need guardianship.<sup>37</sup>

So in the initial stage of granting guardianship rights to women by making the Religious Court a problem solver as legal maxims explain that *hukm al-hakim yarfa' al-khilaf* (legal decisions born from the trial process by a judge are able to eliminate legal distinctions in society), the measuring tool is those (women) who have intellectual abilities (reasoning) in understanding the burden of law (*taklif*), are able to carefully examine the

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<sup>36</sup> Sukron Ma'mun dan Ibnu Akbar Maliki, "A Socio-Historical Study of Women's Rights Advocacy in Islamic Legal Construction," *Journal of Southeast Asian Human Rights* 7, no. 1 (Juni 2023): 13, <https://doi.org/10.19184/jseahr.v7i1.39156>.

<sup>37</sup> Amirudin Nur Muhamad, "Perempuan Sebagai Wali Nikah (Analisis Atas Metode Istimbath Hukum Khoiruddin Nasution)" (Tesis, Ponorogo, Institut Agama Islam Negeri Ponorogo, 2022), iii.

good and bad things in every action, and are physically able to carry out their obligations as marriage guardians in marriage activities.<sup>38</sup>

## **Conclusion**

Based on the research and discussion that the author has described above, it can be concluded that guardianship is a valid condition in marriage which is regulated in detail in government regulations and Islamic family law in Indonesia which adopts the provisions of Islamic law according to the opinion of the *jumhur ulama*, especially the Shafi'iyah Ulama. In the Algerian Family Code 1984, it is also stipulated that the guardian is one of the valid conditions of marriage but it does not explain in detail the matters relating to the guardian in a marriage. Nonetheless, in Algerian family law, adult women are given the right to choose a guardian who is present according to their will without any conditions being imposed. This makes the guardian not the primary condition for marriage. This indicates that the Algerian Family Code endeavors to adopt all scholarly opinions on marriage guardians, especially the Hanafi who give adult women the right to marry themselves. Although the Family Code of 1984 as a whole adopts the opinions of the Malikiyyah scholars.

In the concept of *maslahah*, women should have access to become guardians of marriage or marry without being obliged to have a guardian over them. In accordance with the development of modern times synonymous with advances in knowledge and technology that open up opportunities for women to play a role in the domestic and public sectors, the idea of women as guardians of marriage can be an alternative in the context of developing guardianship in Islamic law for this modern era.

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<sup>38</sup> Ressi Susanti dan Ahmad Rajafi Sahran, "Membangun Kesetaraan Gender Tentang Wali Nikah dan Saksi Dalam Hukum Keluarga Islam di Indonesia (Maqashid al-Syari'ah Approach)," *JURNAL AQLAM: Journal of Islam and Plurality* 1, no. 1 (2016): 13, <http://dx.doi.org/10.30984/ajip.v1i1.496>.

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