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Marriage Guardianship Law for Women in Islamic Jurisprudence, KHI and Supreme Court Decisions (Analysis of Religious Court Judges' Perceptions)

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Abstract. *This study aims to understand how Religious Court judges interpret the law on female marriage guardianship in the KHI and jurisprudence. This empirical study involved judges throughout Indonesia through an online survey for 10 months (October 2021 – July 2022) to analyze the legal discovery methods used by judges in deciding related cases. This study analyzed data from 52 religious judges who were determined using purposive sampling. Data collection methods included in-depth interviews, questionnaires, and document studies. Qualitative data analysis with a descriptive-analytical approach was used to describe and interpret the research findings. Research on marriage guardianship for women in the KHI and Supreme Court Decision Number 002 K/AG/1985 shows that there are three main understandings among Religious Court judges: a) marriage guardianship is absolutely necessary for all women; b) marriage guardianship is only mandatory for women under 21 years of age; and 3) the obligation of marriage guardianship can be reviewed based on the benefit and does not deviate from the opinions of the Islamic schools of thought. This difference in understanding arises due to the diverse methods of interpretation of the related articles (19, 71, 107) of the KHI and the Supreme Court Decision. Although the majority of respondents agree that the application of the Supreme Court Decision is more in line with PERMA Number 3 of 2017, the majority of Religious Court judges still believe that the rule of marriage guardians as a pillar of marriage that must be fulfilled for all women is more relevant to be applied in Indonesia today.*

Keywords: *Decisions; Judge's; Religious*

1. Introduction

Marriage in the national legal system is a form of intertwining of civil law and religious law.[1]Marriage is not only related to formal aspects, but also bound to spiritual and social aspects. The connection and attachment of religious norms in marriage is a manifestation of the principle of the Almighty God in Pancasila as the philosophy of the State.[2]Law Number 1 of 1974 concerning Marriage (Marriage Law) itself has emphasized this relationship because a marriage is formed based on the One Almighty God.[3]More firmly, the Compilation of Islamic Law (KHI) stipulates that carrying out marriage is an act of worship,[4]which means that marriage is not only about the relationship between individuals, but is also related to the relationship between humans and their God.

The connection and attachment of the issue of marriage to religious norms requires a religious assessment of a marriage. The role of religious law is emphasized in Article 2 paragraph (1) of the Marriage Law, that the validity of a marriage is based on the legal provisions of each religion and its beliefs. The problem then for the Muslim community is the existence of a diversity of Islamic jurisprudence schools in Islamic religious law, so that in implementing the provisions of this Article, it is not uncommon to find disparities in the application of law in Religious Court Decisions regarding the validity of a marriage, thus giving rise to legal uncertainty. This reality became the concern of Bustanul Arifin, a former Supreme Court Justice, at the time before the KHI was born, because very often in every problem there was always more than one opinion (qaul), so that when the Religious Court would apply Islamic law, people asked "Which Islamic law?"[5]The presence of the Circular Letter of the Bureau of Religious Courts No.

[1]Indonesian Ulema Council, delivered at the Trial of Case Number 68/PUU-XII/2014 at the Constitutional Court, judicial review of Article 2 of the Marriage Law. This was recorded in the Constitutional Court Decision Number 68/PUU-XII/2014, June 18, 2015,https://www.mkri.id/public/content/persidangan/bangunan/68_PUU-XII_2014.pdf.

[2]Constitutional Court Decision Number 68/PUU-XII/2014, 18 June 2015,https://www.mkri.id/public/content/persidangan/bangunan/68_PUU-XII_2014.pdf.

[3]Government of the Republic of Indonesia, Law of the Republic of Indonesia Number 1 of 1974 Concerning Marriage, Jakarta: 2 January 1974, State Gazette of the Republic of Indonesia 1974 Number 1.

[4]Ministry of Religious Affairs of the Republic of Indonesia, Compilation of Islamic Law (Jakarta: Directorate General of Development of Islamic Religious Institutions, 2001), Article 2. In the science of Uṣūl Fiqh, the category of law is divided into laws related to worship and laws related to muamalah. 'Abdul Wahhāb Khallāf in his book, 'Ilm Uṣūl al-Fiqh, categorizes marriage, which is part of Aḥwāl Syakhṣiyyah, as part of muamalah law, not worship. Worship is a form of charity that aims to regulate the relationship between humans and their God. 'Abdul Wahhāb Khallāf, 'Ilm Uṣūl al-Fiqh (Cairo: Dār al-Qalam, 1956), p. 33.

[5] Supreme Court of the Republic of Indonesia, Collection of Legislation Relating to the Compilation of Islamic Law with Definitions in its Discussion (Jakarta: Supreme Court of the Republic of Indonesia, 2011), p. 10.

B/l/735 dated 18 February 1958 to refer to the 13 prescribed fiqh books did not succeed in quelling this anxiety.[6]

The idea of positivizing Islamic law in Indonesia as a guideline for Muslim society gave birth to the KHI, which includes Book I on marriage, through Presidential Instruction Number 1 of 1991. The positivization of Islamic law through the KHI is basically aimed at upholding legal certainty, so that there is uniformity in the application of Islamic law.[7]According to A. Gani Abdullah, the legal formulation in the KHI attempts to end the dual perception of the validity of Islamic law as indicated by Article 2 paragraph (1) of the Marriage Law.[8]Meanwhile, according to A. Hamid S. Attamimi, who is of the opinion that KHI is not a written form of law in Indonesia, but rather an unwritten form of law, he is of the opinion that KHI can still be used to fill legal gaps.[9]

The presence of the KHI as a guideline for judges of the Religious Courts has been very helpful in creating uniformity of law, although it has not really succeeded in reducing differences in judges' perceptions in applying marriage law. Socio-cultural changes in society, the presence of new perspectives, and the development of science and technology have recently demanded the dynamism of Islamic law, so that several provisions of the KHI have been updated. These updates can be seen, among others, in the Circular of the Supreme Court (SEMA) concerning the Results of the Plenary Meeting of the Religious Chamber which has several times determined a legal provision that is different from the provisions of the KHI[10], especially after the presence of Supreme Court Regulation (PERMA) Number 03 of 2017 concerning Guidelines for Adjudicating Cases of Women in Conflict with the Law, which emphasizes that judges in adjudicating cases of women in conflict with the law must be based on principles, including, among others, the principles of non-discrimination and gender equality.

The judge's obligation to consider the principles of non-discrimination and gender equality certainly influences the judge's way of thinking or perception when

[6]The books requested to be used as guidance for Religious Court judges are (1) Al Bājūrī; (2) Fatḥul Mu'īn with its Syarah; (3) Syarqāwī 'tool Taḥrīr; (4) Qulyūbi/Muḥalli; (5) Fatḥul Wahhāb with its Syarah; (6) Tuḥfah; (7) Targībul Musytāq; (8) Qawānīnusy Syar'iyah lissayyid Uśmān bin Yaḥya; (9) Qawānīnusy Syar'iyah lissayyid Ṣodāqah Dakhlān; (10) Syamsūri lil Farā'iḍ; (11) Bugyatul Mustarshidīn; (12) Al-Fiqh 'alal Mażahibil Arba'ah; (13) Mugnil Muḥtāj; Ibid, p. 11-12.
[7]Ibid, p. 10.
[8]A. Gani Abdullah, in the Drafting Team, Dimensions of Islamic Law in the National Legal System (Jakarta: Gema Insani Press, 1996), p. 12.
[9]A. Hamid S. Attamimi, The Position of the Compilation of Islamic Law in the National Legal System, in the Compilation Team, Dimensions of Islamic Law in the National Legal System (Jakarta: Gema Insani Press, 1996), p. 152.
[10]These provisions, for example, are that the KHI determines that a wife who has been sentenced to bain divorce is not obliged for her husband to provide iddah maintenance, and the KHI also determines that the husband is not obliged to provide mut'ah to the wife if the divorce is not the husband's will. This provision is different from SEMA Number 3 of 2018 which determines that in cases of contested divorce the wife is still entitled to idah and mut'ah maintenance, as long as she is not nusyūz.

adjudicating cases concerning women, including the issue of marital guardianship for adult women, which is the object of research in this thesis. Moreover, today feminist circles, in particular, have criticized the marriage guardian arrangement as a product of patriarchy and must be abandoned. Some critics assess the guardianship system for women, which, among other things, stipulates that adult women must obtain permission from a male guardian to travel, marry or leave prison,[11]is a system that can hinder the realization of women's rights,[12]become the basis of the legal and social subordination of women,[13]and is a conservative rule that discriminates against women.[14]The impact in countries that strictly implement this rule, such as Saudi Arabia, is the emergence of a feminist social movement that campaigns to end the male guardianship system over women.[15]

The development of science and technology, the emergence of various new perspectives, as well as social and cultural changes, will certainly be able to influence the judge's interpretation of the provisions in the KHI regarding marriage guardians for women. In addition, in the author's view, the regulation of marriage guardianship for women in the KHI itself has the potential to invite different perceptions in its application, which will result in legal uncertainty. The author will present several arguments. First, the KHI in Article 19 does not emphasize whether the regulation of marriage guardianship for women applies for life or not, so it is very open to various interpretations. This is different from the provisions of family law in several countries, and also as studied in the schools of Islamic jurisprudence. In Islamic jurisprudence, for example, the majority of scholars firmly determine the obligation to have a marriage guardian for a woman regardless of her age and marital status.[16]Meanwhile, Abū Ḥanīfah, Abū Yūsuf and Zufar, emphasized that marriage guardians are only required until a woman is mature and sane; This opinion has been confirmed by Maḥmūd Syaltūt and M. 'Ali As-Sāyis, in their book, Muqāranah Al-Mażahib fi Al-Fiqh.[17]

The ambiguity of the validity of a marriage guardian for women is different from the family law regulations in a number of Muslim countries, or countries with

[11]Human Rights Watch. Boxed in: women and Saudi Arabia's male guardianship system. (July 2016). Accessed viahttps://www.hrw.org/report/2016/07/16/boxed/women-and-saudi-arabias-male-guardianship-system, January 12, 2021.
[12]Jawad Syed, Faiza Ali, and Sophie Hennekam. "Gender equality in employment in Saudi Arabia: a relational perspective." Career Development International (2018).
[13]Afaf Almala, Gender and guardianship in Jordan: femininity, compliance, and resistance (Doctoral dissertation, SOAS, University of London, 2014).
[14]Samia El Nagar, and Liv Tønnessen. "Family law reform in Sudan: competing claims for gender justice between sharia and women's human rights." CMI Report (2017).
[15]Huda Alsahi, "The Twitter Campaign to end the male guardianship system in Saudi Arabia." Journal of Arabian Studies 8.2 (2018): 298-318.
[16]Muḥammad bin 'Ali ash-Syaukāni, Nail al-Awṭār min Asrār Muntaqa al-Akhbār (Saudi Arabia: Dar Ibn al-Jauzi, 1427 AH/2006 AD).
[17]Maḥmūd Syaltūt and M. 'Ali As-Sāyis, Muqāranah Al-Mażahib fi Al-Fiqh, translated by Ismuha, Comparison of Schools in the Matter of Fiqh (Jakarta: Bulan Bintang, 2004), p. 84

Muslim majorities. In Saudi Arabia, as in Malaysia, it is clearly regulated that a woman, regardless of her age, can only marry with the consent of a guardian.[18]In line with the Qānūn Al-Aḥwāl Ash-Syakhṣiyyah of the United Arab Emirates Number 28 of 2005.[19]While Turkish family law provides for guardianship over children, a guardian has the right to annul a marriage entered into without his/her consent, unless she is pregnant or the guardian has ratified the marriage.[20]Jordanian family law places women under guardianship until the age of 30.[21] Meanwhile, in the 2004 reform of family law in Morocco, the role of marriage guardian was made optional and not mandatory, so that adult women could carry out their own marriage contracts.[22]

The second argument, different perceptions regarding the position of a marriage guardian for women in this marriage can arise due to the ambiguity of the KHI regulation on this issue. Article 71 of the KHI which explains that "a marriage can be annulled if: the marriage is carried out without a guardian or is carried out by a guardian who is not entitled" places the invalidity of a guardian in a marriage in the category of being annulled. The diction "can be annulled" gives rise to multiple interpretations because according to Mukti Arto, this diction means that it is temporary or procedural,[23]not like a pillar. Is the marriage guardian really only procedural as other points in Article 71 of the KHI, such as the position of polygamy permits from the Religious Court or the age limit for marriage. The diction "can be canceled" indicates that there is still a possibility that a marriage that is carried out without a guardian or with a guardian who is not entitled can be validated, but the KHI does not explain which provisions in the marriage guardian may be validated, so it is very dependent on the judge's perception.

Article 107 of the KHI paragraph (1) and (2) stipulates that "Guardianship is only for children who have not reached the age of 21 years and/or have never been married. Guardianship includes guardianship of the self and one's assets." According to Wahbah Az-Zuḥaili, guardianship of the self includes guardianship in matters of marriage.[24]Thus, as the author's third argument, if the guardianship provisions in this article also apply to marriage, then it can be said that the

[18]Zainah Anwar and Jana S. Rumminger, Justice and Equality in Muslim Family Laws: Challenges, Possibilities, and Strategies for Reform', 64 WASHINGTON & LEE LAW REVIEW 1529. (2007). Accessed viahttps://scholarlycommons.law.wlu.edu/wlulr/vol64/iss4/12.
[19]Ma`had Dubāi Al-Qaḍā`I, Qānūn Al-Aḥwāl Asy-Shakhṣiyyah Number 28 of 2005 (Dubai: Al-Ma'had, 2017).
[20]Tahir Mahmood, Family law reform in the Muslim world (New Delhi: Indian Law Institute, 1972).
[21]Afaf Almala, Gender and guardianship in Jordan: femininity, compliance, and resistance (Doctoral dissertation, SOAS, University of London, 2014).
[22]Can be seen in Article 25 THE MOROCCAN FAMILY CODE (MOUDAWANA) 2004. Dörthe Engelcke, "Interpreting the 2004 Moroccan Family Law: Street-Level Bureaucrats, Women's Groups, and the Preservation of Multiple Normativities." Law & Social Inquiry 43.4 (2018): 1514- 1541.
[23]Mukti Arto, Islamic Legal Reform Through Judges' Decisions (Yogyakarta: Pustaka Pelajar, 2015), p. 214.
[24]Wahbah az-Zuḥaili, al-Fiqh al-Islāmi wa Adillātuh (Damascus: Dār al-Fikr, 1985).

guardianship provisions in the KHI apply in a limited manner, not absolutely, in contrast to the Syāfi'i school of thought, or the majority of scholars. This interpretation will cause debate because this provision is not included in the chapter on the pillars and conditions of marriage, thus it can cause different perceptions among law enforcers and the Muslim community.

The existence of Supreme Court Decision Number 002 K/AG/1985, as a form of interpretation of the Marriage Law regarding permission to marry from parents, as the author's fourth argument, can also give rise to diverse perceptions of the application of the law of marriage guardianship for women. In 1984, the Brebes Religious Court in Decision Number 471/1984 and the Surakarta High Religious Court in Decision Number 27/1984 understood that the guardianship regulation in the Marriage Law was enforced regardless of the age of the bride. However, when this case reached the cassation level at the Supreme Court, the trial led by Prof. H. Bushtanul Arifin, in Decision Number 002 K/AG/1985 considered that "the marriage between Astida binti Suma and Rois Qodim bin Qodim was valid according to Islamic law, because Astida binti Suma was 24 years old and had the status of a widow, so that permission to marry from parents or the issue of guardianship was not absolute/no longer needed."

The Supreme Court's decision takes into account the age of the bride, and thus it can be said that the Supreme Court limits the issue of guardianship, in the sense that it does not apply absolutely to all women regardless of their age. The legal principle in this consideration is very close to the understanding of the Ḥanafi school. This decision is considered a form of interpretation of the regulation of marriage guardianship in the Marriage Law, where because the Supreme Court's consideration touches on the issue of marriage permits, it is very possible that this Supreme Court consideration expands the interpretation of the regulation of marriage permits in Article 6 paragraph (2) of the Marriage Law. Although this decision was born before the KHI, its rules are seen as more in line with the spirit of gender equality and non-discrimination, as has been emphasized in PERMA Number 03 of 2017. This consideration of gender equality and non-discrimination has also been applied in the Constitutional Court Decision Number 22/PUU-XV/2017, which states:

However, when the difference in treatment between men and women has an impact on or hinders the fulfillment of basic rights or constitutional rights of citizens, whether included in the group of civil and political rights or economic, educational, social and cultural rights, which should not be differentiated solely on the basis of gender, then such differentiation clearly constitutes discrimination.

Based on these arguments, it is very potential for different views of judges in applying the provisions of marriage guardians for adult women. In practice in the Religious Court environment itself, in the end, there is indeed a tendency for these different perceptions, where there are decisions that rigidly make marriage guardians absolute for women, but there are also decisions that do not make the

provisions of marriage guardians absolute in the KHI. The KHI, as is known, determines that marriage guardians consist of lineage guardians and judge guardians, there is no room for the application of other types of guardians, but in practice there are decisions that validate types of guardians outside of lineage guardians and judge guardians, which can be categorized as guardians who are not entitled according to the KHI.

Some of the decisions that make absolute the marriage guardian for women as the lineal guardian and the judicial guardian only are, among others:

1) In Stipulation Number 350/Pdt.P/2018/PA.Mpw, the court rejected the application for isbat nikah of a 27-year-old widow with a 43-year-old man. The marriage, which was carried out in secret in 2016, was rejected on the grounds that their marriage absolutely required a guardian, and the guardian of marriage in their marriage was not the rightful guardian.

2) In Stipulation Number 2/Pdt.P/2020/PA.Wgp, the marriage between Applicant I who is a 49-year-old widower, and Applicant II who is a 42-year-old widow was rejected by the Religious Court to be confirmed. In his considerations, the Judge explained that the marriage guardian in the marriage was not the rightful guardian, even though Applicant II had handed over his marriage affairs to his uncle because his own father had died.

3) In the Decree Number 217/Pdt.P/2018/PA.Mpw, Petitioner I who is a bachelor aged 21 years, and Petitioner II who is a widow aged 20 years held a marriage held at the house of Petitioner II's biological grandmother, where Petitioner II submitted her marriage to a cleric named Bujang, because Petitioner II did not know the whereabouts of Petitioner II's parents. The Religious Court refused to validate their marriage.

4) In the Decree Number 438/Pdt.P/2018/PA.Mpw, the marriage confirmation of the Applicants was rejected by the Religious Court, also due to the issue of the marriage guardian, even though when they married in secret in 2003, the woman was 21 years old and the man was 26 years old.

In contrast to these decisions, some judges have a more relaxed view by considering the legitimacy of the guardian of the muḥakkam.[25], such as Stipulation Number 6/Pdt.P/2013/PA.Sgr. which expands the term guardian judge to include guardian muḥakkam, even though the category of guardian muḥakkam is not recognized in the KHI, so it is categorized as a guardian who does not have the right[26]. In this case, the judge starts from a contextual interpretation by considering the socio-cultural and legal awareness of the community and carries

[25]A guardian of marriage is someone who is appointed by both prospective husband and wife to act as a guardian in their marriage contract. Abdul Kadir Syukur, "Marriage with a Guardian of Marriage (A Study of the Implications and Perceptions of Ulama in Banjarmasin City)." Syariah: Journal of Law and Thought 14.1 (2014).

[26]Makbul Bakari, and Rizal Darwis. "Legal Analysis of the Marriage of Convert Women with Religious Figures as Marriage Guardians." Al-Mizan 15.1 (2019): 1-32.

out contra legem[27] by expanding the meaning of the terminology of guardian judge to include the meaning of guardian muḥakkam[28]

The difference in perception among law enforcers regarding the regulation of marriage guardians for women is certainly not good in the legal system because it can create legal uncertainty. In addition to the legal uncertainty, several academics themselves have tried to test the relevance of the regulation of marriage guardians in Indonesia to be applied in current socio-cultural conditions. Sandy Wijaya in his thesis supports efforts to reconstruct the regulation of marriage guardians based on gender justice and uṣūl fiqh.[29] This is different from Nelli Fauziah, who believes that the regulation of marriage guardians in Indonesian family law is still relevant today, even though countries such as Morocco have abolished this regulation.[30]This idea is in line with Ahmad Rofiq's view, which generally emphasizes that the KHI in the field of marriage does not need to be revised because it is still in accordance with the Indonesian context.[31]This differs from the opinion of Euis Nurlaelawati who believes that the KHI regulations in the field of marriage, especially concerning women's rights, need to be revised.[32]

The issue of marriage guardianship for women is still an interesting issue to study, considering the various interpretations and applications of diverse laws in judicial practice. Based on these problems, this study aims to fill the gap in knowledge regarding the understanding and application of marriage guardianship law for women in religious court practice. Specifically, this study examines how Religious Court judges interpret and apply the provisions of marriage guardianship in the Compilation of Islamic Law (KHI) and Supreme Court decisions. In addition, this study also analyzes the rules of legal discovery used by judges in dealing with various cases of marriage guardianship, so that it is expected to contribute to the development of a more comprehensive understanding of marriage guardianship law in Indonesia.

2. Research Methods

This study uses an empirical legal approach to analyze the understanding and application of marriage guardianship law for women in HKI and Supreme Court decisions. The specification of this study is descriptive analytical using normative legal research methods.

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[27]*Contra*Legem means opposing or deviating from the applicable positive legal rules because the existing written law no longer reflects the values of justice for the case at hand. Mukti Arto, Islamic Law Reform through Judges' Decisions, (Yogyakarta: Pustaka Pelajar, 2015), p. 78.
[28]Ibid.
[29]Sandi Wijaya, The Concept of Marriage Guardian in the Compilation of Islamic Law from a Gender Perspective. Thesis. Sunan Kalijaga State Islamic University, 2017.
[30]Nelli Fauziah, Family Law Reform in Indonesia and Morocco (Comparative Study on the Position of Marriage Guardians), Thesis. Sunan Kalijaga State Islamic University, 2018.
[31]Ahmad Rofiq, Islamic Legal Reform in Indonesia (Yogyakarta: Gama Media Offset, 2001).
[32]Euis Nurlaelawati, Modernization, tradition and identity: The Compilation of Islamic Law and legal practice in the Indonesian religious courts (Amsterdam University Press, 2010).

This study uses an empirical legal approach. The legal approach views law as a norm or das sollen, by analyzing legal materials both written and unwritten (primary, secondary, and tertiary). The empirical approach views law as a social and cultural reality (das sein), with primary data obtained through direct interviews with respondents at the research location, especially regarding the interpretation and application of marriage guardianship provisions, especially through the Religious Court. The research specifications are descriptive analytical, which describe data obtained from observations, interviews, and document studies, then analyze them to discuss the legal problems of marriage guardianship for women in fiqh, KHI, and Supreme Court Decisions. This study uses a normative legal approach with library materials as in-depth secondary data regarding the principles of law and related legal systematics. The data in this study are divided into primary and secondary data. Primary data was obtained from interviews with respondents and informants related to the perceptions of Religious Court judges regarding the law of marriage guardianship for women. Secondary data includes primary legal materials, such as legislation, official records, and judges' decisions. Secondary legal materials, in the form of books and publications related to the law of marriage guardianship for women. Tertiary legal materials, such as legal dictionaries and the great dictionary of the Indonesian language. Data analysis was carried out qualitatively by identifying the values contained in the data that cannot be measured in numbers. This method is used to explore the understanding of social phenomena, especially the perceptions of Religious Court judges regarding the law of marriage transfer for women in the KHI and the Supreme Court Decision. Data collected through interviews and document studies were analyzed qualitatively to provide a deeper understanding of the application of the law in this context.

3. Results and Discussion

3.1. Religious Court Judges' Understanding of the Law on Marriage Guardianship for Women in Islamic Jurisprudence, KHI and Supreme Court Decisions

The Compilation of Islamic Law (KHI) regulates the provisions of Marriage Guardianship in certain chapters and but is not limited to Chapter IV on the pillars and conditions of marriage, part three, starting from Article 19 to Article 23. In addition to these articles, provisions regarding guardianship or marriage guardians also appear in other articles, including Article 1 regarding general provisions, Article 14 as a pillar of marriage, and Article 71 regarding the annulment of marriage. The issue of general guardianship of children can also be found in Article 107, which, in the introduction, the author has expressed the possibility of being interpreted to include marriage. Of the many articles in the KHI regarding marriage guardians, the author chooses three articles that are considered the most crucial in understanding the problems in this study, namely Article 19, Article 71 and Article 107.

Article 19 of the KHI states that "a marriage guardian in marriage is a pillar that must be fulfilled by the prospective bride who acts to marry her." This article emphasizes that the position of a marriage guardian in marriage is a pillar. If we refer to the terminology of pillars in the science of Uṣūl Fiqh, pillars mean something that is the basis for the existence of law, and it is part of its essence.[33]

The difference with conditions is that conditions are not part of the essence or nature of something. az-Zuḥaili gave an example, a pillar is like bowing in prayer, while a condition is like ablution when about to pray, or like the presence of two witnesses when carrying out a marriage contract.[34]

Based on this definition of pillars, because the KHI places the marriage guardian as a pillar, it can be understood that the existence of the essence of marriage depends on the presence or absence of a guardian, if there is no guardian then the essence of the marriage is also considered non-existent. More clearly, if a marriage is carried out without the presence of a guardian, then the marriage is void.

The existence of a marriage guardian, according to Article 19 of the KHI, is determined for the prospective bride. The term woman in this article is not accompanied by any embellishments, whether it applies to prospective brides who are still children or adults, or whether it applies to prospective brides who have never been married or have been married or are widows. The embellishment of the status of women needs to be clarified because there are different legal practices, such as in the fiqh of the Ḥanafi school which distinguishes between adult women and children.[35], or as in the Supreme Court Decision Number 002 K/AG/1985 which emphasizes the status of a widow and the age of the bride in her marriage. Likewise, it is found in the KHI itself in Article 107 which limits the issue of guardianship only to children who have not reached the age of 21 years and/or have never been married, although the application of this Article to marriage issues is still debatable.

3.2. Rules for the Legal Discovery of Religious Court Judges Regarding the Regulation of Marriage Guardianship in Islamic Jurisprudence, KHI and Supreme Court Decisions

The rules and methods applied by Religious Court judges in understanding the regulation of marriage guardians for women are described based on the KHI and Supreme Court Decision Number 002 K/AG/1985. Based on the author's research, as stated above, there are three groups that form three patterns of understanding and interpretation of Religious Court judges in understanding the provisions of marriage guardians in the KHI and Supreme Court Decision Number 002

[33]Muḥammad Muṣṭafa Az-Zuḥaili, al-Wajīz fī Uṣūl al-Fiqh al-Islāmy, Juz I (Damascus: Dār al-Khair, 2006), p. 404

[34]Ibid. The mention of two witnesses as a condition of marriage certainly refers to the opinion of az-Zuhaili himself, because other schools of thought such as the Syāfi'i School actually emphasize that two witnesses are part of the pillars of marriage, as also regulated in KHI Article 14.

35Wahbah az-Zuḥaili, al-Fiqh al-Islāmi wa Adillātuh. (Damascus: Dār al-Fikr, 1985).

K/AG/1985. The author will describe the arguments of each of these groups, especially to see how their legal discovery methods relate to the provisions of marriage guardians for women in the KHI and the Supreme Court Decision.

a. The first group

The first group is those who understand the marriage guardian as a pillar of marriage that must be fulfilled by the bride when she is going to get married. This group understands all the provisions of the marriage guardian in the KHI and the Supreme Court Decision within this framework. In understanding Article 19 of the KHI which reads, "the marriage guardian in marriage is a pillar that must be fulfilled by the prospective bride who acts to marry her," this group interprets it literally. Literal interpretation merely uses sentences from the regulations as a guide, it does not deviate from the litera legis.[36]

There are two words in Article 19 of the KHI that deserve attention; the word “rukun” and the word “prospective bride.” The affirmation of the marriage guardian as a rukun nikah, according to this group, must be interpreted as the grammatical meaning of the rukun nikah itself. Based on the daily use of the word rukun, it means “something that is the basis for the existence of law, and it is part of its essence,”[37]then it can be understood that the existence of the essence of marriage depends on the presence or absence of a guardian, if there is no guardian then the essence of the marriage is also considered non-existent. More clearly, if a marriage is carried out without the presence of a guardian, then the marriage is void.

b. Second group

The second group is those who understand that the guardianship of marriage as a pillar of marriage is not absolute. They understand that the use of the term "can be canceled" in Article 71 of the KHI indicates this non-absoluteness. This group also accepts that Article 107 of the KHI which limits the provisions of guardianship is applied to limit the rules of guardianship as a pillar of marriage. Likewise, they can accept the consideration of the Supreme Court Decision Number 002 K/AG/1985 to limit the interpretation of the provisions of the guardianship of marriage in the KHI.

The second group understands Article 19 of the KHI which states that "marriage guardianship in marriage is a pillar that must be fulfilled by the prospective bride who acts to marry her," that marriage guardianship must indeed be fulfilled by the prospective bride, but because there are no restrictions on the age and status of women in this Article, the interpretation can be linked to Article 107 paragraph (1) which limits guardianship to children who have not reached the age of 21 years and/or have never been married. The understanding can also be linked to the

[36]Satjipto Rahardjo, Legal Science, 8th edition (Bandung: Citra Aditya Bakti, 2014), p. 95.
[37]Muḥammad Muṣṭafa az-Zuḥaili, Al-Wajīz fi Uṣūl al-Fiqh Al-Islāmy, Juz I (Damascus: Darul Khair, 2006), p. 404 .

restrictions on the absoluteness of guardianship in the consideration of Supreme Court Decision Number 002 K/AG/1985, as well as the restrictions on marriage permission from parents or guardians in Article 6 of the Marriage Law.

c. The Third Group

The discovery of law is different from the application of law.[38]In the process of implementing the law, technical operations can be approached in 2 (two) ways, namely through inductive and deductive legal reasoning.[39]Handling a case or dispute in court always begins with an inductive step in the form of formulating facts, seeking causal relationships, and estimating probabilities. Through this step, the first and second level court judges are judex facti.[40]After the inductive step is obtained or the facts have been formulated, it is followed by the application of the law as a deductive step.

In the previous sub-chapter, the differences in perception of Religious Court judges in understanding the provisions of marriage guardians in the KHI and Supreme Court Decision Number 002 K/AG/1985 have been seen. The differences in understanding are based on the differences in the judges' methods of interpreting the law carried out on the texts of the provisions of marriage guardians in the KHI and Supreme Court Decision Number 002 K/AG/1985. In this sub-chapter, the author wants to emphasize how each respondent's perception is regarding the application of the law to the Religious Court's decision. This emphasis is important to express because there are judges' perceptions that contradict the two sources of law on marriage guardians, in addition to judges who do not contradict them.

The Supreme Court decision has validated a marriage of a woman who is a widow and is 24 years old, even though the second marriage has been proven to have been carried out by someone other than the rightful guardian. According to Article 71 of the KHI, this type of marriage can be annulled. There are differences of opinion among judges regarding the meaning of "can be annulled" in this article, some judges understand that the annulment here applies absolutely because Article 19 of the KHI has clearly stated that the marriage guardian is a pillar of marriage, which if there is a defect, then the marriage must be annulled. Thus, this group understands that there is a conflict between the legal principles in the Supreme Court Decision and the provisions of the KHI. Although some judges understand that there is a possibility that the marriage will not be annulled

[38]Widodo Dwi Putro, in the Judicial Commission, Application and Discovery of Law in Judges' Decisions (Jakarta: Secretariat General of the Judicial Commission of the Republic of Indonesia, 2011), p. 122

[39]Habibul Umam Taqiuddin, "Legal Reasoning in Judges' Decisions." JISIP (Journal of Social Sciences and Education) 1.2 (2019).

[40]Judex factie means judges (who examine) facts, different from the term judex jurist which means judges (who examine) the law. While the Supreme Court is called a judex jurist court.

because it is still considered valid, so that in fact there is no conflict between the KHI and the Supreme Court Decision.

Discussion:

The results of the study, as described in the previous sub-chapter, will be reviewed in this sub-chapter based on the theory of legal systems, the theory of justice and gender equality, and the theory of maqāṣid sharia. The review based on the theory of legal systems is conducted to resolve and/or harmonize the understanding, discovery and application of the law of marriage guardians in the KHI and the Supreme Court Decision, as well as other laws and regulations. Meanwhile, the review based on the theory of justice and gender equality is conducted to examine the ideality of the provisions of marriage guardians, and how the provisions of marriage guardians are desired by the development of law in Indonesia today. Meanwhile, the review based on the theory of maqāṣid sharia is conducted to examine the provisions of marriage guardians based on the benefit, which should be closely related to the context in which the rules are enforced.

3.3. Legal System Theory Perspective

The national legal system forms a pyramid structure, the applicable legal norms are in a tiered, multi-layered and grouped system.[41]in Hans Kelsen's language it is called the theory of legal norm levels (Stufentheorie). In the sense that the legal norms apply, originate and are based on higher legal norms, and higher legal norms apply, originate and are based on higher legal norms, and so on until a basic norm of the Indonesian state, namely: Pancasila. Based on the theory of the legal system developed by Hans Nawiasky, who was also a student of Hans Kelsen, Pancasila is called Staatsfundamentalnorm (fundamental state norm), then below it there is a layer of legal norms called Staatsgrundgesetz (basic state rules/main state rules), Formel Gesetz ('formal' laws), and Verordnung (implementing rules) and Autonom Satzung (autonomous rules).

Based on this theory of legal norm levels, the national legal system has established a hierarchy of laws and regulations. Law of the Republic of Indonesia Number 12 of 2011 concerning the Establishment of Legislation Article 2 establishes Pancasila as the source of all sources of state law. Then, Article 3 paragraph (1) confirms the 1945 Constitution of the Republic of Indonesia as the basic law in Legislation. The consequence of this determination is that every material contained in Legislation must not conflict with the values contained in Pancasila and the 1945 Constitution. The hierarchy of laws and regulations in Indonesia consists of the 1945 Constitution of the Republic of Indonesia, Decrees of the People's Consultative Assembly, Laws/Government Regulations in Lieu of Laws, Government

[41]Maria Farida Indrati Soeprapto, quoted by Lailam, Tanto. "Construction of Conflicting Legal Norms in the Law Testing Scheme." Constitutional Journal 11.1 (2016): 18-42.

Regulations, Presidential Regulations, Provincial Regulations, and Regency/City Regulations.[42]

Marriage regulations in Indonesia are regulated in the form of laws, namely Law Number 1 of 1974 concerning Marriage. Based on the theory of the national legal system, this Marriage Law must be subject to the 1945 Constitution and Pancasila. In the 1945 Constitution, Article 28 B paragraph (1) has determined that everyone has the right to form a family and continue their descendants through a legal marriage. The validity of this marriage is regulated in the Marriage Law, which states that a marriage is valid if it is carried out according to the laws of each religion and its beliefs. The validity of a marriage is linked to the legal rules of each religion. The linkage of the validity of this marriage to religious law is based on the first principle of Pancasila, as emphasized in the Marriage Law itself that marriage must be based on the Almighty God.

The provisions of the Marriage Law regarding whether a marriage is valid or not are left to the provisions of each respective religious law.[43]Interpretations of the articles in the Marriage Law have also emerged, including in decisions of the Religious Courts up to the Supreme Court level,[44]and it is realized that the provisions of the Marriage Law regarding Islamic marriage law are still very limited. This includes the issue of marriage guardians, where the Marriage Law does not regulate it in detail. Supreme Court Decision Number 002 K/AG/1985 includes ijtihad in order to fill the legal vacuum, where in its considerations it places the issue of permission to marry from parents with the issue of guardianship.

In order to complete or adjust the provisions of marriage in the Marriage Law with Islamic law, the Compilation of Islamic Law was born, which is considered to be in accordance with the social conditions of the very diverse Indonesian Muslim community, so the KHI becomes a guideline for the Indonesian Muslim community in carrying out marriages. However, the presence of this KHI as a guideline for marriage in Indonesia has not completely resolved the legal problem, as evidenced by the various interpretations of the provisions therein, which can be seen, among others, from the disparity in the decisions of the Religious Courts, including in the application of the law of marriage guardians in marriage.

The results of the author's research, among others, show differences in the understanding of Religious Court judges in interpreting the provisions of marriage guardians in the Compilation of Islamic Law; between those who understand marriage guardians as a pillar of marriage that must be fulfilled for prospective

[42]Government of the Republic of Indonesia, Law of the Republic of Indonesia Number 12 of 2011 Concerning the Establishment of Legislation, Jakarta 12 August 2011, STATE GAZETTE OF THE REPUBLIC OF INDONESIA YEAR 2011 NUMBER 82.

[43]Constitutional Court Decision Number 68/PUU-XII/2014, 18 June 2015,https://www.mkri.id/public/content/persidangan/bangunan/68_PUU-XII_2014.pdf.

[44]Supreme Court of the Republic of Indonesia, Collection of Legislation Relating to the Compilation of Islamic Law with Definitions in its Discussion (Jakarta: Supreme Court of the Republic of Indonesia, 2011), p. 10.

brides of any age and marital status, those who understand marriage guardians as a pillar for prospective brides who are not yet 21 years old or have never been married before, and those who understand marriage guardians as a pillar whose validity is not absolute.

Raharjdo said that the words in legislation, basically, if stated explicitly, would end the search for the intent of a legislation.[45]But exceptions are made for not accepting the words of the law as having the power to make the final decision. First, this situation is faced when the law itself is logically flawed, that is, there is a form of ambiguity in the words of the law. Second, when a literal interpretation would lead us to such absurdity and unreasonableness.[46]What happened to the provisions on marriage guardianship in the KHI, according to the majority of judges at the Religious Court, as per the results of this study, is that the KHI regulations on marriage guardianship are ambiguous, so that various interpretations of it have emerged.

The Marriage Law does not regulate the provisions of marriage guardians, but the Marriage Law regulates the matter of parental permission to marry. However, regarding the requirement for parental permission, the Marriage Law leaves its validity to each religion and belief; meaning, it applies as long as the laws of each religion and belief of the person concerned do not determine otherwise (Article 6 paragraph 6).

In Islamic law, the issue of marriage permits is not much discussed except in the Ḥanafi school of thought. In the Syafi'i school of thought, the issue discussed in detail is the issue of marriage guardians. Is marriage permits different from guardianship issues? The application of the provisions on marriage permits is interpreted by Supreme Court Decision Number 002 K/AG/1985 in line with the provisions on guardianship in Islamic law. In this case, the Supreme Court's tendency is to apply the Ḥanafi school of thought concept of marriage guardians, thus validating a marriage that has been carried out with a guardian who is not entitled because the bride is 24 years old and has the status of a widow. Thus, there is a difference in interpretation between the first-instance and appellate court judges and the cassation-level judges.

The KHI which was born after the Supreme Court's decision adopted this marriage permit provision, but then differentiated the articles regulating it from the provisions on marriage guardians, thus giving rise to a different interpretation from the Supreme Court's Decision that marriage permits are different from marriage guardians. In fact, the regulation of marriage permits with marriage guardians can be harmonized, especially because the Marriage Law itself opens up

[45]In Islamic law, according to 'Abdul Wahhāb Khallāf, basically as long as the law contains clear rules, it cannot be interpreted and cannot change the text, even if the judge himself considers that the application of the text is unfair. 'Abdul Wahhāb Khallāf, 'Ilm Uṣūl al-Fiqh (Cairo: Dār al-Qalam, 1956), p. 217.
[46]Satjipto Rahardjo, Legal Science, 8th edition (Bandung: Citra Aditya Bakti, 2014), p. 98.

opportunities for the application of marriage permit provisions adjusted to each religion and belief. Then the articles regulating the matter of marriage guardians themselves, there are differences of interpretation among the judges of the Religious Courts, as the author has shown in the sub-chapter of research results.

R. Soeroso stated that the lawmakers do not establish a specific system that must be used as a guideline for judges in interpreting laws. Therefore, judges are free to interpret. In implementing the interpretation of laws and regulations, grammatical interpretation is always carried out first, because in essence, to understand the text of the laws and regulations, the meaning of the words must first be understood. If necessary, it is continued with an authentic interpretation or an official interpretation interpreted by the lawmakers themselves, then continued with historical and sociological interpretations. As much as possible, all interpretation methods should be carried out, in order to obtain the right meanings. If all these methods do not produce the same meaning, then an interpretation method that brings the highest possible justice must be taken, because justice is indeed the target of the lawmakers when realizing the relevant law.[47]

The occurrence of differences in understanding regarding the provisions of marriage guardians in the KHI, among others, is due to differences in interpretation methods. So if based on the opinion of R. Soeroso above, the application of the law must be returned to the values of justice. Related to the context of justice itself, Supreme Court Regulation number 03 of 2017 concerning Guidelines for Adjudicating Cases of Women in Conflict with the Law has regulated in relation to women's cases, because this marriage guardian is related to women, the application of justice here includes justice and gender equality, and non-discrimination. Based on this provision, in the author's research, the majority of Religious Court judges agreed to interpret the provisions of marriage guardians in the KHI by considering the Supreme Court Decision which does not make marriage guardians absolute for women, in order to respond to the principles of gender equality and non-discrimination in PERMA, although then the majority of them understood that the application of marriage guardians for women alone is not a form of discrimination against women.

According to Ibn Sina Chandranegara, as quotedby Irfani, regulatory disharmony is a 'congenital' problem of the rule of law caused by too

[47]R. Soeroso, Introduction to Legal Science, 17th ed. (Jakarta: Sinar Grafika, 2016), p. 99. Even according to Mukti Arto, in facing every case, for judges, justice is number one, while legal texts are number two, so that judges may carry out contra legem if the text is considered no longer able to fulfill truth and justice. Judges' decisions should not be fixated on existing conventional legal doctrines and norms, but must be dynamic in order to maintain the essence of Islamic sharia in every case. This is because conventional law in the form of statutory regulations, legal compilations and fiqh as applied law, has a static nature, as a result it is often no longer able to revive the spirit of justice and realize the ideals of maqāṣid sharia law in new cases that are always dynamic. Mukti Arto, Islamic Law Reform Through Judges' Decisions (Yogyakarta: Pustaka Pelajar, 2015), p. 10

many regulations being formed or what is known as hyper regulations. According to Jaap C. Hage, this regulatory disharmony is characterized by the existence of norm conflicts, where the factors include demands for the dynamics of laws and regulations following the development of community needs. Giovanni Sartor added that norm conflicts can also be caused by demands for legal protection against conflicting interests and uncertainty regarding the content or substance of the law itself.[48]Based on the theory of legal systems, these independent legal regulations should be bound into a single unified structure because they refer to a particular ethical assessment.[49]in this case are the values of Pancasila and UD 1945. One of the basic principles in a good legal system, according to Fuller, is that a system should not contain regulations that conflict with each other. In the regulation of marriage guardians in the KHI, this legal system is not good because there is a legal conflict between Article 19 of the KHI and the provisions of Article 71 of the KHI, where Article 19 of the KHI regulates marriage guardians as a pillar, which is then interpreted as absolute, while Article 71 of the KHI does not make the provisions of marriage guardians absolute. The result is a disparity in the decisions of the Religious Courts. For example, there are decisions that reject the implementation of muḥakkam guardians because they are not recognized in the KHI, but there are decisions that accept muḥakkam guardians. Then, there are judges who refuse to validate a marriage carried out by a widow who is over 21 years old who represents her to someone who is not in the category of lineage guardian, judge guardian or muḥakkam guardian, and there are judges who validate her marriage.

In the author's view, to harmonize these marriage guardianship regulations, a compromise can be made, not necessarily through derogation. Derogation requires one regulation to submit and lose to the other regulation that wins. According to the author, it does not have to be through derogation but a compromise can still be made or in Islamic law it is known as the theory of al-jam'u wa at-taufīq.[50]By using this theory, the marriage guardian must be understood as a pillar of marriage, but the meaning of the pillar here must be reinterpreted with the interpretation of the Gus Baha model which categorizes this pillar of marriage into two; żātiyyah and gair żātiyyah, and categorizes the marriage guardian as a pillar of gair żātiyyah so that its application is not absolute. This non-absoluteness must be raised so that Article 19 is in harmony with Article 71 of the KHI, and also with the Supreme Court Decision. Then the non-absoluteness here must be understood not in the context of freeing adult women to marry without a guardian, but must be understood in the framework of easing the application of

[48]Irfani, Nurfaqih. "The Principles of Lex Superior, Lex Specialis, and Lex Posterior: Meaning, Problems, and Use in Legal Reasoning and Argumentation." Indonesian Legislation Journal 16.3 (2020): 305-325

[49]Satjipto Rahardjo, Legal Science, 8th edition (Bandung: Citra Aditya Bakti, 2014), p. 49

[50]The explanation of the concept of this method has been explained in the previous footnote. 'Abdul Wahhāb Khallāf, 'Ilm Uṣūl al-Fiqh (Cairo: Dār al-Qalam, 1956), p. 231.

the law to a marriage that may have mistakenly applied the provisions of the marriage guardian. The mistake in applying the provisions of the marriage guardian is a condition that must be considered by the judge so as not to rush to annul the marriage, because the KHI itself emphasizes that "can be canceled" not "mandatory/absolutely canceled." Thus the form of compromise here is in a very specific case, not generally applicable.

3.4. Theoretical Perspectives and Gender Equality

In the perspective of justice and gender equality, feminists consider that the marriage guardianship regulation does not reflect gender justice and equality. The marriage guardianship legal system is considered a system that can hinder the realization of women's rights,[51]become the basis of the legal and social subordination of women,[52]and is a conservative rule that discriminates against women.[53]Moreover, if you look at the reasons for implementing guardianship for women in Islamic jurisprudence, as stated by Wahbah az-Zuḥaili, that guardianship is basically applied to those who are considered nāqiṣ al-ahliyyah (less competent in law).[54]or al-qāṣir, equal to children and madmen. Why are women considered nāqiṣ al-ahliyyah different from men. This is also a concern for some academics so that they judge from the perspective of gender justice, women must also be considered kāmil al-ahliyyah[55] as men in their marriage.[56]Law Number 7 of 1984 concerning Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women itself emphasizes that men and women have the same rights and responsibilities regarding guardianship.

In contrast to the author's research results, the majority of Religious Court judges consider that the regulation of marriage guardians for women is not a form of discrimination against women because the regulation is intended for the benefit

[51]Jawad Syed, Faiza Ali, and Sophie Hennekam. "Gender equality in employment in Saudi Arabia: a relational perspective." Career Development International (2018).
[52]Afaf Almala, Gender and guardianship in Jordan: femininity, compliance, and resistance (Doctoral dissertation, SOAS, University of London, 2014).
[53]Samia El Nagar, and Liv Tønnessen. "Family law reform in Sudan: competing claims for gender justice between sharia and women's human rights." CMI Report (2017).
[54]Humans from the perspective of Ahliyyah or the authority to carry out legal acts are divided into three types, namely 'adīm al-ahliyyah, nāqiṣ al-ahliyyah and kāmil al-ahliyyah. People who are considered not to have Ahliyyah include children and crazy people. Meanwhile, people who are still less than perfect in Ahliyyah are people who have reached the age of mumayyiz but have not yet reached puberty. Meanwhile, if he has reached maturity and is of sound mind, his expert knowledge is perfect, however, there may still be a reduction in his authority to carry out legal actions if there are factors, for example he is crazy, sleeping, apoplexy or an idiot. 'Abdul Wahhāb Khallāf, 'Ilm Uṣūl al-Fiqh (Cairo: Dār al-Qalam, 1956), p. 138.
[55]Kāmil al-ahliyyah in the concept of Uṣūl Fiqh is a condition in which a person, either male or female, has legal competence or has the authority to carry out legal acts perfectly. Basically, they are people who have reached puberty and are rational. This is the main requirement for someone to be considered kāmil al-ahliyyah.
[56]Sandi Wijaya, The Concept of Marriage Guardian in the Compilation of Islamic Law from a Gender Perspective. Thesis. Sunan Kalijaga State Islamic University, 2017.

of women. Differentiation alone is not a form of discrimination, but is called a form of discrimination if it harms women or prevents them from obtaining their rights. Basically, of course, this regulation of marriage guardians is not intended to hinder women's right to marry, but is intended for their benefit. Constitutional Court Decision Number 22/PUU-XV/2017 emphasizes "However, when the difference in treatment between men and women has an impact on or hinders the fulfillment of basic rights or constitutional rights of citizens, both those included in the group of civil and political rights and economic, educational, social, and cultural rights, which should not be differentiated solely on the basis of gender, then such a distinction is clearly discrimination. " The legal considerations of this decision emphasize that discrimination is if the difference between women and men has an impact on preventing women from fulfilling their rights.

Based on this opinion, the majority of Religious Court judges (65.4 percent of respondents) considered that the provision that regulates guardianship as a pillar of marriage that must be fulfilled for the bride regardless of her age and status is still a more relevant form of regulation in Indonesia today. This view is in line with the results of Nelli Fauziah's research which assessed that the regulation of marriage guardians in Indonesian family law is still relevant today, even though countries such as Morocco have abolished this regulation.[57]This idea is in line with the view of Ahmad Rofiq, who generally asserts that the KHI in the field of marriage does not need to be revised because it is still in accordance with the Indonesian context.[58]

In contrast to the results of this study, Sandy Wijaya in his thesis supports this reconstruction effort based on gender justice and uṣūl fiqh.[59]In line with the opinion of Euis Nurlaelawati, who assessed that the KHI regulations in the field of marriage, especially concerning women's rights, do need to be revised.[60]This view is supported by feminist circles, as it has become a social movement in Saudi Arabia, where they campaign to end the system of male guardianship over women.[61]This has been achieved through the 2004 reform of family law in Morocco, which made the role of marriage guardian optional rather than mandatory, so that women could enter into marriage contracts themselves.[62]

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[57]Nelli Fauziah, Family Law Reform in Indonesia and Morocco (Comparative Study on the Position of Marriage Guardians), Thesis. Sunan Kalijaga State Islamic University, 2018.
[58]Ahmad Rofiq, Islamic Legal Reform in Indonesia (Yogyakarta: Gama Media Offset, 2001).
[59]Sandi Wijaya, The Concept of Marriage Guardian in the Compilation of Islamic Law from a Gender Perspective. Thesis.
Sunan Kalijaga State Islamic University, 2017.
[60]Euis Nurlaelawati, Modernization, tradition and identity: The Compilation of Islamic Law and legal practice in the Indonesian religious courts (Amsterdam University Press, 2010).
[61]Huda Alsahi, "The Twitter Campaign to end the male guardianship system in Saudi Arabia." Journal of Arabian Studies 8.2 (2018): 298-318.
[62]Can be seen in Article 25 THE MOROCCAN FAMILY CODE (MOUDAWANA) 2004. Dörthe Engelcke, "Interpreting the 2004 Moroccan Family Law: Street-Level Bureaucrats, Women's Groups, and the Preservation of Multiple Normativities." Law & Social Inquiry 43.4 (2018): 1514- 1541.

Legal developments in Indonesia are moving towards enforcing justice and gender equality. The constitution and laws and regulations require the elimination of all forms of discrimination, which in this case includes the differentiation of men's and women's rights in accessing marriage. The implementation of marriage guardianship falls into this category of discriminatory acts, according to several parties, because based on Human Rights Watch reports between 2008 and 2016, this guardianship regulation affects women's rights to make their own decisions and that treating them as minors potentially exposes them to the risk of domestic violence due to the authority held by men.

In the author's view, in order to fulfill the mandate of laws and regulations that emphasize the urgency of considering gender justice and equality, and reflecting on the views of the majority of Religious Court judges who consider the regulation of marriage guardians in the KHI to be still relevant to the cultural and social conditions of Indonesian society, then what needs to be done regarding the provisions of marriage guardians in the KHI is a reinterpretation of its text, not necessarily by changing the text of the article. The interpretation that is generally carried out regarding the provisions of marriage guardians so far has been in the style of the Syāfi'i school of thought, which makes the rule of marriage guardians for women absolute.

The author proposes two forms of interpretation: First, changing the tendency of interpreting the KHI text with the Syāfi'i school of thought to the Māliki school of thought. In the Māliki school of thought, the guardian of marriage is also placed as a pillar of marriage, but guardianship in this school of thought is categorized into special guardianship and general guardianship,[63]different from the Syafi'i school. General guardianship in the Māliki school can be interpreted more broadly so that the non-absoluteness of the marriage guardian, as understood from Article 71 of the KHI and the Supreme Court Decision, can be understood within this framework. The development of the concept of general guardianship in the Māliki school can be done using the ijtihad model of Imam Sya'rani who proposed a model of implementing law by categorizing legal subjects into qawiyy and ḍa'īf. Thus, judges in the Religious Court when facing cases of marriage annulment or marriage isbat,[64]must take into account the context of the justice seeker.

The second form of interpretation remains within the framework of the Syafi'i school, but as understood by Gus Baha, the terminology of "rukun" must be distinguished into two categories, namely żātiyyah and gair żātiyyah.[65]In essence, this understanding is also not to make the provisions of the pillars of marriage absolute for the general public. With this model of Gus Baha's understanding, the marriage guardian is still placed as a pillar of marriage, but do not rush to annul

[63]Wahbah Az-Zuhaili, Al-Fiqh al-Islami wa Adillatuh. (Damascus: Dar al-Fikr, 1985)., p.190
[64] Achmad Budi Waskito, "Implementation of Itsbat Nikah as A Way To Get The Legal Power Which Is Not Recorded," Jurnal Daulat Hukum 1, no. 2 (2018): 517.
[65]Gayeng Santri, Gus Baha: Non-Muslim Marriage According to Islamic Law, accessed via URL:https://youtu.be/ur04oGBnj-c, October 24, 2021.

the marriage of those who incorrectly apply the provisions of the marriage guardian. In the reality that the author faced in court, errors in the application of the provisions of the marriage guardian often occur in the general public, especially those who live in Muslim minority areas.

The weakness of this view, in the author's opinion, in the framework of enforcing the principle of justice and gender equality is that the distinction between men and women is still enforced. However, as emphasized by the majority of judges of the Religious Court in this study, if the regulation does not hinder women's rights, it is not called a form of discrimination. Thus, in order not to hinder women's rights, the provisions of marriage guardianship need to be understood as not being absolute; if this provision prevents women from obtaining their rights, the provisions of marriage guardianship can be deviated from. So here, a judge's accuracy and caution are needed in providing considerations. From the perspective of Islamic law itself, guardianship is basically enforced to help the person who is being guardianized in fulfilling their interests.

3.5. Maqāṣid Sharī'ah Theory Perspective

The regulation of marriage guardians for women is in the perspective of maqāṣid syarī'ah. Referring to classical literature, classical scholars of uṣūl did not provide a comprehensive definition of maqāṣid syarī'ah, but discussions related to maqāṣid syarī'ah have been going on since the classical era. In the context of discussing the results of this study, the author will discuss the problems in this study reviewed from the perspective of maqāṣid syarī'ah Ibn 'Asyūr. Ibn 'Asyūr proposed a formulation of four epistemological frameworks of maqāṣid, namely al-fiṭrah (religiously sincere), al-samāḥah (tolerance), al-musāwah (egalitarian), and al-ḥurriyah (freedom of action), which are very useful for maintaining the five maqāṣid; hifẓ ad-din, hifẓ an-nafs, hifẓ al-'aql, hifẓ an-nasl and hifẓ al-mal.[66]Of the four epistemological frameworks proposed by Ibn 'Asyūr, the author will focus on the principle of al-musāwah because it is closely related to the principle of gender equality.

*Al-musāwah,*or equality, in the view of Ibn 'Asyūr, is a basic principle in sharia law. Based on this principle of equality, every Muslim is equal before the sharia; no distinction may be made based on gender, social status, ethnicity and so on. This principle is based on the principle of Islam as a natural religion. Humans who are equal in their nature or in terms of creation, then they are also equal in law. So from the aspect of basyariyyah, humans, without distinguishing between genders, are equal, where they all come from the Prophet Adam. Thus, it is clear that humans are the same in the eyes of sharia, both in terms of dharûriyat and hajiyat

[66]Muḥammad Ṭahir ibn 'Asyūr, Maqāṣid al-Syarī'ah al-Islāmiyyah (Amman: Dār an-Nafais, 2001), p. 15.

needs. There is no point of difference between humans in terms of dharûri and only a very small difference in terms of hajiyat.[67]

According to Ibn 'Asyur, enforcement of the principle of al-musāwah must not be violated unless there are obstacles. Conditions that can hinder the enforcement of the principle of equality are factors which, if ignoring the enforcement of this principle, are aimed at bringing about greater benefits or preventing harm.[68]Ibn 'Asyûr defines mashlahah as an act that brings goodness or benefits for eternity or that touches the majority or a few people. While mafsadah is the opposite of mashlahah, namely an act that brings damage or harm, whether it lasts forever or not, felt by the majority or a few people.[69]

Based on the principle of al-musāwah, if it is connected with the provisions of marriage guardianship, then the basic principle or basic rule in marriage guardianship should be equal between men and women; it is not permissible to differentiate the legal provisions between men and women based on their gender alone. This provision is very much in line with the provisions of marriage guardianship in the Ḥanafi school; where they do not differentiate between men and women, they both have the right to carry out their own marriages if they are adults and legally competent. Then why do other schools ignore the principle of al-musāwah in marriage guardianship, because they consider that there is benefit in ignoring this principle.

Basically, guardianship is prescribed for the marriages of people who are considered incompetent and crazy in order to safeguard their welfare and maintain their rights because they are weak and helpless.[70]According to Ibn 'Asyūr,[71]al-Qaffal[72]and Joseph,[73]and also as mentioned by an-Nawawi in his al-Majmū', one of the main objectives of this guardianship system is to distinguish (at-tafriqah) marriage from other forbidden relationships between men and women such as adultery. Then, a marriage is closely related to regeneration to produce offspring, therefore parents and relatives have rights over the marriage

[67]Yaqin, Ainol. "Revitalization of Maqāṣid Al-Syari'ah in Islamic Law: A Study of the Thoughts of Muḥammad Al-Tahir Ibn 'Asyūr." Ash-Syir'ah: Journal of Sharia and Legal Sciences 50.2 (2016): 315-340.
[68]Muḥammad Ṭahir ibn 'Asyūr, Maqāṣid al-Syarī'ah al-Islāmiyyah (Amman: Dār an-Nafais, 2001), p. 15.
[69]Yaqin, Ainol. "Revitalization of Maqāṣid Al-Syari'ah in Islamic Law: A Study of the Thoughts of Muḥammad Al-Tahir Ibn 'Asyūr." Ash-Syir'ah: Journal of Sharia and Legal Sciences 50.2 (2016): 315-340.
[70]Wahbah az-Zuḥaili, Mausū'ah al-Fiqh al-Islāmi wa al-Qaḍāyā al-Mu'āṣirah. Damascus: Dār al-Fikr, 2010).
[71]Muḥammad Ṭahir ibn 'Asyūr, Maqāṣid al-Syarī'ah al-Islāmiyyah (Amman: Dār an-Nafais, 2001), p. 15.
[72]Muḥammad bin Ali al-Qaffāl, Maḥāsin asy-Syarī'ah fī Furū' asy-Syāfi'iyyah (Beirut: Dār al-Kitab Al-Ilmiyah, 2007).
[73]Sarṭūṭ Yūsuf, Maqāṣid ash-Syarī'ah al-Islāmiyah al-Muta'alliqah bi al-Usrah. Diktat (University Center of El Bayadh Nour El Bachir, 2017). Quoted fromhttps://www.cu-elbayadh.dz.

so as not to bring evil and tarnish the honor of a family and can mix up the lineage.[74]Thus it can be said that the purpose of this guardianship is also closely related to hifẓ an-nasl, protecting descendants and hifẓ al-farj, protecting the private parts to avoid illicit relationships. In addition, this guardianship is in order to maintain kinship relations between children and their parents or guardians.

The existence of a guardian is a form of protection for women, who are often in a weak condition and are deliberately weakened in social life. Women because they have a desire for men as men have a desire for women, while they are weak, it is very possible for them to get caught up in things that harm themselves and their family, so marriage matters are left to their parents. By being with a guardian when entering into a relationship with a man in marriage, the woman is showing that she has a family who is ready to defend and help her in facing problems.[75]

So it can be said that guardianship in marriage is a form of caution and vigilance so that women do not get trapped in bad relationships, let alone forbidden ones. A guardian is expected to be able to choose a husband who is suitable for the woman and protect her from bad men. The closest people, the closest family, are usually more protective, more loving, and more willing to endure hardships.[76]If a person does not have a guardian from his relatives to carry out all these functions, then his guardian is the sultan, whose actions according to the sharia are manuth bil mashlahah.

Based on the explanation above, in the author's opinion, if faced with the issue of the validity of a marriage, which in the Religious Court is related to cases, including marriage confirmation and marriage annulment, then the basic principle that must be followed is the principle of al-musāwah or the principle of equality. Not rejecting outright the validity of their marriage, even if according to the Judge or other legal practitioners concerned they were wrong in applying the provisions of the marriage guardian in their marriage. Starting from this principle of equality, the judge or other practitioners, consider the benefits and harms of the ratification of the marriage. If there is no malafade in their marriage, as feared by some scholars such as prostitution, their marriage can be ratified. But for example, if by ratifying their marriage it is feared that it will give rise to malafade, perhaps to one of the husband and wife, their children or family, in this case the principle of al-musāwah can be set aside.

Furthermore, the regulation of KHI, which is currently more widely understood based on the characteristics of the Syāfi'i school of thought, is in accordance with

[74]Muḥammad bin Ali al-Qaffāl, Maḥāsin asy-Syarī'ah fī Furū' asy-Syāfi'iyyah. (Beirut: Dār al-Kitab Al-Ilmiyah, 2007); Sarṭūṭ Yūsuf, Maqāṣid ash-Syarī'ah al-Islāmiyah al-Muta'alliqah bi al-Usrah. Diktat (University Center of El Bayadh Nour El Bachir, 2017). Quoted fromhttps://www.cu-elbayadh.dz.

[75]Muḥammad Ṭahir ibn 'Asyūr, Maqāṣid al-Syarī'ah al-Islāmiyyah (Amman: Dār an-Nafais, 2001), p. 15

[76]Muḥammad bin Ali al-Qaffāl, Maḥāsin asy-Syarī'ah fī Furū' asy-Syāfi'iyyah. (Beirut: Dār al-Kitab Al-Ilmiyah, 2007)

the opinion of the judges of the Religious Court, because this understanding is considered more relevant in Indonesia today. This relevance is related to the benefits and harms of the application of the law of marriage guardianship; the freedom of women to marry themselves is considered not yet relevant to the current socio-cultural conditions of Indonesian society. Therefore, although the regulation of KHI is considered to ignore the principle of al-musāwah between men and women, it is considered more beneficial to apply. However, in the author's opinion, when faced with this case of marriage guardianship, if the expected benefits or feared harms do not occur in a marriage that is wrong in applying the law of marriage guardianship according to KHI, then we can return to the basic principles of Islamic law, namely al-musāwah. Moreover, KHI itself, according to the majority of interpretations of the judges of the Religious Court, is ambiguous so that it accepts various forms of interpretation.

4. Conclusion

Based on the results of this study, it can be concluded that there is a diversity of understanding of Religious Court judges regarding the law of marriage guardianship for women in the Compilation of Islamic Law (KHI) and Supreme Court Decision Number 002 K/AG/1985. Three dominant patterns of understanding emerged among judges, namely the understanding of marriage guardianship as a pillar of marriage that must be fulfilled regardless of the age or status of women, the understanding of guardianship as a requirement that only applies to women under the age of 21, and the understanding that marriage guardianship is a basic law that can be deviated from based on the benefit, by considering the considerations of the school of thought. In addition, this study also shows that the diversity of legal discovery methods applied by judges, such as grammatical, systematic, and teleological interpretations, affect the diversity of the application of marriage guardianship law in decisions. Some judges use the rules of the Supreme Court's decisions to adjust to the principle of gender equality, while others tend to maintain the provisions of marriage guardianship as a pillar of marriage that must be fulfilled. In dealing with the diversity of understanding and application of marriage guardianship law for women, the author provides several recommendations. First, Religious Court judges are advised to interpret the provisions on marriage guardianship in the KHI with a more flexible approach, such as that applied in Gus Baha's fiqh or the Māliki school, which broadens the understanding of general guardianship. Second, judicial institutions, especially the Supreme Court, are advised to re-discuss the provisions on marriage guardianship for women in the Plenary Meeting of the Religious Chamber in order to reduce disparities in decisions and legal uncertainty. Third, legislative institutions are expected to systematically review the regulation of marriage guardianship in marriage so that it is more in line with developments in law and women's rights. Finally, academics are advised to conduct more in-depth research on the relationship between marriage guardianship law and family welfare and the enforcement of women's human rights in Indonesia.

5. References

Journals:

Budi Waskito, A. (2018). Implementation of Itsbat Nikah as A Way To Get The Legal Power Which is not Recorded. Jurnal Daulat Hukum, 1(2), 517. https://doi.org/10.30659/jdh.v1i2.3325

Daud, FK, & Sururuie, RW (2021). The authority of the marriage guardian in Islam: Analysis of marriage without a guardian in Indonesia from the perspective of fiqh and positive law. Akademika, 15(2).

Hidayati, T. (2014). Legal analysis of the role of marriage guardian according to Islamic jurisprudence and the Compilation of Islamic Law (Study of the Supreme Court of the Republic of Indonesia Decision No. 261/K/AG/2009). Premise Law Journal, 3, 13969.

Muharam, FW, Derry, T., & Mujahid, I. (2019). The concept of marriage guardian according to KHI and the PERSIS Hisbah Council. Proceedings of Islamic Family Law, 19-25.

Munthe, H., Prasetiya, NH, & Harahap, AM (2022). The legitimacy of muḥakkam guardians as marriage guardians in Indonesia: An analysis of decision No. 197/Pdt. P/2020/Pa. Ppg of the Supreme Court from the perspective of syād al-zariyah. Al-Mashlahah Journal of Islamic Law and Social Institutions, 10(2).

Ubaidillah, MB (2018). The concept of the guardianship of marriage in the perspective of hadith & fiqh al-hadith. Usratuna: Journal of Islamic Family Law, 1(2), 1-18.

Zatnika, IM, & Nurcholis, M. (2020). Gender analysis of the concept of marriage guardian according to the Compilation of Islamic Law. Istinbath: Journal of Islamic Law Research, 14(1), 1-30.

Books:

Al-Jaziri, 'A. (1986). al-Fiqh 'ala al-Mażāhib al-Arba'ah. Beirut: Dar al-Fikr.

Al-Maḥalli, JMA (1996). Syarḥ al-Waraqāt fī 'Ilm Uṣūl al-Fiqh. Mecca: Maktabah Nizār Muṣṭafa al-Bāz.

Almala, A. (2014). Gender and guardianship in Jordan: Femininity, compliance, and resistance (Doctoral dissertation, SOAS, University of London).

Al-Qarāfī, S. (2010). al-Furūq. Kuwait: Dar an-Nawādir.

Alsahi, H. (2018). The Twitter campaign to end the male guardianship system in Saudi Arabia. Journal of Arabian Studies, 8(2), 298-318.

Anwar, Z., & Rumminger, J. S. (2007). Justice and equality in Muslim family laws: Challenges, possibilities, and strategies for reform. Wash. & Lee L. Rev., 64, 1529-1545.

Arto, M. (2015). Islamic Law Reform Through Judges' Decisions. Yogyakarta: Pustaka Pelajar.

Ashidiqie, MLI (2021). Criticism of the marriage guardian regulations in the KHI and gender perspective fiqh. Al-Mazaahib (Journal of Comparative Law), 9(1), 23-44.

Ash-Syaukāni, M. bin 'A. Nail al-Awṭār min Asrār Muntaqa al-Akhbār.

Askarial. (2018). Interpretation or interpretation as a method of legal discovery. Menara Ilmu, 12(2).

As-Sarakhsi. (1993). al-Mabsūṭ (Vol. 5). Beirut: Dār al-Ma'rifah.

As-Suyūṭī, J. 'A. (1983). al-Ashbah wa an-Nazha`ir. Beirut: Dār al-Kutub al-'Ilmiyyah.

Asy-Sya'rani, AW (1989). Kitab al-Mīzān. Beirut: 'Alim Al-Kutub.

Az-Zuḥaili, MM (2006). Al-Wajīz fi Uṣūl al-Fiqh Al-Islāmy (Vol. 1). Damascus: Dār al-Khair.

Az-Zuḥaili, W. (1985). al-Fiqh al-Islāmi wa Adillātuh. Damascus: Dār al-Fikr.

Az-Zuḥaili, W. (1986). Uṣūl al-Fiqh al-Islamiy. Damascus: Dār al-Fikr.

Az-Zuḥaili, W. (2010). Mausū'ah al-Fiqh al-Islāmi wa al-Qaḍāyā al-Mu'āṣirah. Damascus: Dār al-Fikr.

Bachtiar, B. (2019). Legal Research Methods. South Tangerang: Unpam Press.

Bakari, M., & Darwis, R. (2019). Legal analysis of the marriage of female converts with religious figures as their marriage guardians. Al-Mizan, 15(1), 1-32.

Beirut: Dar al-Kitāb al-'Ilmiyah.

Charrad, M. M. (2012). Family law reforms in the Arab world: Tunisia and Morocco. Report for the United Nations Department of Economic and Social Affairs (UNDESA), Expert Group Meeting, New York.

David, A. (2009). Sunan Abī Dāud (Vol. 3). Beirut: Dār al-Risālah al-'Alamiah.

Directorate General of Badilag. (2020). Report on the Implementation of Activities in 2020. Jakarta: Directorate General of Badilag.

Engelcke, D. (2018). Interpreting the 2004 Moroccan family law: Street-level bureaucrats, women's groups, and the preservation of multiple norms. Law & Social Inquiry, 43(4), 1514-1541.

Fakih, M. (1996). The position of women in Islam: A gender analysis review. Tarjih: Journal of Tarjih and Development of Islamic Thought, 1(1), 22-37.

Fauziah, N. (2018). Family Law Updates in Indonesia and Morocco (Comparative Study on the Position of Marriage Guardians) (Thesis, Sunan Kalijaga State Islamic University).

Germain, C. M. (2003). Approaches to statutory interpretation and legislative history in France. Duke J. Comp. & Int'l L., 13, 195.

Ginting, SB (2017). Historical systematic grammatical interpretation of the alleged blasphemy case by Ahok. Jurnal Law Pro Justitia, 2(2), June.

Government of the Republic of Indonesia (1984). Law of the Republic of Indonesia Number 7 of 1984 concerning Ratification of the Convention on the Elimination of All Forms of Discrimination against Women. State Gazette of the Republic of Indonesia 1984 Number 29.

Hadiputra, A. (2009). Legal consequences of marriage annulment due to invalid marriage guardian status according to Law No. 1 of 1974 concerning marriage in the Sleman religious court. Thesis, Postgraduate Program, Diponegoro University.

Harašić, Ž. (2015). More about teleological argumentation in law. Pravni vjesnik: časopis za pravne i društvene znanosti Pravnog fakulteta Sveučilišta JJ Strossmayera u Osijeku, 31(3-4), 23-50.

Human Rights Education Associates (HREA). (2004). The Moroccan family code (Moudawana), An unofficial English translation of the original Arabic text. Retrieved from http://www.hrea.org/wp-content/uploads/2015/02/Moudawana.pdf

Human Rights Watch. (2016). Boxed in: Women and Saudi Arabia's male guardianship system. Retrieved from https://www.hrw.org/report/2016/07/16/boxed/women-and-saudi-arabias-male-guardianship-system

Ibn 'Ashur, MT (2001). Maqāṣid al-Syari'ah al-Islāmiyah. Amman: Dar an-Nafais.

Irfani, N. (2020). The Principles of Lex Superior, Lex Specialis, and Lex Posterior: Meaning, Problems, and Use in Legal Reasoning and Argumentation. Indonesian Legislation Journal, 16(3), 305-325.

Kamali, MH (2011). Maqāṣid al-Shari'ah and ijtihad as instruments of civilizational renewal: A methodological perspective. ICR Journal, 2(2), 245-271.

Khallāf, 'AW (1956). 'Ilm Uṣūl al-Fiqh. Cairo: Dār al-Qalam.

Khallāf, 'AW (2015). al-Ijtihād fī ash-Syarī'ah al-Islāmiyah (Trans.). Jakarta: Al-Kautsar Library.

Lailam, T. (2016). Construction of conflicting legal norms in the scheme of testing laws. Constitutional Journal, 11(1), 18-42.

MacCormick, N. (1993). Argumentation and interpretation in law. Ratio Juris, 6(1), 16-29.

Mahad Dubai al-Qaḍāi. (2017). Qānūn al-Aḥwāl ash-Shakhṣiyyah Number 28 of 2005. Dubai: Al-Ma'had.

Mahmood, T. (1972). Family law reform in the Muslim world. New Delhi: Indian Law Institute.

Manan, A. (2013). Discovery of law by judges in procedural law practice in religious courts. Journal of Law and Justice, 2(2), 189-202.

Manullang, EFM (2019). Teleological/sociological interpretation, purposive interpretation and Aharon Barak: A critical reflection. Veritas et Justitia, 5(2), 262-285.

Marzuki, PM (2010). Legal Research. Jakarta: Kencana.

Ministry of Religion, Republic of Indonesia (2001). Compilation of Islamic Law. Jakarta: Directorate General of Islamic Religious Institutional Development.

Muhaimin. (2020). Legal Research Methods. Mataram: Mataram University Press.

Munawwir, AW (1997). Al-Munawwir Arabic-Indonesian Dictionary. Surabaya: Pustaka Progresif.

Nagar, S. E., & Tønnessen, L. (2017). Family law reform in Sudan: Competing claims for gender justice between sharia and women's human rights. CMI Report.

Nurlaelawati, E. (2010). Modernization, tradition and identity: The Compilation of Islamic Law and legal practice in the Indonesian religious courts. Amsterdam University Press.

Padjen, IL (2020). Systematic interpretation and the re-systematization of law: The problem, co-requisites, a solution, use. International Journal for the Semiotics of Law, 33(1), 189-213.

Putro, WD (2011). Application and discovery of law in judges' decisions. Jakarta: Secretariat General of the Judicial Commission of the Republic of Indonesia.

Rahardjo, S. (2014). Legal Science (8th ed.). Bandung: Citra Aditya Bakti.

Rights, Global. (2006). The Moroccan Family Code (Moudawana) of February 5, 2004: An unofficial English translation of the original Arabic text. Rebates: Global.

Rofiq, A. (2001). Islamic Law Reform in Indonesia. Yogyakarta: Gama Media Offset.

Soeroso, R. (2016). Introduction to Legal Science (17th ed.). Jakarta: Sinar Grafika.

Supreme Court of the Republic of Indonesia. (2011). Collection of Legislation Relating to the Compilation of Islamic Law with Definitions in its Discussion. Jakarta: Supreme Court of the Republic of Indonesia.

Susanti, DO, & Efendi, A. (2019). Understanding statutory texts using the exegetical interpretation method. Kertha Patrika, 41(2).

Syaltūt, M., & as-Sāyis, M. 'A. (2004). Muqāranah al-Mażāhib fi al-Fiqh (In the edition revised by Ismuha). Comparison of Schools of Thought in Fiqh Issues. Jakarta: Bulan Bintang.

Syed, J., Ali, F., & Hennekam, S. (2018). Gender equality in employment in Saudi Arabia: A relational perspective. Career Development International.

Taqiuddin, HU (2019). Legal reasoning in judges' decisions. JISIP (Journal of Social Sciences and Education), 1(2).

Tulab, T. (2017). Review of guardian status in marriage based on a feminist approach. Ulul Albab: Journal of Islamic Law Studies and Research, 1(1), 152-164.

Wijaya, S. (2017). The Concept of Marriage Guardian in the Compilation of Islamic Law from a Gender Perspective (Thesis, Sunan Kalijaga State Islamic University).

Yaqin, A. (2016). Revitalization of Maqāṣid Al-Syari'ah in the istinbāṭ of Islamic law: A study of the thoughts of Muhammad Al-Thahir Ibn 'Asyūr. Asy-Syir'ah: Journal of Sharia and Legal Sciences, 50(2), 315-340.

Regulation:

Law Number 1 of 1974 concerning Marriage.

Supreme Court Regulation (PERMA) Number 03 of 2017 concerning Guidelines for Adjudicating Cases of Women in Conflict with the Law.

The amended 1945 Constitution, in Article 1 paragraph (3) states that "The State of Indonesia is a State of Law". This means that state administration in all areas must be based on fair and definite legal rules and not be based solely on political power.

Internet:

http://www.hrea.org/wp- content/uploads/2015/02/Moudawana.pdf. January 15, 2021.

https://id.wikipedia.org/wiki/Mahkamah_Agung_Republik_Indonesia

https://www.hrw.org/report/2016/07/16/boxed/women-and-saudi-arabias-

https://www.mkri.id/public/content/persidangan/bangunan/68_PUU-XII_2014.pdf.

https://www.mkri.id/public/content/persidangan/bangunan/68_PUU-XII_2014.pdf.

male-guardianship-system, January 12, 2021.