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The Position of the Guardian in Marriage Perspective of the Hanafi and the al-Shafi'i Madhhab

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Abstract

This article aims to find out and understand the position of the guardian in marriage according to the Hanafi and the al-Shafi'i madhhab, and its application to Islamic law (fiqh), as well as its actualization in social life. To obtain data and answers to these problems, descriptive qualitative (non-statistical) research is used, which focuses on the normative approach method. The results of the study found that there was a difference between the Hanafi and the al-Shafi'i madhhab in viewing the position of a guardian in a marriage. The Hanafi madhhab views that a guardian in marriage is not a pillar but only a sunnah, so that his absence does not affect the *ijab-qabul*. In contrast to the al-Shafi'i madhhab of thought, which places the guardian as one of the pillars, the absence of which makes the consent of the *qabul* invalid or invalid. With the sense of security that arises because of the permission of the guardian, because marriage is a life choice that a person will live, then women with their life choices must be based on the knowledge of the guardian.

Keywords:

Guardian; Marriage; Hanafi Madhhab; al-Shafi'i Madhhab.

Abstrak

Artikel ini bertujuan untuk mengetahui dan memahami kedudukan wali dalam pernikahan menurut mazhab Hanafi dan mazhab al-Syafi'i, dan aplikasinya terhadap hukum Islam, serta aktualisasinya dalam kehidupan bermasyarakat. Untuk mendapatkan data dan jawaban terhadap permasalahan tersebut digunakan jenis penelitian deskriptif kualitatif (non-statistik), yang terfokus pada metode pendekatan normatif. Hasil penelitian ditemukan bahwa ada perbedaan antara mazhab Hanafi dan mazhab Al-Shafi'i dalam memandang kedudukan seorang wali dalam sebuah pernikahan. Mazhab Hanafi memandang bahwa wali dalam pernikahan bukanlah sebuah rukun melainkan hanyalah sunnah, sehingga ketiadaannya tidak mempengaruhi berlangsungnya *ijab-qabul*. Berbeda dengan

mazhab al-Syafi'i yang mendudukan wali sebagai salah satu rukun yang ketiadaannya menjadikan ijab-qabul tidak sah atau batal. Dengan adanya rasa aman yang timbul sebab adanya izin dari wali, karena pernikahan merupakan sebuah pilihan hidup yang akan dijalani seseorang, maka wanita dengan pilihan hidupnya harus berdasarkan pengetahuan wali.

Kata Kunci:

Wali; Pernikahan; Mazhab Hanafi; Mazhab al-Syafi'i.

1. Introduction

Marriage is an important thing in the reality of human life, in which two people of different types (husband, wife) are gathered, in building a household to have offspring as the successor of the generation.¹ It is the human beings who are in the household that are called "family".² The family is the smallest unit of a nation, the family that aspires to in a legal marital bond is a happy prosperous family that always gets the blessings of God.³

The formation of a prosperous and happy family requires a valid marriage in accordance with the religious norms of the prevailing rules.⁴ The strength of the marriage that is established and fostered by the husband and wife depends largely on the will and intentions of the husband and wife who carry out the marriage.⁵ Therefore, in a marriage it is necessary to have a love born between the husband and wife. Marriages are built with pseudo-love (not born), Various Problems of Islamic Civil Law in Indonesia such marriages usually do not live long and end in a

¹ Michael G. Lawler and Todd A. Salzman, "Pope Francis, Civil Unions, and Same-Sex Marriage: Theological Reflections," *Irish Theological Quarterly* 87, no. 1 (2022): 3–21, <https://doi.org/10.1177/00211400211060630>.

² Mudofir Abdullah, "Marriage In Islam and the Problem of Gender Equality: A Philosophical Perspective," *Ulumuna* 22, no. 1 (2018): 57–76, <https://doi.org/10.20414/ujis.v22i1.333>.

³ Maznah Mohamad, "Introduction to the Special Issue 'Marriage, Intimacy, Gender and Islam in Southeast Asia,'" *Religions* 12, no. 7 (2021): 10–13, <https://doi.org/10.3390/rel12070539>.

⁴ Miszairi Sitiris, Mustafa bin Mat Jubri @ Shamsuddin, and Mohd Afandi Bin Awang Hamat, "Stipulation of Rights in the Practice of Nikah Al-Khitbah According to the Fuqaha' and the Islamic Family Law in Malaysia," *Journal of Islam in Asia* 17, no. 1 (2020), <https://doi.org/10.31436/jia.v17i1.847>.

⁵ H M Umar, "The Legitimacy of The Marriage of Husband and Wife Who Are Converts to Islam and the Implications for Their Descendants," *International Journal of Southeast Asia The* 3, no. 1 (2021): 57–67, <https://doi.org/10.47783/journijsa.v3i1.327>.

divorce.⁶ If the marriage has ended with a divorce, then the one who bears the consequences is the whole family which is usually very concerning.

Marriage is not only a legal act but is also a sunnah of the Apostle according to the words of the Prophet narrated by jema'ah hadith experts and Imam Muslim.

Means:

"And I marry women, whoever hates my sunnah, then he does not belong to my people".⁷

Having a good family according to Islam is very supportive of leading to prosperity, including in seeking the sustenance of Allah. Therefore, this marriage with prologue and epilogny, amanah and the practice of the rule system is a sacred duty for all Indonesian citizens. Allah swt. creating His creatures in pairs as He said in Q.S. al-Zāriyāt/51: 49.

Translation:

"And all things We created in pairs so that you might remember the greatness of God".⁸

So is Allah swt. making His creatures the most perfect and paired. Allah swt created male and female humans, male and female animals. So, it is with vegetation. This is intended so that all living things are then created a happy, peaceful, and prosperous life. For living things and life in this world to remain sustainable and flourish, there must be descendants who carry out and continue the wheel of life on the surface of this earth. For this reason, there must be a successor who is bound in a marriage contract, which is to unite two couples of the opposite sex, male and female.

⁶ Siti Kasiyati, "Law Enforcement in Indonesia in Perspective of Transcendental Legal Justice Paradigm," *Journal of Transcendental Law* 2, no. 2 (2020): 100–114, <https://doi.org/10.23917/jtl.v2i2.11855>.

⁷ Abī al- Ḥusain Muslim bin al- Ḥajjāj bin Muslim al-Qusyairī Muslim, *Ṣaḥīḥ Muslim*, 2nd ed. (Riyadh: Dār al-Salām, 2000)., p. 362.

⁸ Kementerian Agama RI, *Al-Qur'an Dan Terjemahannya* (Jakarta: Lajnah Pentashihan Mushaf Al-Qur'an Badan Litbang dan Diklat Kementerian Agama RI, 2019), <https://lajnah.kemenag.go.id/unduhan/category/3-terjemah-al-qur-an-tahun-2019>.

Marriage is a command from Allah swt. to His servants to obtain a legitimate offspring in society, namely the creation of a peaceful and peaceful family, as the word of Allah in Q.S. al-Rūm/30: 21.

Translation:

And among the signs of His dominion is that He created for you wives of your own kind, that you might be inclined and feel at peace with him and made him among you a sense of love and affection. Indeed, in such a thing there are really signs for the thinking.

Based on the above verse it can be known that, from cohabitation between a couple who will then give birth to their offspring which is something that is the main thing for the formation of society. This will create peace and happiness in the nation and state. But on the contrary, chaotic, and damaged descendants will result in chaos in society, nation, and state.

Marriage is also the sunnah of the prophets and apostles, Allah swt. said in Q.S. al-Ra'd/13: 38.

Translation:

And verily We have sent some Apostles before you and We have given them wives and posterity. And there is no right for an Apostle to bring in a verse but with Allah's permission. For each time there is a Book.⁹

From Abi Ayyub ra that the Messenger of Allah PBUH said,
Means:

Four things constitute the sunnah of the apostles: [1] Hinna', [2] farfumed, [3] brushing teeth (siwāk) and [4] marry.¹⁰

In marriage, a strong affection will be created between a husband and wife with the creation of a *sakīnah* family, *mawaddah* and *rahmah*.¹¹ Marriage also aims to turn something that was previously illegitimate into lawful. Marriage means language is to get together. Marriage is an important thing in human life. Besides as an execution on the command of Allah swt. also, as a sacred way of fulfilling the

⁹ Kementerian Agama RI.

¹⁰ Abu Isa Muhammad bin Isa bin Saurah bin Musa bin ad-Dahhak as-Sulami Al-Tirmīzī, *Sunan At-Tirmīzī* (Cairo: Dar al-Ma'rifah, 2006)., p. 451.

¹¹ Ahmad Fauzan and Hadi Amroni, "The Concept Of Sakīnah Family In The Contemporary Muslim Generation," *Al-'Adalah* 17, no. 1 (2020): 51–70.

needs of human nature.¹² Marriage can keep people away from adultery. Man can channel his biological needs (sex) to his partner who is lawful according to religion.¹³ Meanwhile, according to ushul experts, there are three different opinions in defining marriage. First, according to Hanafii, the meaning of marriage is originally intercourse, while the meaning of *majāzī* is a contract, which becomes lawful of sex relations between men and women. Second, according to al-Shafi'iyah on the contrary, namely marriage means the origin of the contract while the meaning of *majāzīnya* is intercourse. As for the third, according to the priest Hamzah and some ushul experts of abu Hanafiah's companions, argue that marriage is the gathering between the contract and intercourse.¹⁴

According to Hanafi madhhab, marriage is a Contract which means obtaining the property right to have sexual relations with a woman who has no obstacle to being married in sharia. Whereas madhhab al-malikiyah is defined A contract that justifies sexual relations with women who are not mahrams, not majusi, not slaves to the book with *ṣīgah*. The al-Shafii madhhab has a different definition of marriage from the previous definitions. i.e. a Contract which includes the acquisition of sexual intercourse with lafadz marriage, *tazwīj* or lafadz whose meaning is commensurate.¹⁵

The definition mentioned in the Al-Hanabilah madhhab is somewhat similar to the definition of the al-Shafii madhhab, namely the marriage contract or contract recognized in it pronunciation of *al-nikāh*, *al-tazwīj* and pronunciation which have a commensurate meaning. As a form of worship, marriage must meet the conditions set by sharia.¹⁶ Among the intended conditions is the presence of a guardian on the part of the bride. Its existence must absolutely exist in a marriage because the

¹² Erie Hariyanto et al., "Sakinah Family Empowerment by Optimizing the Role of BP4 and Parents Mental Revolution Perspective," *Samarah* 5, no. 2 (2021): 619–47, <https://doi.org/10.22373/sjhk.v5i2.10965>.

¹³ Supardin Supardin and Abdul Syatar, "Adultery Criminalization Spirit in Islamic Criminal Law: Alternatives in Indonesia's Positive Legal System Reform," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 5, no. 2 (2021): 913–27, <https://doi.org/http://dx.doi.org/10.22373/sjhk.v5i2.9353>.

¹⁴ Syariful Alam, "Reconstruction of Marriage Zonation in Islamic Law Perspective," *Legality: Jurnal Ilmiah Hukum* 27, no. 2 (2019): 161, <https://doi.org/10.22219/jihl.v27i2.10154>.

¹⁵ Abdurrahman Al-Jazīrī, *Al-Fiqh 'Alā Al-Mazāhib Al-Arba'Ah* (Cairo: Dār al-Ḥadīṣ, 2015)., P. 302.

¹⁶ Al-Jazīrī.

marriage contract will occur between the guardian and the bridegroom. Not with the bride.¹⁷ Thus, Islam teaches about the absoluteness of the existence of a guardian in a contract whose essence is to justify a woman's.¹⁸ It is impossible for a woman to justify her own by marrying in the absence of a guardian.

2. Literature Review

Looking at past exploration, a few effects of marriage without a gatekeeper have been found, including: in a review directed by Fakhurrazi M. Yunus, Dewi Arlina Dewi Arlina with the title "Marriage Crossing out because of Marriage without a Watchman Consent (Investigation of the Choice of the Syar'iyah Sigli Court Number 246/Pdt.G/2012/MS-Sgi), where in this review there was a distortion of the watchman's information which was accounted for to be a *mafqūd* gatekeeper and the misrepresentation of the gatekeeper's mark so the first watchman/father of the lady mentioned a revocation of the marriage for syar'i reasons that marriage without a watchman isn't legitimate.¹⁹ The examination composed by Aminanto named "An investigation of the practices about the legitimacy of marriage without a watchman (*takhrīj* hadith about the legitimacy of marriage without a gatekeeper)", in light of the concentrate in this study it was uncovered that the hadith about the legitimacy of marriage without a gatekeeper as far as the *sanad* is considered a *hasan* hadith that its legitimacy is discussed. Concerning the perspective, the gathering that permits marriage without a gatekeeper relates it to her own marriage with the contention that a lady who is full grown and has good judgment has the option to complete all types of exchanges, is allowed to decide her own fate, and is allowed to make every lawful move, including making an *ijab qabul*. in marriage.

¹⁷ Abd. Rasyid Sidiq, Rusli Rusli, and Syahabuddin Syahabuddin, "Gender Analysis of Marriage Guardians in the Compilation of Islamic Law," *International Journal of Contemporary Islamic Law and Society* 3, no. 1 (2021): 1–14, <https://doi.org/10.24239/ijcils.vol3.iss1.24>.

¹⁸ Aayesha Rafiq, "Role of Guardian in Muslim Woman's Marriage: A Study in the Light of Religious Texts," *IJISSET-International Journal of Innovative Science, Engineering & Technology* 2, no. 4 (2015): 1254–61, https://ijiset.com/vol2/v2s4/IJISSET_V2_I4_202.pdf.

¹⁹ Fakhurrazi M. Yunus and Desi Arlina, "Pembatalan Nikah Karena Nikah Tanpa Izin Wali (Studi Terhadap Putusan Mahkamah Syar'iyah Sigli Nomor 246/Pdt.G/2012/MS-Sgi)," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 1, no. 1 (2017): 101–28, <https://doi.org/10.22373/sjnk.v1i1.1572>.

In the act of a marriage, the people who say "*ijāb*" are from the lady of the hour's side (guardian) and the individuals who say *ikra "qabū"* are from the lucky man's side.²⁰ So, from this it is outlined that the job of a watchman is required as a delegate of the lady of the hour's side. In any case, the ministers of the madhhabs have various thoughts on this. Some say a watchman should be available in a marriage. Then again, there are the people who express that watchman are not a necessity in a marriage contract. Hence, in this postulation the creator will attempt to look at the assessment of the ministers of the madhhabs, particularly the al-Shafiiyah and Hanafi madhhabs in deciding the place of the gatekeeper in the marriage parade. It's exceptionally fascinating that this issue is examined in a logical paper, entitled *The Place of Gatekeepers in Marriage (Similar Concentrate between the Hanafi Madhhab and the al-Shafi'i Madhhab)*. This exploration is supposed to have the option to give an outline of positive information and data for essayists, the scholastic local area, and peruses, as well as critical thinking in the public arena regarding watchmen and observers in four ways of thinking point of view relationships. This exploration is likewise expected to have the option to add information to the two specialists and the general population with respect to the perspectives on the Hanafi and al-Shafi'i madhhabs towards watchmen in Islamic relationships and is supposed to be a commitment of thought in the logical fortunes of sharia.

A portion of the past examinations that turned into the underlying investigations in this review include: First, the proposition named "*The Place of Gatekeepers and Observers in Marriage Viewpoint of Four Madhhabs of Religion (Maliki, Hanafi, al-Shafi'i and Hanbali)*" composed by Rinwanto, Yudi Arianto.²¹ This article examines in everyday about the place of gatekeepers and observers in marriage as per the perspectives on the four ways of thinking, while this review looks

²⁰ Ahmad Nabil Atoilah and Ahmad Kamal, "Penggantian Wali Nasab Oleh Wali Hakim Menurut Intruksi Presiden Nomor 1 Tahun 1991," *Istinbath | Jurnal Penelitian Hukum Islam* 15, no. 1 (2019): 113, <https://doi.org/10.36667/istinbath.v15i1.276>.

²¹ Rinwanto and Yudi Arianto, "Kedudukan Wali Dan Saksi Dalam Perkawinan Perspektif Ulama Empat Mazhab (Maliki, Hanafi, Shafi'i Dan Hanbali)," *JAI-Maqashidi: Urnal Hukum Islam Nusantara* 3, no. 1 (2020): 82–96, <https://ejournal.sunan-giri.ac.id/index.php/ALMAQASHIDI/article/view/268>.

at explicitly the place of watchmen and spotlights on the perspectives on just two ways of thinking, to be specific Hanafi and Shafi'i. Second, a diary article named "The place of a marriage watchman as indicated by Ibn Rushd's view", which was composed by Pendi Hasibuan.²² Concerning the consequences of his exploration that Ibn Rushd contends that it's anything but a legitimate prerequisite for a marriage without a watchman, Wali for Ibn Rushd is definitely not a lawful necessity for a marriage. Here, Ibn Rushd calls it a condition for a substantial marriage (one more term for a lawful marriage is a mainstay of marriage) in light of the fact that as per him, assuming it is significant, the *shara'* will make sense of the different gatekeepers, gatherings and their successions. There ought not be a postpone in that frame of mind from the time it was required. The postponement of a clarification from the period of scarcity shouldn't happen from the Prophet, in light of the fact that many wedding occasions around this issue of guardianship require a portrayal from the Prophet. Neither mutawatir nor near mutawatir, while the set of experiences itself doesn't exist. The case is different in this review which centers around the advantages and disadvantages of the place of marriage watchman as per the Hanafi and al-Shafi'i madhhabs.²³

In practice a marriage, the one who pronounces " *ijāb* " is from the side of the bride (guardian) and the one who pronounces the ikra " *qabūl* " is from the side of the groom. Therefore, from this, it is illustrated that the role of a guardian is needed as a representative of the bride's side. However, the priests of the madhhab had different ideas about this. Some state the guardian must be present in the marriage. On the contrary, there are those who state that guardians are not a condition in a marriage contract. Therefore, in this thesis, the author will try to examine the opinions of the imams of the madhhab, especially in the al-Shafiiyah madhhab and the Hanafiah madhhab in determining the position of the guardian in the marriage procession.

²² Pendi Hasibuan, "Kedudukan Wali Dalam Pernikahan Menurut Ibnu Rusyd," *Al Hurriyah: Jurnal Hukum Islam* 3 (2018).

²³ Nida Chaerunnisa and Mukhtar, "Studi Komparatif Kedudukan Wali Dalam Pernikahan Menurut Imam Syafi-i Dan Imam Hanafi," *Mizan: Journal of Islamic Law* 1, no. 2 (2017), <https://doi.org/10.32507/mizan.v1i2.12>.

3. Research Method

This article is descriptive qualitative (non-statistical) research is used, which focuses on the normative approach method. The study of turas books, research journals, research reports, and literature pertinent to the research topic provides the data sources. The obtained library data is descriptively examined with a thorough and in-depth study.

4. Discussion

4.1. Views of the Hanafi Madhhab Regarding the Position of Guardian

Opinion of Imam Abu Hanifah. Among scholars there is a difference of opinion in the whether or not there is a guardian in marriage, Imam Abu Hanifah argued that it is legal to marry a sensible adult woman in the absence of a guardian, an adult woman can be a guardian in her marriage as well as the marriage of another woman, provided that her future husband is sekufu, and the dowry is no less than the dowry that applies to the surrounding community.²⁴ If the woman marries a person who is not as close to her then her guardian. The arguments put forward by Abu Hanifah, are surah al- Baqarah verse 232:

Translation:

"Then do not you (the guardians) prevent them from remarrying with her future husband".²⁵

The guardian in marriage²⁶ according to the view of the Hanafii madhhab is not to be the pillar of a marriage, but only a necessity to be fulfilled, this is based on qiyas, where a woman who is baligh and mature may be the same as a man in terms of buying and selling. The Hanafi Madhhab views that marriage has two purposes, namely the primary goal and the secondary goal. Primary purposes are only owned by women without the intervention of their guardians, such as matters of copulation, living and others. Meanwhile, secondary purposes where the guardian enjoys, such

²⁴ Chaerunnisa and Mukhtar.

²⁵ Kementerian Agama RI, *Al-Qur'an Dan Terjemahannya*.

²⁶ Muhammad Ifzal Mehmood and Noraini Binti Md Hashim, "Marriage Without Wali'S Consent: A Paradigm Shift in the Family Structure of Pakistan," *IJUM Law Journal* 29, no. (S1) (2021): 135–51, [https://doi.org/10.31436/iiumlj.v29i\(s1\).639](https://doi.org/10.31436/iiumlj.v29i(s1).639).

as the kinship between the two families. Such a purposeful contract is natural that those who perform the purpose of marriage also have such a purpose. In addition, the marriage contract is the same as buying and selling, if a woman has the right to sell her property, then naturally she is allowed to do her own marriage aqad in terms of marriage, because this is indeed about her benefit.

The Hanafi priest said that a woman who is balig and sensible can choose her husband herself and may marry herself, whether she is a virgin or a widow. No one has a authority over himself or opposes his choice, a condition, the chosen person is sekufu (worth it).²⁷ But if he chooses a man who is not as close to him, then his guardian may oppose him, and ask the qadhi to cancel his contract. With the reason for keeping the disgrace that may arise on the part of her husband as long as he has not been pregnant or giving birth. If it turns out that she is pregnant or giving birth, then she has the right to ask for annulment of the court, in order to safeguard the interests of the child and choose the womb.

Imam Abu Hanifah said that the first order of guardianship was in the hands of the son of the woman who was going to marry, if indeed he had children, even if it was the result of adultery. Then it continues among them; 1) Grandson (on the part of the male ank); 2) Dad; 3) Paternal grandfather; 4) Siblings; 5) Brothers are as shaky as possible; 6) Uncle (father's brother); and 7) Uncle's Son: 8) And so on.

4.2. Views of the al-Shafi'i Madhhab Regarding the Position of Guardian

For Muslims in Indonesia, the al-Shafi'i madhhab is a familiar madhhab because that is familiar because the majority of Muslims in Indonesia are adherents of the al-Shafi'i madhhab.²⁸ This is seen from the spread of Islam in Indonesia is commonplace because the early spreaders of Islam in Indonesia were Gujarat Muslim traders and the Chinese were adherents of the al-Shafi'i sect. This trace can also be seen from the early Islamic royal system in the archipelago which also

²⁷ Al-Jaziri, *Al-Fiqh 'Alā Al-Mazāhib Al-Arba'Ah*.

²⁸ Kholil Syu'aib, "Al-Syaikh Muhammad Mahfudz Al-Termasī Al-Jāwī Al-Indūnisī Wa Asānīduhu Fī 'ilmi Al-Fiqhi," *Al-Ihkam: Jurnal Hukum Dan Pranata Sosial Pranata Sosial* 12, no. 2 (2017), <https://doi.org/10.19105/al-Ihkam.v12i2.1369>.

adhered to the al-Shafi'i sect and so did the Islamic kingdoms after it. According to the al-Shafi'i madhhab a woman who wants to perform a marriage must have a guardian, and the guardian in this madhhab has a position as one of the pillars that must be fulfilled in marriage.

The al-Shafi'i Madhhab considers it valid or void in a marriage contract whose lafadz ijab is pronounced by a woman whether a girl or a widow, sekufu or not, with the permission of the guardian or not, directly for herself or as a representative for others.²⁹ According to the opinion of the al-Shafi'i madhhab about the guardian of marriage, a woman who has never been married, then her marriage must be approved by her guardian, namely the father and or another male breed of the woman (bride). So the woman in the view of the Shafii priest should not marry herself to the man she wants. The reason used by the al-Shafii madhhab in this regard is based on the hadith of Abu Musa al-Shafi'i narrated by Abu Daud and others, as follows:

Means:

"From Abu Musa Al-As'ari said: Bersabda: The Messenger of Allah was. There is no marriage but with a guardian". (History. Abu David, HR. Ahmad Tirmidzi, Ibn Hiban, and Hakim).

The statement "no" in this hadith means "invalid", which is the closest meaning to this subject matter. So a marriage without a guardian is void . Also the Aisyah hadith narrated by Abu Daud is as follows:

Means:

"From Aisyah ra, he said: said the Messenger of Allah: Every woman who marries without the permission of her guardian, her marriage is void, her marriage is void, her marriage is void, if the woman has been, for the woman the dowry is a missile dowry because it is considered lawful to marry her. If they are at odds, if they are at odds then the sultan is the guardian for the woman who has no guardian". (History of Abu David).

According to the al-Shafi'i madhhab the first hadith denies (negates) a marriage that takes place without a guardian. Then the question arises, can a fact be hypothesized? certainly not, so if so, according to the hypocrisized madhhab of ni it is one of two things, namely perfect (*takmil*) and legal (*sah*). To bring closer to the

²⁹ Al-Jazīrī, *Al-Fiqh 'Alā Al-Mazāhib Al-Arba'Ah*.

hypocrisy of facts, it is by way of denying the validity, on this basis the hadust of Abu Musa is to deny the validity of the marriage contract without a guardian not to deny the perfection of marriage without a guardian.

Regarding the second hadith, the word "without the permission of the guardian" then the marriage is void, according to this madhhab there is no mafhum mukhalafahnya, which reads as follows "The marriage contract with the permission of the guardian, then the marriage is valid", because in the hadith it has been explained the cause of the occurrence of marriage without the permission of the guardian, because there is a dispute between the guardian and the woman, in which case it is *Shulthaniah* (the guardian of the judge) who is the guardian, thus the hadith has no mafhum mukhalafah. So according to Imam namely sempura and sah it is clear that, it is not valid for a marriage contract whose lafaz ijab is pronounced by a woman or man who does not represent his guardian.³⁰

The issue of the wali madhhab al-Shafi'i pioneered by Imam al-Shafi'i argues that a person who can become a guardian must meet some of the following conditions:³¹

1. Islam

Infidels or non-muslims should not marry a muslim woman, because they do not have al-Wilayah (power) of infidels against muslims. The Word of Allah swt. in Quran surah al-Nisā verse 141:

Translation:

"And God will never give way to the pagans to exterminate the believers".³²

2. Fair

The just point is that the guardian does not commit major sins, does not always commit minor sins and does not commit acts that bring dignity such as peeing on the highways, walking casually disrespectfully, and so on. Therefore the ungodly should not marry a woman of faith, even the right to be a guardian can pass to another guardian if the other person is a just person. Also because ungodly is a

³⁰ Mustāfa Al-Khin, *Kitāb Fiqh Mazhab Al-Syāfi'ī* (Kuala Lumpur: Pustaka Salam, n.d.), p. 795.

³¹ Al-Khin., p. 796.

³² Kementerian Agama RI, *Al-Qur'an Dan Terjemahannya*.

deficiency that can damage a testimony. Therefore the ungodly are forbidden to be guardians in marriage.

3. Balig

Children should not be guardians because she can't take care of herself. Therefore, by not allowing children to be guardians then it will be better.

4. Be sensible

A madman shouldn't be a guardian because he can't take care of himself like a kid and that's a madman not biased into being a guardian because it's more important.

5. Must not have defects in vision

A person who is not well versed in his views due to the factor of old age or defects of reason should not be a guardian because he is unable to choose a partner who is as arrogant as possible. If the guardian is sick or fainting is caused by illness, it is necessary to wait for the fainting encountered only briefly, such as falling asleep.

6. The guardian is not a person who is forbidden by the sharak to spend his property because of al-Shafi'i

This means that people who are forbidden by sharak to spend their property because shafih are those who waste their property. Then they shouldn't take care of themselves, of course, it's even better that they don't take care of others. Not a person who is in the faith People who are having hajj or Umrah should not marry a person who is about to marry as mentioned in the hadith of the Prophet which means: "one who has faith (whether male or female) may not marry, may not marry (whether a woman who is ihram or not)"

7. Muhrim of the woman in question

The guardian who marries is a muhrim or one blood from the bride's father.

8. Independence

The point is that people who are not bound by anything and are free to sort out what they want.

9. With voluntary

In carrying out his duties a guardian marries with a sense of sincerity and no sense of hesitation.

The composition of the saints according to the Shafii madhhab is as follows; 1) Father; 2) Siblings; 3) Brother who is a father; 4) Son of a sibling; 5) Son of a brother; 6) Biological uncle; 7) Uncles ; 8) Son of biological uncle; and 9) Uncle's son.

Taking into account the names of the saints in the al-Shafii madhhab, it is clear that the guardianship of marriage is on the path of *aṣabah*.³³ If there is no close guardian then it is assumed by the abid guardian, if there is no abid then "Shulthanlah" (religious judge or head of local religious affairs) becomes his guardian. So according to Imam al-Shafi'i it is clear that, it is not valid for a marriage contract whose pronouncement ijab is pronounced by a woman or man who does not represent his guardian.

Then the above list of guardian sequences should not be stepped or scrambled. So that if the biological father is still alive, then his guardianship rights should not be taken over by the guardian at the next sequence number. Unless the party concerned gives them their permission and rights.

4.3. Comparative Analysis of the Opinions of the Hanafi Madhhab and the al-Shafi'i Madhhab about Marriage Guardians

Contrary to the opinion of the majority of jurisprudence scholars, Imam Abu Hanifah and his disciple Abu Yusuf argued that sensible adult women have the right to perform a direct marriage contract without a guardian, whether a girl or a widow, whether married to a man who is as simple as possible or not.

The arguments put forward by Abu Hanifah and Abu Yusuf are quranic text in surah al-Baqarah verse 232:

Translation:

"Then do not you (the guardians) prevent them from remarrying with their future husbands".³⁴

Imam al-Shafi'i uses ahad hadith which states that a marriage is invalid except with the permission of the guardian. "*Lā nikāh illā bi waliy*" whereas Abu

³³ Musda Asmara, "CONCEPT OF WALI MUJBIR IN MARRIAGE (LEGAL CRITICISM OF COUNTER LEGAL DRAFT COMPILATION OF ISLAMIC LAW)," *Mizani: Wacana Hukum, Ekonomi Dan Keagamaan* 8, no. 2 (2021): 189–204.

³⁴ Kementerian Agama RI, *Al-Qur'an Dan Terjemahannya*.

Hanifah, did not want to accept this hadith because it was judged ineligible to be used as a hujjah or postulate. Therefore, according to Abu Hanifah, an acceptable hadith must reach the level of mutawatir, that is, the hadith of the Prophet which is impossible for fraud or lies to occur over the hadith brought. Women are free to do buying and selling contracts and other contracts, therefore they are free to do their marriage contracts.³⁵ Because there is no legal difference between the marriage contract and other contracts.

And Imam al-Shafi'i's argument corresponds in the hadith of the Prophet:

Means:

"It is from Abu Burdah Ibn Abu Musa, from his father Radliyallaahu 'anhu that the Messenger of Allaah 'alaihi wa Sallam said: "It is not valid to marry except by a guardian".

The hadiths that associate the validity of marriage with the permission of the guardian are special, that is, when the woman who is about to marry herself is not qualified to act alone, for example because she is still immature or has no common sense. Unlike the al-Shafi'i, Abu Hanifah lived in the City of Kufah, in a time of many hadith forgeries that occurred in the middle of Kufah which was already a cosmopolitan city. Kufah women at that time were used to marrying in the range of 18-22 years, a measure of age that was more mature than the marriage age in Bagdad. At such an age, women can certainly be independent in making decisions so that they can determine their own life path.

Therefore, Abu Hanifah argued that Muslim women have the right to marry themselves even if their guardians disagree or do not know about it. While there are opinions that allow mature and common sense women to perform their own marriages, they are not accepted and generally accepted opinions in the Muslim world. In Indonesia, for example, in the Compilation of Islamic Law, it is explained that the guardian is one of the pillars of marriage, and without a marriage guardian is invalid. Article 19 of the KHI reads;

³⁵ Tengku Keizeirina and Devi Azwar, "Preparing To Appoint Indonesian Minor Guardians Under Islamic Law," *Journal of Positive School Psychology* 6, no. 6 (2022): 3110–16.

” The Guardian of Marriage in marriage is a pillar that must be fulfilled for the prospective woman who acts to marry her”.

1. Factors causing *Ikhtilāf*

Factors that cause differences between the Hanafi madhhab and the Shafii madhhab³⁶ in looking at the position of the guardian in marriage include the following:

- a. Differences in the taking and interpretation of the holy verses of the Qur'an as well as differences in understanding the hadith.
- b. The Hanafi madhhab prioritizes qiyas over the ahad hadith, while the al-Shafi'i madhhab prioritizes the ahad hadith over the qiyas.
- c. According to the Hanafi madhhab women in the muamalah are similar in rights to men, therefore they give the marriage contract to the contract of buying and selling while the Shafii madhhab adheres to the hadith of Ahad, which corresponds to *asabāb al-nuzūl* verse 234 of Surah Al-Baqarah.
- d. Hanafi argued that a matter which was negated by the syara with the intermediary (الانفية) must be understood that the absence is perfect.
- e. According to Shafii (الانفية) the omitted is his shah, the Hanafi madhhab interprets with imperfect words and Shafi'i interprets it illegitimately.

From the previous discussion, it can be seen that the role of guardians in marriage has actually shifted throughout history. From being a seller of women in marriage in pre-Islamic Arabia, then becoming a protector of women when they were incapable of marrying themselves in the early days of Islam. It is unfortunate, however, that the role of the guardian as a conditional protector then tends to be generalized as universally applicable to all women by the jurisprudence scholars who came later.

2. Differences and Similarities

Hanafiyah scholars are of the opinion that for the marriage of small children, whether in sound mind or not in common sense, it is obligatory for a guardian to sign

³⁶ Harwis Alimuddin and Tahani Asri Maulidah, “Implication of Local Wisdom in Islamic Law Compilation Legislation,” *Mazahibuna: Jurnal Perbandingan Mazhab* 3, no. 2 (2021): 143–58, <https://doi.org/10.24252/mh.v3i2.24982>.

the marriage. Meanwhile, women who are mature and of sound mind can carry out their own marriage contract without a guardian.

This is different from the view of the al-Shafi'iyah scholars. Imam al-Shafi'i is of the opinion that every marriage contract is carried out by a guardian, whether the woman is an adult or a child, a widow or a virgin, healthy in mind or unhealthy. There is no right at all for women to sign their marriage.

Al-Shafi'iyah agrees that there must be a guardian or substitute in every marriage for both girls and widows, both adults and minors. As for Shafi'i, who agrees that guardians of *ghair mujbir* are fathers and grandfathers, while Hanafi, guardians of *ghair mujir* are only boys. that a female guardian is allowed in the absence of a male guardian. Al-Shafi'iyah scholars, require guardians as pillars of marriage based on Al-Baqarah verse 232 and the hadith from Aisyah. As for the Hanafiyah scholars, rejecting this basis because there is a *daif* of the hadith and according to Hanafiyah, the context of verse 232 of Al-Baqarah does not indicate the necessity of having a guardian.

Hanafiyah and al-Shafi'iyah scholars, although they have many different views regarding marriage guardians, the similar views of the two scholars as well as the Marriage Law are as follows:

1. Hanafiyah scholars, view that marriage must use (there is) a guardian in the marriage contract, as long as the bride is not in a relationship with her future husband.
2. Al-Shafi'iyah scholars, marriage must present a guardian in the procession of the marriage contract, whether the woman is a girl or a widow.

The Al-Shafi'i madhhab with its view on the position of guardians as pillars in marriage gives women a sense of security because of marriages that arise because of the permission of the guardian. Marriage is a life choice that a person will live, so a woman with her life choice must be based on the knowledge and approval of her guardian. While the Hanafi Madhhab does not require a guardian in marriage, there will be many people who marry at will without the knowledge and permission of the guardian in question so that it will result in harm for women.

**Consequences of the Examination of the Distinctions between the two
Madhhabs with Tables.**

Hanafi Madhhab	Al-Shafi'i Madhhab
<p>Imam Abu Hanifa is of the assessment that the marriage of a grown-up lady who is levelheaded without a watchman is substantial, a grown-up lady can turn into a gatekeeper in her marriage as well as the marriage of another lady, with the conditions of her future spouse are equivalent, and the endowment isn't not exactly the share that applies to the encompassing local area. In the event that the lady weds an individual who isn't as per her, then her gatekeeper.</p> <p>Gatekeepers in marriage as per the Hanafii way of thinking are not the mainstays of a marriage, but rather just sunnah to satisfy, this depends on qiyas, where a lady who is endlessly full grown may have the equivalent muamalah as men regarding trading.</p> <p>Imam Abu Hanifah said that the first request of guardianship is in quite a while of the child of the one who will offer, assuming she has youngsters, regardless of whether it is the consequence of infidelity. Then, at that point, it go on between</p> <ol style="list-style-type: none"> 1. Grandson (from the child's side). 2. Father. 3. Fatherly granddad. 4. Kin. 	<p>As per the Al-Shafi'i madhhab, a lady who needs to wed should have a watchman, and the gatekeeper in this madhhab has a situation as one of the support points that should be satisfied in marriage. The Al-Shafi'i madhhab thinks of it as legitimate or void in a marriage contract whose lafadz ijab is articulated by a lady, either a young lady or a widow, equivalent or not, with the consent of her gatekeeper or not, straightforwardly for herself or as a delegate for other people.</p> <p>As indicated by the assessment of the Shafii madhhab of marriage watchmen, a lady who has never been hitched, then her marriage should be endorsed by her watchman, to be specific the dad as well as other male variety of the lady (lady of the hour). Thus, in the perspective on Imam Shafi'i, a lady can't wed herself to a man she needs.</p> <p>The structure of the gatekeeper as indicated by the Shafii madhhab is as per the following:</p> <ol style="list-style-type: none"> 1. Father 2. Siblings 3. Siblings who are a similar dad 4. The child of a male kin 5. Child of father's sibling 6. Uncle 7. Father's uncle

5. Father's sibling.	8. Child of natural uncle
6. Uncle (father's sibling).	9. Father's uncle's child
7. Uncle's Child.	

5. Conclusion

Scholars of the Hanafi madhhab are of the opinion that for the marriage of a child, whether in sound mind or not in common sense, it is obligatory for a guardian to sign the marriage. Meanwhile, women who are mature and of sound mind can carry out their own marriage contract without a guardian. Scholars of the al-Shafi'i madhhab are of the opinion that every marriage contract must be carried out by a guardian, or a substitute appointed by the guardian, whether the woman is an adult or a child, widowed or still a virgin, healthy in mind or unhealthy. There is no right at all for women to sign their marriage

The al-Shafi'i madhhab with its view on the position of guardians as pillars in marriage provides a sense of security for women because marriages arise because of the permission of the guardian. Marriage is a life choice that a person will live, so a woman with her life choice must be based on the knowledge and approval of her guardian. While the Hanafi Madhhab does not require a guardian in marriage, there will be many people who marry at will without the knowledge and permission of the guardian in question so that it will result in harm to the woman.

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