

# Reconstructing the Concept of Marriage Guardianship

Iffatin Nur<sup>1\*</sup>, Moh. Lutfi Ridho<sup>2</sup>, Akhyak<sup>1</sup>

<sup>1</sup> UIN Sayyid Ali Rahmatullah Tulungagung, Graduate School,  
Jl. Mayor Sujadi Timur No. 46, Tulungagung 66221, INDONESIA

<sup>2</sup> Office of Religious Affairs of Jombang,  
Jl. Bupati R. Soedirman No. 26, Jombang, 61419, INDONESIA

\*Corresponding Author: [iffaeltinury@gmail.com](mailto:iffaeltinury@gmail.com)

DOI: <https://doi.org/10.30880/hsp.2024.04.01.003>

## Article Info

Received: 7 December 2023

Accepted: 29 March 2024

Available online: 30 June 2024

## Keywords

ADHKI; adoptive parent; APRI; *fiqh*  
of reciprocity; marriage guardian

## Abstract

This study aims to reveal the obsolescence of Islamic law concerning the concept of guardianship of children that so far still seems patriarchal. In this context, there is a phenomenon against justice and benefits for children. In a certain position, a child who should have his/her rights in the form of protection, financing, and education is simply abandoned, encouraging someone to adopt him/her and fulfill the obligations that should be imposed on the child's biological parents. This condition raises a polemic when a female child has grown up and is about to get married, regarding "Who has the right to be the guardian in her marriage?" and "What exactly is the essence of guardianship?" This qualitative study employed a multi-system study model on the perceptions and views of the Indonesian Islamic Marriage Registrars Association (Asosiasi Penghulu Republik Indonesia or APRI, *Ind.*) and the Indonesian Family Law Lecturers Association (Asosiasi Dosen Hukum Keluarga Islam or ADHKI, *Ind.*) to reveal the methodological and practice aspects of guardianship in Indonesia. The results show that the reconstruction of the concept of guardianship of adopted children in the perspective of APRI and ADHKI based on *fiqh* (Islamic jurisprudence) of reciprocity resulted in a model of reciprocal rights and obligations between children and parents as well as husband and wife that provides opportunities for a mother who has taken care of her daughter and an adoptive father who has raised a female child to become a marriage guardian.

## 1. Introduction

Many parents, especially biological fathers, neglect their children due to economic conditions or because the children are born out of wedlock. Such a phenomenon leaves many problems for both the children and their adoptive parents. The children face abortion, dilemmas, stereotypes, punishment, discrimination, violence, and even banishment or neglect. Surviving the abortion, once born, they will experience other problems including stereotypes as adulterous or illegitimate children and several other terms. Furthermore, with their powerlessness, they will struggle to face various refusals in obtaining their rights and position as legitimate children in general because, legally, a child only has a civil relationship with his/her mother and the mother's family (Indonesian Constitutional Court, 2010).

Abandoned women do not have guardians (*wālī nikāh*) in their marriages. Consequently, many marriages took place without guardians or with them but are non-compliant with the Indonesian Presidential Instruction (Inpres) No. 1 of 1991 concerning the Compilation of Islamic Law (Government of Indonesia (GoI), 1991). For example, the guardians' names written on the marriage certificates do not match the facts, or; the birth certificates mention the

biological fathers and mothers, but the women, in practice, get married under *wāli ḥākim* (a Muslim judge acting as the marriage guardian) instead. These practices are forbidden by Islamic law and the Indonesian Act No. 35 of 2014 concerning the Amendments to the Indonesian Act No. 23 of 2002 on Child Protection, and are considered breaking kinship relations (GoI, 2014). However, such practices are still widely found in Indonesia.

For example, the case number 0081/Pdt.P/2014/PA.Bsk ((Indonesian Supreme Court (ISC), 2014) was a marriage guardianship-related case decided at the first-level court. Moren bint Desril Harun, a resident of Batusangkar, filed a lawsuit against her biological father who refused to be her guardian in her marriage based on the reason that he did not get involved in her upbringing and education (Roza & Yaswirman, 2019). The court decided to: a) grant the application entirely, b) appoint a marriage registrar (penghulu, *Ind.*) in the area to be the applicant's marriage guardian as *wāli aḍal* (a Muslim judge acting as the marriage guardian in a condition when the bride's legal guardians refuse to exercise their right), and (c) charge the court fees to the applicant (ISC, 2014).

Regarding child guardianship, in their research on children's position, Nurlaelawati and van Huis (2020) said that the inability of Islamic law concerning family affairs, as enshrined in the Indonesian Act No. 1 of 1974 concerning Marriage (Undang-Undang Perkawinan or UUP, *Ind.*) in responding to contemporary problems, comes as a result of its fear of losing religious spirit and character. Hidayah (2014) concluded that in the study of Islamic law, an adoptive father does not have a strong religious textual basis to be positioned as the guardian of the marriage of the girl he adopted. Meanwhile, Assim & Sloth-Nielsen (2014) said that protecting children from everything that harms them is a necessity.

Islamic law has advocated for children's humanity. Legally, children may not be aborted, killed, and abandoned. Their freedom should not be restricted; their rights should not be drowned out; and their human dignity should not be undermined either through exploitation, violence, burdening, or stereotyping. In the view of Islamic legal philosophy, especially *maqāṣid shari'ah* (objectives of Islamic law), human benefits are mainstreamed, thus forming general ideals in the principles of Islamic law. *Maqāṣid shari'ah* can serve as a driving force to create future changes toward a more constructive and humanistic society (Nur, Adam & Muttaqien, 2020). If there is a discrepancy between the ideals of Islamic law and empirical reality, then what can be reviewed is the benefits of the philosophy, which produces *fiqh* (al-Qardhawi, 1986; al-Raisuni, 1992; Ibn al-Subki, [n.d.]). As Nur, Muttaqin, and Wakhid (2020) stated, legal products cannot be separated from social conditions and realities. With these conditions, Islamic law must be able to answer various challenges of the times related to the socio-cultural conditions of society.

Cases of neglect of children by their biological parents and the high number of social crimes and sexual violence against children were the reasons for the issuance of the Indonesian Act No. 17 of 2016 concerning the stipulation of government regulations in place of the Indonesian Act No. 1 of 2016 concerning the second amendment to the Indonesian Act No. 23 2002 concerning child protection to become a bill (GoI, 2016). This legislation has been in force since its promulgation and has undergone many changes in the legal paradigm on child protection, such as giving responsibilities to policyholders, both local and central government, the community, and parents or guardians, increasing criminal provisions for perpetrators of sexual crimes against children, and enforcing the rights of restitution.

In the history of Islamic laws, gender relations have been reflected in cases such as marriage, inheritance, family member's rights and obligations, and women's dresses, in which these cases relatively fall into the realm of *ijtihad* (intellectual exercise in stipulating law). Thus, there have been substantial proposals to reconstruct existing products of *ijtihad* that are allegedly biased on gender and patriarchal values (Nurjanah & Nur, 2022). Along with the development of the times and the increasingly complex problems that occur in society, the issue of marriage guardians needs re-examination, considering the socio-historical and socio-political background of the discussion on the rulings regarding marriage guardians in the past that is certainly very different from that today. Most people assume that *fiqh* products are undoubted (a cognitive nature) (Auda, 2008). They forgot a critical thing, namely that the method used to determine a *fiqh* product is more substantial than the *fiqh* product itself (*al-kayfiyyah ahammu min al-maddah*).

Meanwhile, in the case of adoption, some people believe that adopted children are the same as biological children; adopted children are married off by their adoptive parents. This matter, of course, raises a debate in the view of *fiqh*, as previously explained. An adoptive father who adopted a child to save the child from neglect feels that he has fulfilled the child's rights abandoned by the biological parents, so he claims that guardianship should fall into his hands. Such a case shows the importance of conducting more in-depth research on the reconstruction of the concept of marriage guardianship based on the perspectives of the Indonesian Islamic Marriage Registrars Association and the Indonesian Islamic Family Law Lecturers Association.

The reconstruction of the concept of marriage guardian based on the Indonesian Islamic Marriage Registrars Association is necessary. So far, a penghulu, as a practitioner of marriage law in Indonesia, has the competence and knowledge of various problems related to marriage guardians. Meanwhile, the ADHKI is a forum of academics in charge of in-depth studies on laws regarding marriage in Indonesia. These two associations become a forum addressing marriage law in Indonesia both theoretically and practically in society. In the context of *ijtihad* in the contemporary era, the determination of collective benefit becomes very important to respond to and deal with

problems regarding the guardianship of an adopted child and that of a mother's child (Nur & Muttaqin, 2020). Through the mapping and reconstruction steps above, the authors expected that this study would respond to the legal problems of guardianship in marriage in Indonesia.

This study went under a perception that reconstruction should be upon arguments and problems. Concerning child guardianship, for example, the APRI consists of people who deeply understand all the issues related to marriage guardianship. Meanwhile, the ADHKI is a forum that has conducted in-depth studies on marriage law in Indonesia, including child guardianship. As a reconstruction effort, this study used a qualitative approach with a multi-site study design (Bogdan & Biklen, 1998). The data collection techniques used included in-depth interviews, participant observation, comparative analysis, and documentation (Lincoln & Guba, 1985). The data were analyzed using single and comparative case data analysis, followed by checking the data validity with trustworthiness, credibility, confirmability, and data dependability (Yin, 1994).

## 2. Literature Review

Regarding the history of the rulings of marriage guardianship, Subhan (2008) said that many Arab-Makkah traditions were adopted and have legitimacy in the legal system of marriage guardianship in Islam. The authority to become marriage guardians owned by male relatives is a form of the perpetuation of *fiqh*, which refers to the patriarchal culture of Arab society. Furthermore, Umar (2003) also said that the pattern of gender relations and the patriarchal culture of the pre-Islamic society had contributed greatly to the position of men in various aspects, including men as marriage guardians and being able to determine who had the right to marry their daughters. Meanwhile, Smith (1993) explained that there is a type of marriage practice that has been ingrained and has become a tradition of pre-Islamic Arab society. It is *ba'al*, a kind of marriage that is subject to the male kinship system in terms of marriage guardianship. Therefore, it makes sense, as Fyzee's opinion quoted by Bahdar (2013), that in the early period of the formation of Islamic law, the traditions or customary character of the Arabs had a strong enough influence, as in the case of marriage system, thus adopted by marriage law in Islam.

Reflecting on the history and legal construction of the concept of marriage guardians in Islam, it is urgent to reconstruct child guardianship in Indonesia, especially in the regulatory dictums contained in the UUP or the Compilation of Islamic Law (Kompilasi Hukum Islam or KHI, *Ind.*) (GoI, 1991). Within the framework of observing issues related to the renewal of Islamic law, al-Naim (1994), borrowing the theory of John O. Voll, categorized the trend of developing Islamic law in the range of *sharīah* history, namely, first, the trend of returning to the Qur'an and hadith; secondly, opening the door of *ijtihad*, and; thirdly, adopting secular laws that are aligned with the Islamic legal framework.

Al-Naim (1994) argued that the main difficulty faced by Islamic law is when it should deal with issues related to universal human rights, namely in terms of the existence of a frame of reference it possesses. Al-Naim (1994) did not deny such a dilemma, especially since the concept of universal human rights originally came from Western civilization. According to him, in substance, Islamic law is in line with legal norms for universal human rights, making it in line with the various needs of contemporary society and international standards. He also insisted on the proportion that Muslim countries should still make their public law rely on Islamic law (al-Na'im, 1994; Mayer, 1996).

The emergence of new awareness from contemporary Islamic ulema has resulted in more flexible thoughts when faced with Islamic jurisprudence. Such thoughts are helpful to the wider community because modern life, which affects the lives of Muslims as a whole, can no longer be dammed. Changes are inevitable by considering the following reasons: first, this modernization cannot be denied and will affect all aspects of life. The fear that modernization will distance the people from their religion becomes a challenge the people must deal with. The role of contemporary *ulama'* (Muslim scholars) is needed to help the *ummah* (Muslim society) answer these challenges. Secondly, today, it is difficult to avoid the entry of the Western legal system into the lives of Muslims. How can we allow Muslims to live in a Western order? Therefore, a relevant and easily adapted Islamic legal system is necessary for the lives of Muslims themselves. Thirdly, the existing classical *fiqh* is still rigid and textual, making it difficult to adapt to the situations that are increasingly developing over time (al-Qardhawi, 1986).

Smith (1993) conducted a study of Islamic law, including marriage guardianship. He found that in pre-Islamic Arab society, there were two forms of marriage, namely *ba'al* and *sadica*, which applied to patrilineal and matrilineal communities respectively. Both led to different kinship laws, resulting in fundamental differences in the situation faced by women, especially in social relations as a whole and in determining their marriage guardians (Smith, 1993).

Adherents of the patrilineal system are generally more receptive to the *māzhab* (schools of thought) of Imam Shafi'i, Imam Maliki, and Imam Hanbali regarding the hierarchy of marriage guardians. The patrilineal system hierarchy starts with the biological father, grandfather, great-grandfather, biological brother, and so on (al-Mughniyah, 2011). This patrilineal system, of course, favors men over women and, unfortunately, prevails in society in general. Meanwhile, the matrilineal system, which refers to the mother's lineage, is currently only popular among people of some remote tribes.

In another explanation, it is stated that there were several forms of marriage in the Arabian culture before the advent of Islam; namely *safah*, *al-rahti*, *al-mukti*, ordinary marriage, *istibdha'*, *mut'ah*, and polygamy, all of which lead to a patriarchal system, in which a man/husband considers himself powerful (in ownership) over his wife. The man/husband is often referred to as *ba'al* (God, master, ruler, owner), while the wife is referred to as *maf'ul* (servant, slave, controlled, owned). The *safah* model, allowing women to have sex with several men and then determine the father of their biological children, is based on a patriarchal system, where when a woman is married, her position remains *maf'ul*, thus required to be submissive and obedient to her husband (Karim, 2003).

When Islam emerged, one of the primary tasks of the Prophet was to improve the social order that cornered women so much. Islam itself positions women as creatures who should be respected and protected so that there should be no treatment that may humiliate them. The women's fathers and brothers who have reached puberty are the closest guardians who should provide perfect protection and guardianship for women. Unfortunately, this overcomes many challenges. The guardians, who should be able to protect and guard, cannot meet the rights of the women they guard.

Most scholars say that guardians for women have such an important position as protectors of women's rights and benefits. However, in reality, the protection often changes, thus, eventually, limiting the freedom that should be the right of women. For example, some guardians may marry off their daughters without their consent. The Muslim scholars often refer to such guardians as *wālī mujbir* (Nasution, 2005). In such a case, the position of women has not changed: they do not have absolute rights over themselves. The idea of *fiqh* reconstructions, especially those related to guardianship in marriage, comes from such a phenomenon. Contemporary problems in Islamic family law in people's lives universally, especially those related to marriage, are often found. For example, a woman must have a guardian who marries her. Similar problems are often found in Muslim countries, especially in Indonesia where most people follow the Shafi'i school, which views guardianship as one of the conditions for a valid marriage.

The issue of guardianship in marriage is one of the interesting aspects to be studied more deeply. The Maliki and Shafi'i schools view that guardianship is one of the legalities of marriage (al-Jaziri, [n.d.]). Meanwhile, feminism considers guardianship as a form of restriction/restraint on women (Engineer, 2004); the necessity of having a guardian in marriage is proof that a woman does not have freedom for herself because the guardian has authority over part of her life.

The issue of guardianship, in terms of its position as a legal condition and pillar of marriage, has led to a long debate among scholars of *fiqh*. There are at least two groups that have different opinions on this issue. The first believes that a guardian is the key and must exist as a condition for a valid marriage. Besides, women, despite having reached puberty, are not legal to marry themselves or others off. The first group is pioneered by the Malikiyyah, Shafi'iyah, Hanabilah, and Zahiriyah schools. Meanwhile, the second group is represented by the Hanafiyyah school, which views that a guardian is only needed when a woman is not yet mature. A woman who has reached puberty and is reasonable has the right to marry herself off to a man of her choice, as long as both have *kafā'ah* (comparability) (Faizah, 2017).

Supporting this opinion, Engineer (2004) revealed that guardianship law in Islam is inseparable from the culture that existed in pre-Islamic times. What happened at those times was finally combined with Islamic jurisprudence, which emerged later and finally was practiced by the Muslims. In the early days of the development of Islam, many things were not mentioned in the Qur'an but were then responded to by the scholars of *fiqh*, including *fiqh* scholars in Indonesia. Some of these things are included in Islamic law and are finally called Islamic Shari'ah (Schacht, 1950). In this context, changes in the issue of guardianship must also be taken into account contextually (Engineer, 2004).

According to Schacht (1950), to whom Engineer (2004) referred, some practices in the pre-Islamic period were practiced by the Muslim community in the absence of conflict with Islamic values. Regarding the guardianship issue, Engineer (2004) stated that a sincere, serious, and thorough study of the Qur'an and hadith will eventually conclude that women have full autonomy in marriage, both of those who are still *abkārā* (girls) and *thayyibah* (widows). He found that the Qur'an does not mention the need for a guardian to marry off a girl (Engineer, 2004) A widow has the right to choose whether she refuses or accepts a marriage with her consent and does not need to involve a guardian.

According to Engineer (2004), such a guardianship issue should only be addressed within the framework of the Arab society's tradition, which adheres to a patrilineal social system in which the existence of women depends on men. In this social order, fathers, grandfathers, and brothers are obliged to protect and prosper women. They are entitled to the fate of women. Engineer (2004) also gave his opinion regarding *kafā'ah*. As already mentioned, the Hanafi scholars allow women to marry off themselves as long as there is *kafā'ah* between the women and their future husbands. Otherwise, the guardian has the right to annul the marriage. This is something that is not mentioned in the Qur'an, but the scholars of *fiqh* include it in the *Shari'ah*. According to Engineer (2004), the Qur'an confirms the right to choose something. Therefore, any choice made by a person regarding marriage should not be influenced or forced by any other person.

According to Maliki scholars, as narrated by Ashhab, the position of a guardian is absolute. Even marriage is not valid without a guardian. It is in contrast to the history of Ibn Qasim, which states that the existence of a guardian is only sunnah (preferred). Meanwhile, according to Zahiriyah scholars, a woman who is still immature or has no common sense is required to have a guardian, and if she is an adult, it must be with the guardian's permission. One of the regulations regarding guardianship is the UUP. Although not explicitly explained, prospective brides and grooms under 21 must first obtain parental permission (Ramulyo, 2010).

In the discussion of marriage in Islam, what has attracted the attention of jurists from classical times to contemporary scholars is marriage guardianship. There are several verses and Hadith that, based on some scholars' interpretation, indicate that marriage is not valid without a guardian. Meanwhile, other scholars interpret that the same verses and hadith indicate that a guardian is just a complementary factor. A guardian has a very high position in marriage. In practice, one of the pillars of marriage is the 'ijab-qabul, the real executioners of which are the guardian and the bridegroom. Therefore, a guardian plays a very decisive role as a representative of the bride. Imam Shafi'i saw that there is no validity of marriage if there is no guardian of the woman (al-Zanati, 2012), while Imam Abu Hanifah said that guardianship is not one of the pillars of marriage so a marriage is still valid even without the presence of a guardian (al-'Utsaimin, [n.d.]).

The Compilation of Islamic Law or KHI stipulates five conditions for the validity of a marriage, namely the presence of the groom, the bride, the guardian, two witnesses, and the *'ijāb-qabūl* (solemnization of a marriage). These five things are cumulative conditions, meaning that if one does not exist, the marriage is invalid. Over time, many problems emerged in society regarding the legitimacy of a biological father or other *wālī nasab* to be a marriage guardian as in article 14 of the KHI (GoI, 1991). The Indonesian Act No. 1 of 1974, ratified as a concrete form of national legal legislation in Islamic law, has ended a round of issues regarding the diversity of marriage laws in Indonesia. However, it seems that its application is out of the plan. It, which was considered could accommodate some of the Islamic law, becomes inseparable from various criticisms. At least, there are several requests in the form of judicial review to the Constitutional Court. Among the cases submitted are cases of child status, polygamy, divorce, minimum marriage limits, and interfaith marriages.

### 3. Requirements of Marriage Guardians

In the discourse on Islamic law in Indonesia, efforts to deconstruct and reconstruct Islamic legal thoughts carried out by world thinkers were continued by Indonesian Islamic law thinkers such as Hasbi Ash-Siddiqi, Munawwir Syadzali, Kyai Sahal Mahfudz, and Kyai Alie Yafie to name but few. They continued progressive Islamic legal thoughts based on the demands of the times that gave rise to a discourse of Islamic law that implements locality and the *maṣlahah* (benefit) approach (Nugroho, 2005). Islamic law in various fields, including family law, includes transcendental, social, and comprehensive (holistic) political orders, and is continuously moving both evolutionarily and revolutionary. The nature of this movement is unavoidable. This model of thinking exists in many ideas about law, not just logic. Moreover, the law is a genuine science.

Based on the rationale above, the primary issues studied by APRI and ADHKI experts are how to build a model to reconstruct the concept of guardianship of adopted children by adoptive parents or those who are in the position of parents (including mothers) to answer the challenges of the times in the contemporary era and which methodology and model should apply in the reconstruction effort. As it is well known, parents are the guardians of their daughters. One of the rights that parents have over their daughters is to become their guardians. The right is inseparable from the guardian and guardianship. A guardian is a person who has the authority to act against and on behalf of another person. In a marriage, a guardian is someone who acts on behalf of the bride in the marriage contract, while guardianship in terminology means a person's ability to take action without permission from others. Etymologically, guardianship means to love, to help, power, and ability.

The requirements for a guardian include being: 1) a Muslim, 2) just, meaning being polite and neither involved in major sins nor often involved in minor sins, 3) male; women are not permitted to become guardians. However, the Hanafi school allows mature and intelligent women to become guardians for themselves and other women, 4) mature and intelligent, meaning that an immature or crazy person cannot be a guardian, in the sense that a child or a crazy person is not entitled to become a guardian, 5) not under guardianship (*mahjur 'alaih*) because a person who is under guardianship cannot be a legal subject, while a guardian is a legal subject, 6) not in a state of *iḥrām* (wearing special clothes as a symbol to do pilgrimage), either *iḥrām* in *'umrah* (little pilgrimage) or *ḥajj* (pilgrimage). However, the Hanafi scholars see that a guardian who is in *iḥrām* may act as a marriage guardian, and 7) in a healthy mind, not experiencing mental disorders or otherwise they would bring harms into the marriage. The requirements to become a guardian as mentioned in the KHI are being male, a Muslim, *aqīl* (sane), and *bāliḡ* (mature) (GoI, 1991).

The people entitled to be guardians are those based on *wālī nasab* (guardians related to family ties) and *wālī ḥākim* or the person who becomes the guardian because of his position as a judge or ruler. The people who are entitled to become guardians of marriage are the father, paternal grandfather, biological brother, paternal brother, son of paternal brother, son of a paternal uncle, father's biological brother, paternal uncle, son of father's biological

brother, son of a paternal uncle, a male member of the family who gets *'aṣābah*, and, the last, *wālī ḥākim* (Haq, 2015).

The existence of a guardian in the marriage contract is an absolute thing. A marriage contract that is carried out without a guardian is declared invalid (Wahyudi, 2007). A guardian has an important position, namely as a pillar of marriage, and can also act as a person who is asked for approval in the continuity of the marriage bond. Muslim scholars have different opinions about the position of the guardian in the marriage contract. If the bride and groom are still immature, scholars agree that the guardian has a position as a pillar of their marriage because immature children are not allowed to do the contract on themselves.

However, the ulama' differ in terms of women who are adults, whether they are virgins or widows. Those from the Maliki, Shafi'i, and Hanbali schools agree that the existence of a guardian is a must in marriage, while Hanafi scholars do not. Women have the right to marry off themselves or become guardians for other women. The Hanafi scholars' opinion refers to a hadith of the Prophet narrated by Muslim (2001) which means "A widow is entitled the right to her own than the wālī, and the virgin is asked for permission and the permission is her silence". while others refer to a hadith narrated by Abu Hurairah saying that the Messenger of Allah said, "A woman is neither allowed to marry off another woman nor herself. A woman who marries off herself is considered committing prostitution" (al-Asqalani, 1995; Ibn Majah, 1998).

In Indonesia, the provisions regarding marriage guardians are regulated through Article 19 of the Compilation of Islamic Law, which states that a guardian is a pillar of marriage. Of course, this provision follows the opinion of the majority of scholars, especially of the Shafi'i *maḏhab*. However, it does not necessarily impede a woman's right to choose a man to whom she will get married. There are several benefits of the concept of guardianship, namely: a) protecting the honor of women from being aggressive towards men, b) allowing men (guardians) to get in-depth investigation and assessment of the condition of men who come to propose for marrying the women, c) assisting the family in announcing the *'aqad nikāḥ* (marriage contract) to the public, and d) the marriage conducted will not only relate and bond the bride and groom themselves but also the groom's and the bride's family and vice versa. The existence of guardianship will perpetuate the marriage relationship.

#### 4. Types and Obligations of a Guardian

There are three types of guardianship, namely guardianship over life, guardianship over property, and guardianship over life and property. Guardianship over life is in the forms of educating, marrying off, and caring for which is done by the guardian to someone who has a weak personality. This type is owned by the father, grandfather, and so on. Meanwhile, guardianship over property, namely the right to manage the assets of someone who has a disability in managing assets, namely in the forms of investing, maintaining, spending, and donating. Such right belongs to the father, grandfather, or another person who has a will by the judge. Meanwhile, guardianship over life and property is for people who have personality and property retardation. This type of guardianship belongs only to the father and grandfather.

One of the obligations of guardians (parents) is to maintain and provide protection to their children. In Indonesia, contrarily, there are still many cases of neglect by parents or guardians. According to WHO, in 2013, globally, the cases of child neglect physically and emotionally reached 16.3% and 18.4%, respectively (Berliana *et al.*, 2019). Along with the development of civilization, culture, and social changes that continue to move in the realm of globalization, the position of women seems to have undergone a shift. This assumption is reinforced by the incessant struggle of women to liberate themselves from old myths and get women's emancipation and gender equality. Currently, women have been actively involved in building the nation and state through politics, economy, society, culture, education, and even regional security. Sometimes women can appear more independent, dynamic, creative, full of initiative, and professional in taking on their roles.

There seems to be a new problem: a guardian (biological parent) forces a child who has been adopted by someone else, or a child who has been adopted by someone else while his biological parent is not found. What about the guardianship of the child? Then what exactly is the essence of the position of a guardian? In the view of Islamic law, the transfer of guardianship rights in marriage from *wālī nasab* to *wālī ḥākim* is a provision of emergency law, or, in other words, the function of *wālī ḥākim* as a marriage guardian is seen as emergency law.

Through mapping the reconstruction model by APRI and ADHKI experts, the authors found that: 1) the real guardians are those who are not reluctant and neglectful in carrying out their duties, functions, and obligations as guardians, or those doing so because they are truly unable, 2) a mother who has raised, took care of, educated, and provided all the best interests for her daughter has the right to become the guardian on her marriage, 3) other people who are not blood-related to the child but have carried out their duties, functions, and obligations as guardians, are also entitled to the right of guardianship, and (4) *wālī ḥākim* works only for women who have not met the criteria of *rushdah* (mature and sane) and are truly alone without guardians of *'aṣābah* (close male relatives), mothers, or other people. Women who have met the criteria are allowed to get married without a guardian, as is the opinion of the majority of the Hanafi *maḏhab*.

This is based on a construction and deconstruction step by APRI and ADHKI which states that etymologically, the word *wālī* means protector, helper, or ruler.<sup>1</sup> In the context of marriage, the transcendental source used as an authentic argument in determining the pillars of marriage is the hadith saying “*lā nikāḥa illā biwāliyyin/biwāliyyin wa shāhiday ‘adlin*” (No marriage without a guardian / a guardian with two just witnesses). This hadith does not explain in detail the one entitled to be a guardian. It means that the hadith does not bring a *qat’iy* (sure) argument, but *ẓanniy* (ambiguous). To this day, there is no evidence, neither in the form of verse nor hadith, that prohibits women from becoming guardians or textually mentions that guardians must be male.

However, along the way, there have been distortions and deviations in the conception of guardian, especially in the discipline of Islamic law (*fiqh*). The concept of guardianship follows that of *aṣābah*, saying that a guardian must be male and those who are entitled to become guardians are those who come from male lineages; father, grandfather, biological brother, paternal brother, son of brother, son of paternal brother, father's biological brother, father's paternal uncle, son of a biological uncle, son of father's paternal uncle, and, lastly, the judge if *‘aṣābah* is no longer found. This conception of *fiqh* was later promulgated in the dictum of UUP and KHI.

## 5. Reconstructing the Concept of Marriage Guardianship

The issues that need to be re-questioned in the reconstruction of this guardianship are: 1) referring to the substance and essence of the meaning of guardianship, does *‘aṣābah* who does not fulfill his guardianship obligations from the prenatal period until the maturity of the child, has the right to become a guardian?, 2) are mothers who carry out full guardianship duties, from prenatal to adulthood, not be categorized as competent to become guardians (considering that being a marriage guardian is certainly not comparable to carrying out more substantive guardianship responsibilities, namely the obligations to provide a living, educate, fulfill the best interests of the child, and provide love)?, and 3) if both parents abandon the child, while there is another person who is not at all related by blood but who strives sincerely to carry out guardianship obligations, is that person not entitled to become a guardian? Is this a form of justice ordered by Islam?

As a reconstruction effort, APRI and ADHKI view that those who have been proven to carry out guardianship obligations, provide for, raise, educate, and protect children should be entitled to become guardians. Several regulations, including UUP and KHI, need to be reviewed and revised, especially in the dictums of the guardianship article which do not offer justice, benefit, and reciprocity.<sup>2</sup>

Giving guardianship rights to *‘aṣābah* who do not carry out guardianship duties is a form of injustice, especially to people who have been proven to carry out guardianship duties.<sup>3</sup> In addition, the supremacy and dominance of male guardians show masculine-oriented *fiqh* products. Here there is a subordination of the existence of women by considering them as weak and incapable figures so that in carrying out marriages they must be under the authority of their guardians. This pattern also views that a mother who has raised alone her daughter is also not entitled to become a marriage guardian for her. Such masculine-oriented thought shows gender inequality.<sup>4</sup>

Reconstruction by APRI and ADHKI regarding the transfer of guardians from biological fathers to adoptive fathers and biological mothers who take care of them is based on the fact that neglect of a child is a crime (Apriliana, 2015). The formulation of criminal acts related to child neglect is contained in Article 304 of the Criminal Code to Article 308 of the Indonesian Criminal Code. Other laws governing child neglect are the Child Protection Act in Article 76 B in conjunction with Article 77 B and the Act on the Elimination of Domestic Violence in Article 9 paragraph (1) in conjunction with Article 49 letter (a). The two laws contain different articles, elements of articles, and sanctions, although they are the same as those related to child neglect. Sanctions in the form of criminal acts of child neglect can prevent a father from becoming a guardian of his daughter(s) and transfer the guardianship to *wālī ḥākim*. Under these conditions, the construction by APRI and ADHKI to transfer the guardianship of abandoned children to the mothers who care for them and to their adoptive father through court decisions will find its momentum.<sup>5</sup>

Substantially, the reconstruction of the concept of guardianship in the perspectives of APRI and ADHKI is based solely on the authority of guardians. This means that the guardianship that can be carried out by the adoptive father and biological mother is in the category of the implementation of guardianship only as of *wālī ḥākim* determined by the court decision. Thus, giving guardianship rights to adoptive parents and biological mothers is done based on court decisions as that to *wālī ḥākim*. This kind of reconstruction certainly does not abolish the concept of *nasab*.<sup>6</sup>

<sup>1</sup> Interviews with experts from both APRI and ADHKI.

<sup>2</sup> *ibid*

<sup>3</sup> *ibid*

<sup>4</sup> *ibid*

<sup>5</sup> *ibid*

<sup>6</sup> *ibid*

Marriage guardians in the Compilation of Islamic Law, if approached through the reconstruction efforts by APRI and ADHKI, will get a picture that someone, both male and female, who can act perfectly (*kāmil al-ahliyyah*), does not need a guardian and can even become a guardian for people who really need and deserve to be under his/her guardianship. APRI and ADHKI try to understand the texts of the Qur'an and Hadith that talk about marriage guardians contextually because the texts are strongly tied to the situation and conditions of patriarchal people's lives at the time the law arose. Therefore, the reconstruction of the concept of marriage guardians in the perspective of APRI and ADHKI has a relevance that the concept of marriage guardians is a concrete form of implementation of the Indonesian Act No. 7 of 1984 (GoI, 1984) concerning the Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women, stating that men and women have the same rights and responsibilities regarding guardianship.<sup>7</sup>

From the reconstruction effort based on the perspectives of APRI and ADHKI above, the authors describe and provide an argument based on *fiqh* rules that can be used as a step to review and reconstruct the concept of guardianship. In the relationship between parents and children, there are rights and obligations that are mutually exclusive or reciprocal. There are some Islamic legal maxims regarding the matter that may be mentioned as follows: 1) in principle, fulfilling an obligation must take precedence over demanding a right, 2) the essence of a guardianship is to realize the benefit for the child's life, 3) those who fulfill an obligation have a right, and 4) realizing the benefit of the relationship between parents and children is a must.

The thought actualized in the rules of *fiqh* as mentioned is based on a model of *fiqh* of reciprocity to place men and women proportionally. This reconstruction effort is to get a new concept of guardianship that is progressive, contains a greater value of benefits, offers justice, and teaches the principle of reciprocity for the community, especially Muslims. An effort is needed to instill awareness that, in essence, guardianship is neither supremacy nor domination, but liberation and protection, by giving rights to everyone who carries out guardianship obligations, not limited to *'asābah* and men.

This reconstruction model will give rise to the *fiqh* of reciprocity in which men and women have complementary and reciprocal positions in every condition. In addition, children and parents also have rights and obligations based on a mutual relationship. In this term, today, many women can support themselves and pursue higher education without the role of any guardian so that they can determine every single step of their lives. This situation seems to require the concept of a reciprocal relationship between parents and children, meaning that if parents abandon their daughters and their daughters can live independently normally, then the daughters can be said to be independent women and their parents have no right in any way to force them to marry. On the other hand, if there is a child who is abandoned by her parents (her guardians) and then raised and cared for by her adoptive parents, then the right to become her guardian that was originally owned by her biological parents becomes transferred to her adoptive parents for having carried out the obligations actually borne by the biological parents, as stipulated in the law.

The relationship between husband and wife in the *fiqh* of reciprocity has the nature of reciprocity, namely complementing each other in carrying out rights and obligations. If so far the wife has always been positioned as a party who has obligations in private matters, then in the *ijtihad* model using the *fiqh* of reciprocity, she is positioned as a partner with equality to realize their rights and obligations together. The concept of guardianship in Islamic family law in the *fiqh* view of reciprocity is that a person has the right to become a guardian if he has performed his obligations. If a guardian does not exercise his rights, then he also cannot claim his rights. This kind of *ijtihad* model is intended to protect and eliminate discrimination against children, particularly the female ones.

## 6. Conclusion

Reconstruction of the concept of guardianship of adopted children and mother's children in the perspective of APRI and ADHKI based on the *fiqh* of reciprocity resulted in a model of reciprocal rights and obligations between children and parents. In terms of the husband-wife relationship, men and women have complementary and reciprocal positions in every condition, so do children and parents in their relationship. The reconstruction of the concept of guardianship of adopted children is based on the paradigm that when a daughter is abandoned by her parents and then can live independently normally, then she is considered an independent woman and the parents in any way have no right to force her to marry. On the other hand, if a child is abandoned by her parent (guardian) and then raised and cared for by her adoptive parent or raised by her own mother, then the right to become her guardian that was actually of her biological parent (father) is transferred to the adoptive parent, or the mother, who has taken care of her for having carried out the obligations that were imposed to her biological parent (i.e. the father).

---

<sup>7</sup> Interviews with experts from both APRI and ADHKI



## Acknowledgment

This research is self-funded. However, the authors would like to express their gratitude to the librarians of UIN Sayyid Ali Rahmatullah Tulungagung for their tireless assistance in providing valuable sources during their study.

## Conflict of Interest

The authors declare that there is no conflict of interest regarding the publication of the paper.

## Author Contribution

This work was carried out in collaboration among all authors. Author IN designed the study, performed the content and discourse analysis, and wrote the first draft of the manuscript. Author MLR helped to design the study, and did the analysis, whereas author HF managed the data collected, and helped to analyze the study. All authors searched for references and wrote and approved the final manuscript.

## References

- A. Nugroho (2005) Fikih kiri: revitalisasi ushul al-fiqh untuk revolusi sosial, *Al-Jami'ah: Journal of Islamic Studies*, 43(2), 425-454. <https://doi.org/10.14421/ajis.2005.432.425-454>
- Apriliansa, B. (2015). Putusan hâkim dalam tindak pidana penelantaran anak pada Pengadilan Negeri Boyolali (Putusan Nomor: 23/Pid.B/2015/PN.Byl), [UG Thesis, Universitas Negeri Jember]. <https://repository.unej.ac.id/bitstream/handle/123456789/104076/Bella%20Apriliansa%20-%20160710101083.pdf?sequence=1&disAllowed=y>
- al-Asqalani, I. H. (2000). *Fath al-bari syarh shahih al-Bukhari*, Cairo: Dar al-Taqwa.
- Auda, J. (2008). *Maqasid al-syari'ah as philosophy of Islamic law*, London: The International Institute of Islamic Thought.
- Bahdar (2013) Modernisme dan reformisme dalam pembinaan hukum Islam dan pranata sosial, *Hunafa: Jurnal Studia Islamika*, 10(2), 345-357. <https://doi.org/10.24239/jsi.v10i2.35.345-357>
- Bogdan, S. K. and Biklen, R. C. (1998). *Qualitative research for education: an introduction to theory and methods*. 3<sup>rd</sup> ed, Boston: Allyn and Bacon.
- E. Nurlaelawati & S. C. van Huis (2020) The status of children born out of wedlock and adopted children in Indonesia: interactions between Islamic, adat, and human right norms, *Journal of Law and Religion*, 34(3), 356-382. <https://doi.org/10.1017/jlr.2019.41>
- Engineer, A. A. (2004). *Rights of women in Islam*, 3rd ed. London: Sterling Publications.
- F.I. Hidayah (2014) Diskursus hukum Islam di Indonesia tentang perwalian anak angkat, *ISTI'DAL: Jurnal Studi Hukum Islam*, 1(1), 72-79, <https://ejournal.unisnu.ac.id/JSHI/article/view/316>
- Government of Indonesia (GoI). (1984). *The Indonesian Act No. 7 of 1984 concerning Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women*. <https://peraturan.bpk.go.id/Home/Details/46978/uu-no-7-tahun-1984>
- GoI, (1991). *Ministry of Religious Affairs' Decision No. 154 of 1991 on the Implementation of Presidential Instruction No. 1 of 1991 concerning the Dissemination of KHI*, [https://id.wikisource.org/wiki/Keputusan\\_Menteri\\_Agama\\_Republik\\_Indonesia\\_Nomor\\_154\\_Tahun\\_1991](https://id.wikisource.org/wiki/Keputusan_Menteri_Agama_Republik_Indonesia_Nomor_154_Tahun_1991).
- GoI, (2014). *The Act No. 35 of 2014 on the Amandment of the Act No. 23 of 2002 on Child Protection*, <https://peraturan.bpk.go.id/Home/Details/38723/uu-no-35-tahun-2014>
- GoI, (2016). *The Indonesian Act No. 17 of 2016 on the Stipulation of Government Regulations in lieu of the Indonesian Act No. 1 of 2016 concerning the second amendment to the Indonesian Act No. 23 of 2002 concerning Child Protection*, <https://peraturan.bpk.go.id/Home/Details/37575/uu-no-17-tahun-2016>

- H. Haq (2015) Reformasi hak ijbar fiqhi dalam tantangan isu gender kontemporer, *Palastren: Jurnal Studi Gender*, 8(1), 197-224. <https://journal.iainkudus.ac.id/index.php/Palastren/article/view/941>.
- I. Nur & M. N. Muttaqin (2020) Reformulating the concept of maṣlaḥah: from a textual confinement towards a logic determination, *Justicia Islamica: Jurnal Kajian Hukum Dan Sosial*, 17(1), 73-91. <https://doi.org/10.21154/justicia.v17i1.1807>.
- I. Nur, M. N. Muttaqin & A. A. Wakhid (2020) Reformulasi al-qawā'id al-uṣūliyyah al-tashrī'iyah dalam pengembangan fiqih kontemporer, *Analisis: Jurnal Studi Keislaman*, 20(1), 47-68. <https://doi.org/10.24042/ajsk.v20i1.6573>.
- I. Nur, S. Adam & M. N. Muttaqien (2020) Maqāshid al-sharī'at: The main reference and ethical-spiritual foundation for the dynamization process of Islamic law, *Ahkam: Jurnal Ilmu Syari'ah*, 20(2), 331-360. <https://doi.org/10.15408/ajis.v20i2.18333>.
- Ibn Asyur, M. (1947). *Maqāshid al-syari'ah al-Islāmiyah*, Tunis: Dār al-Tunisiyah.
- Ibn Majah, M. Y. (1998). *Sunan ibn Majah*. Cairo: Dar al-Hadith.
- Ibn al-Subki, T.A.W. (n.d.) *Hasyiah al-'allamah al-bannani 'ala matan jam'i al-jawami'*, Ch. 2, Cairo: Dar Ihya' al-Kutub al-'Arabiyyah.
- Indonesian Constitutional Court, (2010), *Putusan MK Nomor 46/PUU-VIII/2010*, Available at: [https://www.bphn.go.id/data/documents/putusan\\_46-puu-viii-2010\\_\(perkawinan\).pdf](https://www.bphn.go.id/data/documents/putusan_46-puu-viii-2010_(perkawinan).pdf)
- Indonesian Supreme Court, (2014), *Directory of Verdicts*. Available at: <https://putusan3.mahkamahagung.go.id/direktori/putusan/71558d20bfeafb0fd8727aee5ec1d0.html>
- al-Jaziri, A. R. (n.d.). *Kitāb al-fiqh 'alā al-mazāhib al-arba'ah*, Beirut: Dar al-Fikr.
- Karim, K. A. (2003). *Al-juzuru al-tarikhiyyah li al-syari'ah al-Islamiyyah*, Cairo: Sina li al-Nasyr.
- Lincoln, Y. S. & Guba, E. G. (1985). *Naturalistic inquiry*. Beverly Hills, CA: Sage.
- Mayer, A. E. (1992). Islam and human rights: different issues, different contexts. lessons from comparisons. In T. Lindholm & K. Vogt (eds.), *Islamic law reform and human rights: challenges and rejoinders*, Copenhagen: Nordic Human Rights Publications.
- al-Mughniyah, M. J. (2011). '*Al-fiqh 'ala al-madzahib al-khamsah*', In Masykur A.B., A. Muhammad, and I. Al-Kaffi (trans. and ed.), *Fiqih lima madzhab*, Jakarta: Lentera.
- Muslim, I. (2001). *Ṣaḥīḥ Muslim*. Riyadh, KSA: Maktabatur Rusyd.
- N. Faizah (2017) Wālī nikah dalam pembacaan ulama dan perundang-undangan (menelusuri nilai-nilai filosofis dari peran wālī nikah), *Proceedings of AnCOMS (Annual Conference for Muslim Scholars)*, Seri 1, 158-171. <http://proceedings.kopertais4.or.id/index.php/ancoms/article/view/17>
- al-Naim, A. A. (1994). *Dekonstruksi syariah: wacana kebebasan sipil, hak asasi manusia, dan hubungan internasional dalam Islam*, Yogyakarta: LkiS.
- Nasution, K. (2005). *Hukum perkawinan 1 dilengkapi perbandingan UU negara Muslim kontemporer*, Yogyakarta: Academia dan Tazafaa.
- al-Qardhawi, Y. (1986). *Syari'ah Islamiyah khuluduha wa shalahuha litathbiqiha fi kulli zaman wa makan*, Cairo: Dar al-'Arabi.
- al-Raisuni, A. (1992). *Nazhāriyyah al-maqāshid 'Inda al-Imam al-Syatibi*, Beirut: Muassasah al-Jami'iah.
- Ramulyo, M. I. (2010). *Hukum perkawinan Islam*, Semarang: PT Toha Putra.

- S. Nurjanah & I. Nur (2022) Gender fiqh: the mobilization of gender responsive movements on social media, *Ijtihad: Jurnal Wacana Hukum Islam dan Kemanusiaan*, 22(1), 1-18. <https://doi.org/10.18326/ijtihad.v22i1.1-18>.
- S. M. Berliana, et al. (2019) Factors associated with child neglect in Indonesia: Findings from National Socio-Economic survey," *Children and Youth Services Review* 106[104487]. <https://doi.org/10.1016/j.childyouth.2019.104487>
- Schacht, J. (1950). *Origins of Muhammadan jurisprudence*, Oxford: Oxford University Press.
- Smith, W. R. (1993). *Kinship and marriage in early Arabia*, London: Adam & Charles Black.
- Subhan, Z. (2008). *Menggagas fikih pemberdayaan perempuan*, Jakarta: Elkahfi.
- U. M. Assim & J. Sloth-Nielsen (2014) Islamic kafalah as an alternative care option for children deprived of a family environment, *African Human Rights Law Journal*, 14(2), 322-345. [http://www.scielo.org.za/scielo.php?pid=S1996-0962014000200003andscript=sci\\_abstractandtlng=es](http://www.scielo.org.za/scielo.php?pid=S1996-0962014000200003andscript=sci_abstractandtlng=es).
- Umar, N. (2003). *Teologi gender antara mitos dan teks kitab suci*, Jakarta: Pustaka Cicero.
- al-'Utsamin, M.S. (n.d.). *Al-Syarhu al-mumti' 'ala zadil mustaqni'*, vol. 2, Cairo: Dar al-Ummah.
- M. I. Wahyudi (2007) Membaca ulang konsep perwalian dalam perspektif Mohammed Arkoun, *Musawa: Jurnal Studi Gender dan Islam*, 5(2), 259-279. <https://doi.org/10.14421/musawa.2007.52.259-279>.
- Y. Roza & L. E. Yaswirman (2019) The transfer process from the nasab guardian to the judge guardian in the case of adhal guardian through the decision of 1B class Religious Court of Batusangkar, *International Journal of Multicultural and Multireligious Understanding*, 6(3), 456-466. <https://ijmmu.com/index.php/ijmmu/article/view/865>
- Yin, R. (1994). *Case study research: design and method*, London: Sage Publication.
- al-Zanati, M. A. H. (2012). *Rahmat al-ummah fi ikhtilaf al-a'immah*, Beirut: Dar al Kutub al-Ilmiyyah.