

The Differences in the Application of the Right of *Ijbar* Based on *Fiqh* and Law No. 39 of 1999 on Human Rights

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Abstract. *This study aims to find out about the differences in the application of ijbar rights according to fiqh and Law No.39 of 1999 concerning Human Rights, how the legal rules of ijbar rights based on fiqh and Law No.39 of 1999, whether the application of ijbar rights based on fiqh and Law No.39 of 1999 is in line, whether there is special protection for women who are forced to marry by guardians, what are the negative impacts of the application of ijbar rights on the harmony of a marriage. The research method used is library research. Many guardians abuse the right of ijbar and lead to forced marriage, while according to Law No.39 of 1999 a child also has full rights over his survival, one of which is to choose his life partner. With regard to the provisions of the mujbir guardian, the majority of fiqh scholars, such as the Maliki, Shafi'i, and Hambali circles allow the right of ijbar by a guardian to a child or person under his guardianship to marry even without the child's permission, this is very contrary to Law No.39 of 1999.*

Keywords: *Fiqh; Ijbar; Law; Right.*

1. Introduction

Marriage is a sacred and legal bond, in the Qur'an termed *mithaqan ghalizan*, which is a solid bond. The marriage bond contains the values of *ubudiyah*, as prescribed by religion, with noble intentions and goals. A marriage is intended to realise a marriage is intended to realise a family, apart from being a demand of human nature, it is also the first step in building a household and is a bond based on divine values to form a *sakinah* and *mawaddah* family.¹

Various ways are taken to achieve this goal, one of which is choosing a good partner. Basically, every human being is given the authority and freedom to

¹ Aspandi, "Pernikahan Berwalikan Hakim (Analisis Fikih Munaqahat dan Kompilasi Hukum Islam)", *Jurnal Al-Ahkam*, Vol. 5 No.1 2017 p.2 Accessed from : <https://media.neliti.com/media/publications/178348-ID-pernikahan-berwalikan-hakim-analisis-fik.pdf>, on September 1, 2023

choose a partner. Sociologically, the selection of a partner will pay attention to physical appearance, heredity, and finance. In other words, before carrying out a marriage, a person must consider the seeds, bebet, and weight of the prospective partner.²

The freedom to choose a prospective spouse in practice is often hindered by the right of *ijbar* owned by the parents or guardians of the prospective bride. Basically, the right of *ijbar* is seen as a form of protection and parental affection towards daughters. However, in practice, it is not uncommon for the right of *ijbar* to be interpreted as the imposition of will on girls at the time of choosing a spouse.³ There is a common view that according to Islamic jurisprudence, a woman does not have the right to choose her spouse; her father or grandfather does. This has led to the common assumption that Islam condones forced marriage. This view is based on an understanding known as the right of *ijbar*.

According to the terminology, *ijbar* is the authorisation for a father to marry off his young daughter without her consent. However, the right of *ijbar* in *fiqh* does not merely remove the girl's right to herself, because forced marriage is not the purpose of the right of *ijbar*.⁴

With regard to the provision of *wali mujbir*, the majority of *fiqh* scholars, such as the Maliki, Shafi'i, and Hambali circles, allow the right of *ijbar* by a guardian to a child or person under his guardianship to marry even without the child's permission.⁵

Guardianship in marriage (*wilayah tazwij*) is one of the most discussed in the implementation of marriage, starting from who is the guardian of marriage, the sequence of guardians, the kinds of guardians, the role of guardians in the implementation of marriage to whether or not women can become guardians of marriage and require guardians to be a condition of the validity of a marriage.⁶

² Safrudin Aziz, "Tradisi Pernikahan Adat Jawa Keraton Membentuk Keluarga Sakinah", *Jurnal Kebudayaan Islam*, Vol. 15 No.1 2017 p.29 Accessed from: <https://ejournal.uinsaizu.ac.id/index.php/ibda/article/view/724> , on September 1, 2023

³ Muhammad Ngizzul Muttaqin dan Nur Fadhilah, "Hak Ijbar Wali (Tinjauan maqoshid syariah dan antropologi hukum islam)", *Jurnal Hukum dan Syariah*, Vol.12 No.1 2020 p.103 Accessed from: <http://ejournal.uin-malang.ac.id/index.php/syariah> , on September 1, 2023

⁴ Syaiful Hidayat, "Wali Nikah Dalam Perspektif 4 Mahzab", *Jurnal Inovatif* Vol.2 No.1 2016 p.107, Accessed from: <https://jurnal.iaih.ac.id/index.php/inovatif/article/download/52/40/> , on September 1, 2023

⁵ Muhammad Jawad Mugniyah, "*Fiqh Lima Mazhab (Al-Fiqh 'ala al-Mazahib al-Khamsah)*", (Jakarta: Lentera, 2008) p.346.

⁶ Aspandi, "Pernikahan Berwalikan Hakim (Analisis Fikih Munaqahat dan Kompilasi Hukum Islam)", *Jurnal Al-Ahkam*, Vol. 5 No.1 2017 p.87 Accessed from: <https://media.neliti.com/media/publications/178348-ID-pernikahan-berwalikan-hakim-analisis-fik.pdf> , on September 6, 2023

Guardianship over a woman is an absolute requirement for the validity of a marriage contract. *Ijbar* guardianship according to the Shafi'i *Madzab* is that which belongs to the father, and grandfather in the absence of the father. So a father may marry a virgin child who is young or old without her permission, and it is recommended to ask her permission. For a virgin who has reached the age of puberty and is of sound mind, asking her permission to marry her is sufficient, according to the most correct view.⁷ This is narrated by the hadist narrated by Muslim:

"Sa'id ibn Manshur and Qutaibah ibn Sa'id narrated to us, they both said: Malik has narrated to us. And Yahya ibn Yahya narrated to us (and this narration is his), and he said: I said to Malik: Did "Abdullah bin al-Fadhl ever say to you, from Nafi", from Ibn "Abbas: That the Prophet said: "A widow has more rights over herself than her guardian, while a girl must be asked for her consent. But her consent is her silence". He (Malik) replied: "Yes" (HR Muslim no 1421).

In the Shafi'i *Madzab*, the *mujbir* guardian is the guardian (father or grandfather in the absence of the father), who has the right to marry the girl even without her consent. Other than these two people (father or grandfather) are non-*mujbir* guardians.⁸

The concept of *ijbar* is often misused by *mujbir* guardians, which leads to forced marriage. This forced marriage arises of course many motives behind it, for example there is an agreement between parents who agree to match their children, there are also family factors, or even there is because the prospective in-laws are rich men. This forced marriage is usually carried out by a father. Usually a father coerces his daughter under the pretext that the right of a virgin girl to consent to marriage rests with the father and the reason also used is that a guardian such as a father has the right of *ijbar*.

Wali mujbir ignores the conditions set out in Islamic law and does not take into account the human rights of the girl as a woman. In the context of this forced marriage, women whose position is also a child are the most disadvantaged party. This is because their rights as a woman as well as a child in choosing their life partner have been violated due to the forced marriage.

In essence, children also have the right to their future survival in forming a family and continuing offspring. Indonesia has enacted legislation on human rights, specifically Law No.39 of 1999 on Human Rights. Law No.39 of 1999 on Human Rights states in article (1) that "Human Rights are a set of rights inherent in the

⁷ Ayi Isha Sholih Muchtar dkk, "Pendapat Imam Syafi'i Tentang Hak Ijbar : Suatu Kajian Berspektif Gender", *Jurnal Istinbath* Vol.16 No.1 2021 p.74, Accessed from: <https://riset-iaid.net/index.php/istinbath/article/view/280> , on September 6, 2023

⁸ Ibid p.75

nature and existence of human beings as creatures of the almighty God and are His gifts that must be respected, upheld, and protected by the State, law, government, and every person for the sake of honour and protection of human dignity”.⁹

From the explanation above, a very different concept is found, there is a legal gap between the concept of *wali mujbir* in marriage and the laws and regulations in Indonesia, especially Law No.39 of 1999 concerning Human Rights. Moreover, the right of *ijbar* in the current context is increasingly being debated. In the midst of the struggle to strengthen women's rights, the concept of *ijbar* is very contrary to the equality and justice that is the focus of this struggle. Therefore, the author is interested in examining more deeply the differences in the application of *ijbar* rights based on *fiqh* which is then examined against Law No.39 of 1999 concerning Human Rights.

2. Research Methods

This research tries to examine in depth the concept of guardianship in general and *ijbar* rights in particular, in the discipline of *fiqh* and the perspective of the compilation of Islamic law. This type of research is library research. This research is descriptive analysis, descriptive is describing and describing precisely about the right of *ijbar*. While analysis is a way to obtain knowledge either through primary or secondary means.¹⁰

Because this research is a library research, the author uses documentation techniques in the form of journals, Al-Qur'an, hadith, books and research results which are then read, examined and analysed to build a new conception of the Differences in the Application of *Ijbar* Rights Based on *Fiqh* and Law No.39 of 1999 concerning Human Rights.

3. Results and Discussion

3.1. *Ijbar* Rights Based on *Fiqh*

a. Maliki school

Imam Malik, the founder of the Maliki school of thought, a father has the right to force his daughter (*ijbar*) to marry, and this right is only owned by a father and *washi* (the person being willed) provided that the father of the girl concerned has

⁹ Tim ICCE UIN Jakarta, “Demokrasi, Hak Asasi Manusia & Masyarakat Madani” , (Jakarta: Prenada Media, 2000), p.200-201

¹⁰ Dede Nurdin, “Konsep Hak *Ijbar* Wali Nikah Menurut Fiqih Islam dan Kompilasi Hukum Islam”, *Jurnal at-Tadbir : Media Hukum dan Pendidikan*, Vol.32, No.2, 2022, p.98, Accessed from: https://www.researchgate.net/publication/362395374_Konsep_Hak_Ijbar_Wali_Nikah_dalam_Perspektif_Kompilasi_Hukum_Islam_KHI on September 10, 2023

died. The will must be evidenced in writing or verbally by a witness. It is stated that the only people who can force a woman to marry are the father of a girl and a boy, the master of his (immature) servant, and the guardian of an orphan. Guardians other than the father may only give in marriage with the consent of the girl concerned.¹¹

Imam Maliki distinguishes between virgins and widows with regard to the consent and freedom of the woman (future wife) in choosing a partner. For widows, there must first be explicit consent before the marriage contract. As for girls or widows who are not yet mature and have not been interfered with by their husbands, there is a difference between the father as a guardian and a guardian other than the father. The father as guardian has the right to force his daughter (*ijbar* right) to marry.

The existence of more power for the guardian in terms of the consent of his daughter, Imam Malik based on a hadith "*al-ayyimu ahaqqubi nafsaha min waliyaha*". This conclusion is drawn from the opposite understanding of the statement that the widow is far more entitled to give consent to her marriage.¹² Hence the ruling on seeking the girl's consent in marriage is Sunnah, not obligatory. Non-father guardians (uncles, brothers, etc.) do not have the right of *ijbar* or the right to force. If the guardian of the girl dies, then the right of guardianship falls to the order of other guardians who are still alive. These non-fatherly guardians do not have the right to compel marriage in the same way as the father does, even though they occupy the same position as guardians.¹³

a. Shafi'i school

Imam Shafi'i is of the opinion that the guardian in marriage is something that must be present, because the marriage guardian is one of the pillars of marriage, which means that marriage without a guardian is invalid, although on the other hand the guardian must not make it difficult for his daughter to get married.¹⁴

The freedom and consent of women in marriage is classified by Imam Shafi'i into

¹¹ Arini Robbi Izzati, "Kuasa Hak Ijbar Terhadap Anak Perempuan Perspektif Fiqh dan HAM", *Jurnal al-Mawarid*, Vol.11, No.2, 2011, 243, Accessed from: <https://media.neliti.com/media/publications/26068-EN-kuasa-hak-ijbar-terhadap-anak-perempuan-perspektif-fiqh-dan-ham.pdf> on September 10, 2023

¹² Ibid 243

¹³ Kudrat Abdillah dan Ah.Kusairi, "Reinterpretasi Hak Ijbar Dalam Hukum Perkawinan Islam di Keluarga Pesantren", *Jurnal : Asy-Syari'ah*, Vol.22 No.1 2020, p.40, Accessed from: https://journal.uinsgd.ac.id/index.php/asy-syariah/article/download/7874/pdf_1 on September 10, 2023

¹⁴ Ayi Isha Sholih Muchtar dkk, "Pendapat Imam Syafi'i Tentang Hak Ijbar : Suatu Kajian Berspektif Gender", *Jurnal Istinbath* Vol.16 No.1 2021 p.74, Accessed from: <https://riset-iaid.net/index.php/istinbath/article/view/280> , on September 10, 2023

three groups: immature girls, mature girls, and widows. Firstly, immature girls. The limit set by Imam Shafi'i to determine the maturity of a girl is under 15 years old or has not experienced menstruation. For immature girls in this case a father may marry off the girl even without her consent on the condition that it is beneficial and not detrimental to the child.¹⁵ The basis of reference for the right of *ijbar* used by Imam Syafi'i is the Prophet's marriage to Aisha, Abu Bakr's daughter who was still 6 years old even though the Prophet began to have intercourse with her when she was 9 years old. Abu Bakr married Aisha who was under 15 years of age and had not menstruated on the grounds that all the affairs of the child were the responsibility of the father.

Both adult girls, girls who are 15 years old or have menstruated according to Imam Shafi'i there is a balance of rights between the father and his daughter. However, there is an emphasis that the father has more rights in determining the marriage of his daughter. Imam Syafi'i concluded that the permission of a girl who is still a girl is not a necessity but only an option.¹⁶

Third, widows, Imam Shafi'i argued based on the following hadith narrated by Muslim which means "It was narrated from Ibn Abbas that the Prophet SAW said: "The widow is more entitled to her than her guardian, while the girl is asked for an opinion about her and her permission is her silence". This hadith explains that the daughter who is widowed, her rights are greater than her father and she is given the right to determine her consent firmly, while the girl is indirectly explained that her guardian is more entitled to her. However, asking for her consent is recommended and her silence is her permission". However, if a widow marries without a guardian, her marriage is not valid.¹⁷

c. Hanafi school

In the view of Abu Hanifah, the founder of the hanafi school of thought, the right of *ijbar* does not exist for people who have reached puberty, reason, adulthood, and widowhood. And Abu Hanifah allows marriage without a guardian (marrying oneself) or asking someone else outside the lineage to marry a girl or widow. And the marriage of a girl or widow is valid even without the permission of the guardian. The basis or argument according to Imam Abu Hanifah that there is no need for a guardian is as follows.¹⁸ as Allah's Word in Q.S Al-Baqarah verse 232:

¹⁵ Kudrat Abdillah dan Ah.Kusairi, "Reinterpretasi Hak Ijbar Dalam Hukum Perkawinan Islam di Keluarga Pesantren", *Jurnal : Asy-Syariah*, Vol.22 No.1 2020, p.41, Accessed from: https://journal.uinsgd.ac.id/index.php/asy-syariah/article/download/7874/pdf_1 on September 10, 2023

¹⁶ Ibid p.42

¹⁷ Ibid p.42

¹⁸ Syaiful Hidayat, "Wali Nikah Dalam Perspektif 4 Mahzab", *Jurnal Inovatif* Vol.2 No.1 2016 p.109, diakses dari : <https://jurnal.iaih.ac.id/index.php/inovatif/article/download/52/40/> , on September 10, 2023

وَإِذَا طَلَقْتُمْ النِّسَاءَ فَبَلَغْنَ أَجَلَهُنَّ فَلَا تَعْضُلُوهُنَّ أَنْ يَنْكِحْنَ أَزْوَاجَهُنَّ إِذَا تَرَضَوْا بَيْنَهُمْ بِالْمَعْرُوفِ ذَلِكَ يُوعَظُ بِهِ مَنْ كَانَ مِنْكُمْ يُؤْمِنُ بِاللَّهِ وَالْيَوْمِ الْآخِرِ ذَلِكَمْ 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 mutual consent between them in a manner that is acceptable to them. This is what is advised to those who believe among you in Allah and the Last Day. That is better for you and more pure. Allah knows, and .you do not know

The foundation used by Imam Abu Hanafi, regarding the matter of the consent of a girl who is still a girl in marriage is the incident of the marriage of al- Khansa at the time of the Prophet Muhammad SAW. On that occasion the Prophet said firmly rejected the marriage of a girl who was married by her father, because the girl did not agree. In this incident, al-Khansa had met the Prophet and conveyed the incident that happened to her, namely she was married by her father to the son of her father's brother whom she did not like. Then the Prophet asked al-Khansa if she had asked for permission to consent, it turned out that al-Khansa stated that she was not happy with her father's choice. The Prophet then sent him away and ruled the marriage invalid, while advising al-khansa to marry the person he liked.¹⁹

d.Hambali school

The Hambali school of thought on guardianship is basically the same as the Maliki and Shafi'i schools of thought. All three *Madzabs* are of the opinion that the guardian is very important (dharuri) in marriage. Without a guardian or someone who replaces the guardian, the marriage is void. It is not permissible for a woman to enter into her own marriage contract under any circumstances, whether it is with an adult or an immature girl or boy, except for a widow who must be asked for her permission and consent.²⁰

Ibn Qudamah of the Hambali school is of the opinion that a father can force his daughter, whether she is an adult or not, to marry a man who is compatible, even if she is not happy with it. The basis for the permissibility of marrying an immature girl is Q.S At-Talaaq (65):4. This verse, in principle, is talking about the 'iddah period of a woman who has not menstruated or a woman who has stopped menstruating. The simple logic is that 'iddah arises because of talaq, and talaq arises because of marriage. Implicitly, this verse shows that it is permissible

¹⁹Kudrat Abdillah dan Ah.Kusairi, "Reinterpretasi Hak Ijbar Dalam Hukum Perkawinan Islam di Keluarga Pesantren", *Jurnal : Asy-Syariah*, Vol.22 No.1 2020, p.41, Accessed from: https://journal.uinsgd.ac.id/index.php/asy-syariah/article/download/7874/pdf_1 on September 10, 2023

²⁰ Syaikh Abdurrahman Al-Juzairi, "*Fiqh Empat Mahzab*", (Jakarta : Pustaka Al-Kautsar, 2015), p.51

for a woman who has not menstruated (immature) to get married.²¹

According to Ibn Qudamah, the basis for the hadith that permits the marriage of immature women is the prophet's act of marrying Aisha when she was seven years old and having sexual intercourse after nine months of age. According to Ibn Qayyim al-Jauziyah, the opinion of the group that says the consent of the girl is not needed for her marriage is based on the opposite understanding of the hadith "a widow has more rights over herself than her guardian". This opinion is rejected by Ibn Qayyim al- Jauziyah by saying that this direct indication of haids should be favoured over taking the opposite meaning. This is because ruling on a particular case does not necessarily mean ruling on the opposite, and another case may have its own ruling. And the strongest reason for rejecting the opinion of this group is the Prophet's hadith which instructs asking for consent for the marriage of a girl.²²

3.2. The Right of *Ijbar* under the Law on Human Rights

In Law No. 39 of 1999 on Human Rights, the recognition of human rights values is regulated more specifically. Although it does not specifically mention the elements of criminal offences as in the jurisdiction of the International Criminal Court (ICC), this Law regulates the fundamental rights that must be protected.²³

Basic human rights based on Law Number 39 of 1999 concerning Human Rights are regulated in market 9 to article 66. Some of the basic rights related to the title of this research are the right to have a family and continue offspring, the right to personal freedom, women's rights and children's rights. The four rights are explained as follows:

a. Right to Family and Progeny

In Law No.39 of 1999 on Human Rights (HAM), the right to have a family and continue offspring is regulated in Article 10 paragraph (1) and paragraph (2). In essence, the article contains a person's freedom, both men and women, to start a family and continue offspring through a legal marriage (marriage that is carried out on the free will of both in accordance with the provisions of the legislation). Free will in this case means that the marriage is carried out with a holy intention without coercion, deception or pressure from anyone against the prospective wife or prospective husband.²⁴

²¹ Arini Robbi Izzati, "Kuasa Hak Ijbar Terhadap Anak Perempuan Perspektif Fiqih dan HAM", *Jurnal al-Mawarid*, Vol.11, No.2, 2011, p.245, Accessed from: <https://media.neliti.com/media/publications/26068-EN-kuasa-hak-ijbar-terhadap-anak-perempuan-perspektif-fiqh-dan-ham.pdf> on September 10, 2023

²² Ibid p.246

²³ Rhona K.M.Smith dkk, "Hukum Hak Asasi Manusia", (Yogyakarta : Pusham UII, 2008), p. 253

²⁴ Elucidation of article 10 paragraph (2) of Law Number 39 of 1999 on Human Rights.

In marriage, both bride and groom have the freedom to express their will to marry or not. In Indonesia, violence against women often occurs through forced marriage. A father sometimes ignores his child's right to have a free family without coercion from any party. The things that often happen as a result of ignoring the right to have a free family are the many cases of domestic violence and in general the victims are women.

b. Right to Personal Liberty

In Law No.39 of 1999 on Human Rights, the right to personal freedom is one of the most fundamental rights for everyone because it involves the right to determine one's own fate. Of the various rights protected in human rights, the right to personal freedom and freedom of expression, expression, association and assembly are the most important.

The right to personal liberty is set out in Articles 20 to 43. Among these rights, one of the most important and relevant to this research is the right to be free to vote and to be elected. The right to be free to vote and to be elected is not only exercised in elections for representatives of the people who sit in parliamentary seats or in presidential elections. But more than that, it is even exercised in everyday life.

This includes the right to choose a school, a place to live, a way of life and other choices in life. Of course, in this case, it includes the right to choose a life partner. Everyone is free to choose who will be their life partner.

c. Women's Rights

The right to have a family and continue offspring and the right to personal freedom are closely related to the human rights of women, this is because women are very vulnerable and are often victims of violence in a marital relationship. Women are categorised as vulnerable people. Women's rights regulated in Law No.39 of 1999 on Human Rights essentially contain the rights of women to have equal opportunities with men such as in politics, employment, education, legal position, citizenship and marriage. Discriminatory treatment of women is also the background for the establishment of women's rights.

d. Child Rights

In addition to women's human rights, this research also relates to children's rights because the woman in question is a child. A child also needs special care and protection and is dependent on the help and assistance of adults, especially in the early years of life. It is not enough for children to be given the same rights and fundamental freedoms as adults.

In Law No.39 of 1999 on Human Rights, children's rights are regulated in Article 52 to Article 66. Children's rights are human rights and for their benefit they are recognised and protected by law even from the womb. Children's rights include the right to life, survival and to improve their standard of living as well as the

right to a name and citizenship status.

Based on the four rights mentioned above, it can be seen that Law No. 39 of 1999 on Human Rights, provides freedom and protection for everyone, both men and women, to enter into a marriage with free will without any intervention or coercion from any party.

In the end, the power of *ijbar* rights can cause resistance to the protection of human rights, which in this case is women. This is certainly contrary to the basic principles of Islam, which is a teaching that is full of human values. Islam comes to earth with messages of humanity, the concept of equality and equality between men has superiority over women, of course this is the beginning of a civilisation revolution, the patriarchal culture of the Arabian Peninsula is slowly reduced by the teachings of Islam.

Many arguments reveal that Islam gives a high position to women. One of the Prophet Muhammad's traditions says that heaven is under the soles of the mother's feet. In another tradition it is also said that when the Prophet Muhammad was asked who was the first person to be honoured in this world. The Prophet Muhammad SAW answered "Your mother" the answer was repeated 3 times by the Prophet then after that was the father.

But a contradiction arises when one also finds some traditions as narrated by al-Bukhari, at-Tirmidzi which asserts that a society will never progress if it is led by women. Isn't this then seen as demeaning to women? Surah an-Nisa, understood that Siti Hawa, the wife of Prophet Adam was created from the rib of Prophet Adam so that later the concept of the nature of women who are lower than men.

The Holy Qur'an is both normative and pragmatic. Its teachings have relevance to the present day. Such teachings should not be treated as normative. They should be seen in the context in which they are applied. Engineer analogises this through interpretations of verses by contextualising them for his time. An example of this is the famous verse, "Men are rulers over women, because God has given some of them (men) more than others (women), and because they (men) have spent some of their wealth. Therefore, the virtuous women are those who obey God and take care of themselves in the absence of their husbands, because God has taken care of them. And those women whom you fear may be unfaithful, counsel them, separate them from their beds, and beat them. Then if they obey you, then do not look for reasons to trouble them. Verily, Allah is the Most High, the Most Great.

According to Engineer, the verse seems to treat women harshly, but again the context must be seen in proportion. At the time of the verse's revelation, women were restricted to the home and the man who supported them. In this condition, the Qur'an takes this into account so that it places a higher position than women. But keep in mind that the Qur'an does not assume or state that a social structure is normative, a social structure must change, such as women who support their

families, or become male work colleagues, then women are equal to men or even superior to men.²⁵

From the verses exemplified by the engineer above, it can be concluded that the verse when viewed together in the right context, it is clear that God does not differentiate between genders or natures brought from birth. The injustice comes from the social structure that causes the superiority of men over women.²⁶

In the midst of the struggle for women's rights, the concept of *ijbar* is contrary to the equality and justice that is the focus of this struggle. *Ijbar*, as a concept of a guardian's power over his daughter, is laden with patriarchal values. The child is considered to be the sole property of the parents and the consent of the child is not important. A *mujbir* guardian is considered to be the one who knows best what is best for the child. Of course, this kind of view is impossible to accept. After all, a girl is a human being who has the right to make her own life choices. The role of a guardian should be limited to directing or providing considerations that are best for their children, not forcing them to submit to parental choices.

The provision of the right of *ijbar* further triggers polemics because there is an incorrect understanding that makes the guardian an authoritarian person in determining the prospective husband of his child or the person under his guardianship. On the other hand, considering the wishes and opinions of children should not be ruled out. Considering that the child or person under their guardianship is the one who will live life with her husband for all time, not the guardian or her parents. This is supported by the enactment of Law No. 39 of 1999 on Human Rights.

In response to this issue, only following the *fiqh* concept of *ijbar* rights and adhering to the contents according to the *fiqh* is an unjustified and disproportionate action. The concept of *wali mujbir* should be based on a more contextual understanding by paying attention to the philosophical basis of the marriage law, which broadly speaking, marriage aims to create a household of *Sakinah, mawaddah* and *rahmah*.

In the conditions of coercion that must be endured in such a way by women victims of *ijbar* rights, of course a *Sakinah, mawaddah* and *Rahmah* household cannot be realised. Many possibilities will occur for women who undergo marriage by force, for example experiencing physical, psychological, or other types of violence.

From this, a statement can be drawn, that marriages undertaken due to coercion

²⁵ Arini Robbi Izzati, "Kuasa Hak Ijbar Terhadap Anak Perempuan Perspektif Fiqih dan HAM", *Jurnal al-Mawarid*, Vol.11, No.2, 2011, p.250, Accessed from: <https://media.neliti.com/media/publications/26068-EN-kuasa-hak-ijbar-terhadap-anak-perempuan-perspektif-fiqh-dan-ham.pdf> on September 10, 2023

²⁶ Ibid p.251

can have adverse effects on women, especially their vulnerability to violence. The purpose of marriage itself is to create a family that is *Sakinah, mawaddah wa rahmah*. This shows the inconsistency of the *ijbar* right of the guardian, because in fact the power of the *ijbar* right owned by the guardian is intended by Allah to lead a woman to happiness in marriage.

Women have full rights over themselves including in choosing a life partner. This right is not restricted by anything, especially when the restriction comes from a guardian who is supposed to act as a protector of his child.

4. Conclusion

Based on the description above, several conclusions can be drawn. First, that the right of *ijbar* is based on the opinion of the imams of the four *Madzabs*, where the power of *ijbar* of the guardian gives more authority for the guardian to marry off his daughter without first asking the child's consent. This is because a guardian is considered to be the one who knows best what is best for his daughter, so this perspective of happiness is formulated by the guardian. According to her parents' (guardian's) view, the daughter is not capable of formulating what is best for her, so her consent is not a priority. In this case, there is a clash between the girl and her parents, with the latter monopolizing the interests of the girl. Secondly, the right of consent has the potential to cause various risks to the girl, for example, violence against women, household disharmony, infidelity and so on, which actually distances from the purpose of marriage itself. This means that there has been an inconsistency in the right of *ijbar* of the guardian, because of the function and position of the *mujbir* guardian who can act authoritatively which can lead women to suffering in the household. When viewed from the perspective of human rights, it can be concluded that the practice of marriage with the right of *ijbar* or forced marriage is contrary to what has been regulated in Law Number 39 of 1999 concerning Human Rights. This is because the practice of marriage with *ijbar* rights or forced marriage is contrary to human rights, especially women's human rights to marry with free will and choose their life partners without coercion and threats. Unlike the case when the prospective bride agrees to the marriage without any intervention or coercion from anyone, then it is not contrary and does not violate the woman's human rights because she has given her consent.

5. References

Journals:

- Abdillah, K. (2020). Reinterpretasi Hak *Ijbar* Dalam Hukum Perkawinan Islam Di Keluarga Pesantren. *Asy-Syari'ah*, 22(1), 35–50. <https://doi.org/10.15575/as.v22i1.7874>.
- Aspandi. (2017). Pernikahan Berwalikan Hakim Analisis Fikih Munakahat dan



- Kompilasi Hukum Islam. *AHKAM*, 1, 85–116.
<https://media.neliti.com/media/publications/178348-ID- pernikahanberwalikan- hakim-analisis-fik.pdf>.
- Aziz, S. (2017). Tradisi Pernikahan Adat Jawa Keraton Membentuk Keluarga *Sakinah*. *Ibda' Jurnal Kebudayaan Islam*, 15(1), 22–41.
- Hidayat, S. (2016). *Wali Nikah Dalam Perspektif Empat Madzhab*. *Inovatif*, 2(1), 106–132.
- Ishak, A., Muchtar, S., Zihad, R., & Puspitasari, I. (2021). Pendapat Imam Syafi'i tentang Hak *Ijbar Wali*: Suatu Kajian Berperspektif Gender. *ISTINBATH*, 16(1). <https://riset-iaid.net/index.php/istinbath>.
- K.M Smith, R., Hostmaelingen, N., Ranheim, C., Arinanto, S., Falaakh, F., Soeprapto, E., Kasim, I., M.Rizki, R., Marzuki, S., Agus, F., Yudhawiranata, A., Sudjatmoko, A., Pradjasto, A., Wijayanti Eddyono, S., & Riyadi, E. (2008). *Hukum Hak Asasi Manusia*. www.pushamuii.org
- Ngizzul Muttaqin, M., & Fadhilah, N. (2020). Hak *Ijbar Wali* Tinjauan Maqashid Syari'ah dan Antropologi Hukum Islam. *De Jure: Jurnal Hukum Dan Syar'iah*, 12(1), 102–119. <https://doi.org/10.18860/j-fsh.v12i1.7580>
- Nurdin, D. (2022). Konsep Hak *Ijbar Wali* Nikah menurut Fiqih Islam dan Kompilasi Hukum Islam. *At-Tadbir*, 32(2), 93–105.