

## OPPORTUNITIES FOR WOMEN AS GUARDIANS OF MARRIAGE IN INDONESIA : AN OVERVIEW IN THE SOCIOLOGY OF ISLAMIC LAW

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### **Abstract**

*Whether we realize it or not, gender inequality is one of the social problems that we can easily find in people's lives. The problem of gender bias can occur in various aspects of life, including the aspect of legal rights, such as the right as guardian of marriage in Indonesia. This study aims to find a discourse analysis of the opportunities for women as marriage guardians in Indonesia. This study employs empirical normative legal method. The primary data sources are the Compilation of Islamic Law (KHI) and social observation. The secondary data sources used were various other relevant studies. Meanwhile, the theory used as a tool of analysis is the sociological theory of Islamic law from Ibn Qayyim al-Jauzi regarding changes in Islamic law. This study concludes that based on the pattern of equality of gender relations in Indonesian society, granting the right of authority as guardian of marriage to female relatives is a form of istihsan bi al-'urf, the change of law from general law (kullii) to special or casuistic law (juz'i) based on existing culture or custom. This is parallel with Ibn Qayyim's theory of change in Islamic law which makes conditions (ahwal) and culture ('adat) part of the factors of changing Islamic law.*

**Keywords:** *Guardian of marriage, women, Indonesia, sociology, Islamic law.*

### **Abstrak**

Baik disadari atau tidak, ketidaksetaraan jender merupakan salah satu problem sosial yang mudah kita temukan dalam kehidupan masyarakat. Problem bias jender tersebut dapat terjadi dalam berbagai aspek kehidupan, tidak terkecuali dalam aspek hak hukum, seperti halnya hak sebagai wali nikah di Indonesia. Penelitian ini bertujuan untuk menemukan analisa wacana atas peluang prempuan sebagai wali nikah di Indonesia. Jenis penelitian ini merupakan penelitian hukum normatif empiris. Sumber data utama, yakni Kompilasi Hukum Islam (KHI) dan observasi sosial. Sumber data sekunder, yakni berbagai penelitian lain yang relevan. Sementara itu, teori yang digunakan sebagai pisau analisis, yakni teori sosiologi hukum Islam dari Ibn Qayyim al-Jauzi tentang perubahan hukum Islam. Penelitian ini menyimpulkan bahwa berdasarkan pola kesetaraan relasi jender masyarakat Indonesia, maka

pemberian hak otoritas sebagai wali nikah kepada kerabat perempuan dapat dikatakan sebagai bentuk *istihsan bi al-'urf*, yaitu perubahan hukum dari hukum umum atau (*kulii*) kepada hukum khusus atau kasuistik (*juz'i*) atas dasar kultur atau adat yang ada. Hal demikian paralel dengan teori perubahan hukum Islam Ibn Qayyim yang menjadikan kondisi (*ahwal*) dan budaya ('adat) merupakan bagian dari faktor perubahan hukum Islam.

**Kata kunci:** : *Wali nikah, perempuan, Indonesia, sosiologi, hukum Islam.*

## A. INTRODUCTION

The sex distinctions between men and women are biological. However, the problem that can arise is when this biological difference can lead to discrimination between men and women in various aspects of life, such as in the aspects of legal rights, professional opportunities, social life and even family life.<sup>1</sup> In Islamic teachings, both in the Qur'an and Hadith, both have the same moral message in respecting and upholding the principle of gender equality in all aspects of life.<sup>2</sup>

The phenomenon of gender bias as above should not have happened. That is because there is a fundamental difference between the concept of sex (gender) and gender. According to Nasaruddin Umar, gender is a concept used to identify differences between men and women based on socio-cultural construction, not differences based on biological (natural) aspects.<sup>3</sup> Then Kamla Bashin, as quoted by Rusli, also distinguishes between gender and sex. According to Kamla, gender is a socio-cultural thing, man-made, can change from time to time, from one culture to another in terms of responsibilities, roles, behavior patterns and others between men and

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<sup>1</sup> Athoillah Islamy, "Gender Mainstreaming in The Hermeneutics of Islamic Family Law," *Al-Bayyinah: Jurnal of Islamic Law*, Vol.4, No.1 (2020) : 20.

<sup>2</sup> Athoillah Islamy, "Gender Mainstreaming dalam al-Qur'an dan Hadis serta Relevansinya Terhadap Epistemologi Hukum Islam," *Jurnal Hukum Islam*, Vol.15, No.1 (2017) : 181.

<sup>3</sup> Nasaruddin Umar, *Argument Kesetaraan Gender dalam Perspektif al-Qur'an* (Jakarta : Paramadina, 1999), cet ke-135.

women. Meanwhile, sex is a biological difference between men and women.<sup>4</sup>

The description above shows that sex (gender) is biological, natural and permanent from birth. Meanwhile, gender is something that is formed from dynamic socio-cultural construction. However, in the social phenomenon of Islamic society, sometimes there is still gender bias experienced by women in social and legal activities, such as gender bias towards the rights as guardians of marriage in Indonesia which are only owned by men as the legal provisions contained in the Islamic Law Compilation ( KHI). Therefore, this study will examine the discourse of opportunities for women as guardians of marriage in Indonesia from the perspective of the sociology of Islamic law.

## B. *LITERATURE REVIEW*

There are several previous studies that are relevant to the main object of this research discussion, including Waliko (2003) in his thesis that the authority of rights as marriage guardians of the male lineage is not a form of fiqh perpetuation of Arab patriarchal culture nor is it a form of male domination. over women, but a form of division of roles and responsibilities.<sup>5</sup> Mardiyah Danial (2009) in her dissertation also stated that based on a review of Hadith and the opinion of fiqh scholars, the existence of women as guardians of marriage is very weak.<sup>6</sup> Asrorun Ni'am Sholeh (2008) says that based on the al-Qur'an and Hadith, the existence of women in the marriage contract is very weak. Therefore, women do not have the

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<sup>4</sup> Rusli, "Isu-Isu Gender Dalam Bingkai Metodologi Studi Islam," *Musawa*, Vol.4 No.1 (2012), 26.

<sup>5</sup> Waliko, "Konsep Perwalian Nikah Menurut Tinjauan Hadis", Sebuah Tesis Sekolah Pascasarjana UIN Syarif Hidayatullah Jakarta, 1424H/ 2003M, 150-152.

<sup>6</sup> Mardiyah Danial, "Kedudukan Perempuan Dalam Perspektif Hadis :Kajian Hadis-Hadis Tentang Bab Nikah Pada Kitab Bulugh al-Mara>m", Sebuah Disertasi Sekolah Pascasarjana UIN Syarif Hidayatullah Jakarta, 1430H/2009M,. 213-215.

right to marry themselves and also become guardians of marriage.<sup>7</sup> Then, Nurzulia Febri Hidayati (2018) stated that the school of Islamic law adhered to by the majority of Muslims in Indonesia is that marriage is illegal if it does not exist or without the consent of the female guardian. According to Nurzulia, this opinion is based on the *pandanagan* belief that women are considered unable to maintain their own safety, either because they are immature or because they do not have experience.<sup>8</sup>

In contrast to some of the figures above, Nasaruddin Umar (2003) states that the cultural conditions of the patriarchal Arab community are logical if they want the authority of the right of guardianship to belong to male relatives, such as fathers, grandfathers and brothers of bride.<sup>9</sup> Zaitunah Subhan (2008) said, in both the Qur'an and the Hadith there is no *qat'i* explanation that the right as guardian of marriage is only owned by men.<sup>10</sup> Then Asni (2012) in his dissertation also said that with changes in gender relations in a family and social life, it is necessary to reconsider the nature of the marriage guardianship function.<sup>11</sup>

Based on some of the previous studies above, no research has been found that focuses on examining the opportunities for women to have the right as guardians of marriage in Indonesia from the perspective of the sociology of Islamic law. Therefore, it provides space and opportunities for the writer to conduct further research.

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<sup>7</sup> Asrosrun Ni'am Sholeh, *Fatwa-Fatwa Masalah Pernikahan Dan Keluarga* (Jakarta : Elsas, 2008), cet.ke-2, 15-19.

<sup>8</sup> Nurzulia Febri Hidayati, "Perempuan Sebagai Wali Nikah Larangan Atau Peringatan," *Palita: Journal of Social-Religion Research*, Vol.3, No.1 (2018) :65.

<sup>9</sup> Nasaruddin Umar, *Teologi Jender Antara Mitos dan Teks Kitab Suci* (Jakarta : Pustaka Cicero, 2003), 137

<sup>10</sup> Zaitunah Subhan, *Menggagas Fikih Pemberdayaan Perempuan* (Jakarta : Elkahfi,2008), cet. ke-2, 229-233.

<sup>11</sup> Asni, *Pembaharuan Hukum Islam Di Indonesia: Telaah Epistemologis Kedudukan Perempuan Dalam Hukum Keluarga* (Jakarta :Kementrian Agama Republik Indonesia, 2012), 271-273.

### C. RESEARCH METHOD

This research is a qualitative research.<sup>12</sup> Meanwhile, this type of research approach is empirical normative legal research.<sup>13</sup> The main data sources, is the Kompilasi Hukum Islam (KHI) and social observations. Secondary data sources, namely various other relevant studies. Meanwhile, the theory used as an analysis knife is the sociological theory of Islamic law from Ibn Qayim al-Jauzi. According to Ibn Qayim, there are five things that can cause legal changes, among others, time change factors, condition factors, place factors, intention factors, and customary factors.

### D. CHANGES IN ISLAMIC LAW IN THE DYNAMICS OF SOCIAL CHANGE IN SOCIETY

In the context of the relation between Islamic law and social change, Duski Ibrahim said that there is a reciprocal relationship between social change and legal change. According to him, the existence of Islamic law in practice can play its role as social control, and also as a medium for changing social life (social engineering).<sup>14</sup> Ibnu Qayyim al-Jauziah, as quoted by Abdi Wijaya, explained that there is a dialectic between changes in Islamic law and the reality of dynamic social life. Ibn Qayyim stated that the existence of Islamic law can change over time, conditions, place, customs (culture) and intentions.<sup>15</sup> Further information as follows.

First, the factor of time. Ibn Qayyim stated that changes in Islamic law can be caused by changes in time. Second, the place factor. In Ibn Qayyim's view, changing places can have implications for changes in Islamic law. In other words, Islamic law has the characteristics of its locality which can cause differences in the application of Islamic law from one place to

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<sup>12</sup> Lexy J. Moleong, *Metodologi Penelitian Kualitatif* (Bandung : Remaja Rosdakarya, 2017), 6.

<sup>13</sup> Peter Marzuki, *Penelitian Hukum* (Jakarta : Kencana, 2007), 87.

<sup>14</sup> Duski Ibrahim, *al-Qawaid al-fiqhiah* (Palembang : Noer Fikri, 2019), 205.

<sup>15</sup> Abdi Wijaya, "Perubahan Hukum dalam Pandangan Ibnu Qayyim," *al-Daulah*, Vol. ^, No.2 (2017) : 390.

another. Third, the condition factor. For Ibn Qayyim, the application of Islamic law can undergo changes due to changes or differences in existing situations and conditions. Fourth, the intention factor. According to Ibn Qayyim, legal stipulation related to a case or action also takes into account the intentions of the perpetrator. This is because the position of intention in the Islamic legal system is an important thing that can change the established legal provisions. Fifth, custom factors. Ibn Qayyim explained that customary or cultural conditions (*urf*) can be a factor that causes legal changes.<sup>16</sup>

Based on the description above, it can be understood that the renewal and development of Islamic law is urgent and must be done in order to answer legal problems caused by social changes and the needs of society. Therefore, socio-cultural conditions and community needs are important and should not be neglected in the context of the contextualization of Islamic law, both in the form of renewal and development of Islamic law.

## E. MARRIAGE GUARDIAN RIGHTS IN INDONESIA

There are three functions of the Compilation of Islamic Law (KHI) in its position as an instrument of Islamic law applicable in Indonesia. First, as a national codification and unification of Islamic law. Second, as a guideline for judges of the Religious Courts in resolving various cases within their authority. Third, as a guideline for the community regarding the applicable Islamic family law.<sup>17</sup>

In the KHI it is explained that in order to realize a valid marriage contract, a marriage contract must fulfill several pillars, including: a prospective husband, a prospective wife, a witness, a marriage guardian

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<sup>16</sup> Abdi Wijaya, "Perubahan Hukum dalam Pandangan Ibnu Qayyim," *al-Daulah*,: 390-392.

<sup>17</sup> Athoillah Islamy, "Eksistensi Hukum Keluarga Islam di Indonesia dalam Kontestasi Politik Hukum dan Liberalisme Pemikiran Islam," *Jurnal Al-Istinbath : Jurnal Hukum Islam*, Vol.4, No.2 (2019) : 164.

and a consent granted. As one of the pillars, the existence of a guardian is only for the bride. Meanwhile, the guardian of marriage must be played by a mature and wise Muslim man.<sup>18</sup>

Furthermore, the classification of guardian of marriage in KHI is divided into two types. First, the guardian of the lineage, namely the guardian who has a family relationship with the prospective bride. Second, the guardian of the judge is a guardian played by the ruler or someone appointed by the ruler as a guardian for someone who does not have a guardian.<sup>19</sup>

Meanwhile, in terms of order, guardians of the lineage consists of four consecutive groups. First, the straight-line group of male relatives consisting of the father, the paternal grandfather and so on. Second, the group of relatives of their biological brothers or siblings, and their male descendants. Third, the uncle's relative group, which consists of the father's siblings, siblings and their male offspring. Fourth, the group of the siblings of their grandparents, their siblings and their male descendants. If in a group of marriage guardians there are several people who are equally entitled to become guardians, then the most entitled to become guardians are those who are closer to the degree of kinship with the prospective bride. If in a group there are people with the same degree of kinship, then the most entitled to become guardians of marriage are biological relatives of same-sex relatives and if in one group there are several people with the same degree of kinship (both siblings or relatives), then it takes precedence. who are older and meet guardian requirements.<sup>20</sup>

Whereas the right of the guardian of the judge only acts when the guardian of the lineage in certain conditions, among others: the guardian of

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<sup>18</sup> KHI, Pasal 20, ayat 1.

<sup>19</sup> KHI, pasal 20,

<sup>20</sup> KHI, BAB IV Rukun dan Syarat Perkawinan, Bagian ke 3 tentang Wali Nikah, pasal 21.

the lineage is not available, the guardian of the line is not allowed to be present, the guardian of the line is not known (ghaib), the guardian of marriage is reluctant to marry off (wali 'adal). In the case of wali 'ad} al, the guardian of the judge can only act after a ruling from the Religious court.<sup>21</sup> Where the application for guardian 'ad (al) is made by the prospective bride to the Religious Court (PA) so that it is determined that the parents who have the right to become a marriage guardian are reluctant or unwilling to marry due to certain factors, such as the guardian (parent) does not approve the prospective son-in-law choice of daughter (prospective bride) or because of other factors. The filing of the wali 'adal decree is intended so that the bride and groom get a guardian of a judge in lieu of a guardian' adal after going through a court decision process<sup>22</sup> Meanwhile, to get the decision of the guardian judge's decision sometimes takes a long time, namely having to wait in a queue because many civil cases are resolved through decisions of the Religious Courts, such as divorce cases and others. This condition often causes the design of the wedding day to be postponed because they have to wait for a decision from the PA to get a guardian judge who will become the guardian of marriage. Likewise for the marriage of children resulting from adultery whose lineage is to the mother, the guardian of the judge will become the guardian of marriage for him (the child resulting from adultery) after a decision has been made by the KUA (Office of Religious Affairs).<sup>23</sup>

From the above explanation, it can be concluded that the rules of marriage guardianship in the KHI are in line with the opinion of the majority of fiqh mazhab scholars, especially the Shafi'i School as the school

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<sup>21</sup> KHI Pasal 23.

<sup>22</sup> Ahmad Syahrus Sikti, *Daf'u al-Darar dalam Putusan Hakim Pengadilan Agama* (Jakarta : Empat, 2015), cet ke-1, 159-160. Buku ini merupakan hasil disertasi Sekolah Pascasarjana Universitas Islam Negeri Syarif Hidayatullah Jakarta tahun 2015.

<sup>23</sup> Wawancara kepada Bapak Romdhoni yang merupakan penghulu di KUA Kecamatan Wonotunggal, Kabupaten Batang, Jawa Tengah pada tanggal 8 Maret 2016 pukul 09.00 WIB.

that dominates the religious practice of Muslims in Indonesia.<sup>24</sup> This can be seen in the KHI regulations which make guardians into the category of harmonious marriage that must be fulfilled in realizing a valid marriage contract. In addition, KHI also does not provide the slightest space for women to become guardians of marriage under any circumstances.

#### F. WOMEN AS GUARDIANS OF MARRIAGE: REFLECTIONS ON THE DIALECTIC OF NORMATIVE AND SOCIO-CULTURAL FOUNDATIONS IN INDONESIA

There are several normative foundations in the Koran and Hadith related to the authority of the rights as guardians of marriage, which are the legal basis for the opinion of Islamic jurists, such as orders and prohibitions on marriage by using verbs that store dhomir (pronoun) for men, as in the editorial paragraph *وانكحوا* (al-Nur ayat 32) *لا تتكحوا* (al-Baqarah ayat 221) dan juga kata *فلا تعضلوهن* (al-Baqarah ayat 232).<sup>25</sup>

Likewise in several Hadiths in mentioning the existence of wali by using a noun (isim) which shows male characteristics such as, *أيما امرأة نكحت*, *أياها فنكاحها باطل* (Hadith Aisyah Hadith Aisyah narrated by Abu Daud, Tirmidhi, Ibn Majah and Imam Ah (mad). Then *لا نكاح إلا بولي* (Abu Musa hadith narrated by Imam Ahmad, Tirmidhi, Ibn Majjah and *الثيب أحق بنفسها من وليها* (Hadith Ibn 'Abbas narrated by Imam Muslim) and several other Hadiths.

It should be understood that in the use of Arabic, if what is meant by a man in particular or a man with a woman at the same time, then the masculine form (mudhakkar) is used as the verse commands to establish praye (*وأقيموا الصلوة*). Where the order is addressed to both men and women even though it uses a verb that has a lot of dhomir for men. (أنتم). According

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<sup>24</sup> Tahir Mahmud, *Family Law Reform In The Muslim World*, 192.

<sup>25</sup> Al-Zamakhshari, *al-Kashaf* (Beirut : Dar al-Ma'rifah, 2009), cet. ke-2, Juz.2, 135. Penjelasan dapat dilihat lagi pada halaman 77-78.

to Nasaruddin Umar, gender identity in Arabic can be seen from the aspects of the language used to denote men and women. Menurut Nasaruddin, the language aspect, among others, can be identified by the use of dhomir (personal pronoun) and gender identification. Further information as follows:

First, the use of dhomir follows the rule of Arabic in general that the mention of khitab (command) in a verb that stores male dhomir by itself is also binding on women, unless there is a special indicator aimed at men. It is different with the mention of dhomir for women which is only aimed at women.<sup>26</sup>

Second, the signification of a noun (isim) between male and female, such as Muslim (male) and Muslimatun (female). The use of nouns intended for both (male and female) is sometimes sufficient to use the male identity (mudhakar). It is different with nouns specifically intended for women. Furthermore, in this case, Nasaruddin also emphasized that not only in Arabic rules but also in other language rules, especially those included in the semitic language family, such as Hebrew, Syriac and Persian, even in other languages such as languages. English and various other European languages also exhibit gender bias, namely the tendency of masculine characteristics in language expression.<sup>27</sup>

The explanation above can be understood that the use of verbs that indicate the orders and prohibitions of marriage in several verses of the Koran and the nouns in the mention of guardians in several Hadiths related to the authority of the rights as guardians of marriage cannot necessarily be claimed and understood to be specifically aimed at men. -men as long as

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<sup>26</sup> Nasaruddin Umar, *Argument Kesetaraan Gender dalam Perspektif al-Qur'an* (Jakarta : Paramadina, 1999), cet ke-194-208.

<sup>27</sup> Nasaruddin Umar, *Argument Kesetaraan Gender dalam Perspektif al-Qur'an* (Jakarta : Paramadina, 1999), cet ke-194-208..Baca Munjin, "Ekspresi Bahasa dan Gender : Sebuah Kajian Sosiolinguistik" *Yin Yang*, Vol.3 No. 2 (2008), 1

there are no indicators that show specifically for men as guardians of marriage. Therefore, it should still be understood that both men and women have the right to be guardians of marriage.

Furthermore, what about one of the Hadiths which literally shows the prohibition of women marrying other people where the Hadith is used as a normative basis for the opinion of the Imam of the School of Laws regarding the prohibition of women marrying themselves (without a guardian) or other women (as guardians), namely the Hadith Abu Hurairah narrated by Ibn Majah, Dar al-qutni and Baihaqi:

عن أبي هريرة قال: قال رسول الله ص.م: لا تزوج المرأة المرأة ولا تزوج المرأة نفسها. (رواه ابن ماجه)

Meaning: *From Abu Hurairah said: The Prophet SAW said: "women may not marry other women and marry themselves."* (Narrated by Ibn Majah).<sup>28</sup>

It should be noted that the understanding of this Hadith has not yet been agreed upon (khilafiyah), as is the case with Abu Hanifah's opinion which can be said to be different from the opinion of the majority of Imams of other Schools. This is because Abu Hanifah allows adult women to marry themselves (without a guardian) and based on the istihsan method described previously, Abu Hanifah allows adult women to become marriage guardians when no marriage guardian is found from the *asabah bi al-nafsi* group.<sup>29</sup> Therefore. It can be understood that based on normative grounds, both al-Qur'an and Hadith as well as the opinion of one of the Imam of the School (Abu Hanifah), the right authority as guardian of marriage is still open to understanding which shows that there is an opportunity for women to have the right as guardian of marriage.

Abu Hanifah's opinion that allows female relatives to become guardians of marriage on the basis of istihsan as said by Ibn Humam al-Hanafi is interesting to be reviewed. According to 'Abd al-Wahhab Khallaf,

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<sup>28</sup> Ibn Majah al-Quzwaini, *Sunan Ibn Majah* (Riyad, Bait al-Afkar al-Dauliyah) Kitab al-Nikah, Bab La nikaha illa biwalyyin, Hadis No.1882, 205.

<sup>29</sup> Ibn al-Humam al-Hanafi, *Fath al-Qadir*, 274-275.

istihsan is the turning or turning away of a mujtahid in establishing a law from the demands of qiyas jalli (qiyas with a clear illat) to qiyas khafi (qiyas which has a vague form of illat, but has a strong influence in achieving the goal of sharia). In addition, Khallaf also understood istihsan as a form of turning away the mujtahid from the demands of kulli (universal) law to juz'i (partial) law.<sup>30</sup> From this it can be said that Abu Hanifah's opinion that allows women to become guardians of marriage is a form of istihsan foundation that specializes in legal stipulations in certain cases (caseistics). However, in this case, the ability of women to become guardians of marriage according to Abu Hanifah was only allowed when the guardian group of asabah bi al-nafsi was not found.<sup>31</sup>

The explanation above shows that although Abu Hanifah allows female relatives to have the right as guardian of marriage, the position of these rights is not equal to the rights possessed by male relatives or in other words, it has not shown gender equality in the authority of the rights as guardians of marriage. This was possible due to the social conditions of the community at that time which still upheld the values of a patriarchal cultural system so that it could be said that they were not ready to accept or acknowledge gender equality in various aspects of life, such as aspects of marriage law, particularly related to the authority of rights as guardians of marriage.

Apart from differences in views regarding gender equality in the authority of the rights as guardians of marriage as described above, it is necessary to realize that apart from being a legal conception derived from the Koran and Hadith and the opinions of fiqh scholars, the existence of Islamic law is also a rule of law. which aims to create benefit for mankind. Therefore, it becomes a necessity if the formulation of the formation of

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<sup>30</sup> 'Abd al-Wahhab Khallaf, *Ilm al-Usul al-Fiqh*. 79-80.

<sup>31</sup> Ibn al-Humam al-Hanafī, *Fath al-Qadir*, 275.

Islamic law cannot be separated from the influence of the socio-cultural construction in which Islamic law was born. According to Joseph Schacht, the existence of Islamic law in the field of family law, such as marriage law and inheritance law, is a continuation of pre-Islamic Arabic law that is influenced by patriarchal cultural patterns.<sup>32</sup> Asaf A.A Fyzee as quoted by Mufidah Saggaf Aljufri also said that the pre-Islamic traditions or customs of the Arabs were one of the sources of Arab law at that time. Where in the early days of the formation of Islamic law, the tradition or traditional character of the Arab nation had a strong enough influence, as in the case of the Arab traditional marriage system which has been adopted in Islamic marriage law.<sup>33</sup>

The explanation above can be understood that the authority of the rights as guardian of marriage owned by men is inseparable from the influence of the marriage tradition and kinship relations of the patriarchal cultural family of Arab society which is legitimate and persists in the existing conceptions of Islamic law (fiqh). This conclusion parallels what was conveyed by Ibn Qayyim al-Jauzi. According to Ibn Qayim, changes in Islamic law can be caused by changes in time. This can be seen from historical experience

In the early days of Islam, the conditions of the Arab Mecca people were still in the era of ignorance. At that time, all forms of crimes against humanity and crimes were very disturbing and detrimental to society. Especially for people whose social and economic status is weak, they often become objects of oppression. In these conditions, Islamic law (Islamic law) brought by the Prophet Muhammad was not automatically forced to be implemented, but through stages.<sup>34</sup>

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<sup>32</sup> Joseph Schacht, *An Introduction to Islamic Law* (Oxford : Calendron Press, 1995), 3

<sup>33</sup> Mufidah Saggaf Aljufri, *Pembaharuan Hukum Islam Menurut Jamal al-Banna*, Sekolah Pascasarjana Universitas Islam Negeri `Syarif Hidayatullah ` Jakarta 2011M.126.

<sup>34</sup> Abdi Wijaya, "Perubahan Hukum dalam Pandangan Ibnu Qayyim," 390.

Furthermore, in the context of the reality of the social culture of Indonesian society today it can be said that it is far from a patriarchal culture that is gender biased in various aspects of life. Thus, it can be seen from the existing phenomenon, that like men, the condition of women in Indonesia is currently free to do activities, both in the domestic (family) and public sphere to be able to actualize their potential. Such conditions provide space for women to freely interact socially with men, making it possible for them to distinguish the good and bad character of a man before determining him as a husband or prospective son-in-law.<sup>35</sup> Regarding changes in the law for changes in social conditions, Ibn Qayyim also stated that the implementation of Islamic law may experience changes due to changes or differences in existing situations and conditions.<sup>36</sup>

The pattern of gender relations in Indonesian society can be said to be gender unbiased, both in the domestic (family) and public sphere, namely that it has upheld gender equality in everyday life which can be a step of consideration in legal reforms related to the authority of rights as guardians of marriage by granting authority rights. as guardian of marriage to female relatives it can be said as a form of *istihsan bi al-'urf*, namely a change in law from general law (*kulii*) to special or casuistic law (*juz'i*) on the basis of existing culture or customs.<sup>37</sup> Ibn Qayyim explained that customary or cultural conditions (*urf*) can be a factor that causes legal changes.<sup>38</sup>

Based on the previous explanation, it can be said that granting the authority of rights to female relatives to become guardians of marriage is a form of benefit consideration based on changes in cultural reality, namely by following the existing pattern of gender equality relations in Indonesian

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<sup>35</sup> Budi Munawar Rahman dkk, *Rekonstruksi Fiqh Perempuan Dalam Peradaban Masyarakat Modern* (Yogyakarta : Pusat Studi Islam Universitas Islam Indonesia, 1996), cet. Ke-1, 75.

<sup>36</sup> Abdi Wijaya, "Perubahan Hukum dalam Pandangan Ibnu Qayyim," 391.

<sup>37</sup> Asmawi, *Perbandingan Ushul Fiqh* (Jakarta, Amzah, 2013), 110-113.

<sup>38</sup> Abdi Wijaya, "Perubahan Hukum dalam Pandangan Ibnu Qayyim," 392.

society (*istihsan bi al-'urf*). According to Ibn Qoyyim as quoted by Djazimah Muqoddas stated that the implementation of Islamic law in a society should be coherent with the sociological conditions of the society itself.<sup>39</sup> This is also in accordance with the law of fiqh which reads: *تغير الأحكام واختلافها بتغير الأزمنة والأمكنة والأحوال*

Meaning: "*Changes and differences in law can be caused by changes in time, place, conditions.*"<sup>40</sup>

From the various explanations above, it can be understood that based on the current pattern of gender equality relations in Indonesian society, it is better if the KHI article regulations regarding the authority of rights as guardians of marriage can be renewed with articles that are not gender biased, namely that the authority of the rights as guardians of marriage should not only be owned. male relatives, but can also be owned by female relatives (family), such as mothers, grandmothers, sisters, aunts and others who are adults.

The renewal of the regulation on the article of marriage guardianship in the KHI by granting the authority of the rights as guardian of marriage for female relatives can be said to be a form of effort to reform Islamic law which can still be said to still refer to the classical fiqh opinion, namely the opinion of Abu Hanifah which allows female relatives to become marriage guardians. . However, in addition, new elements of *ijtihad* were added, such as consideration of sociological conditions, namely the reality of social culture and the existing patterns of gender relations in Indonesian society. So that this results in a legal conclusion that is different from the opinion of Abu Hanifah, namely a legal conclusion that gives equal rights authority between male and female relatives as guardians of marriage. This legal

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<sup>39</sup>Djazimah Muqoddas, dalam Teori Mas{lahah, *Kontroversi Hakim Perempuan Pada Peradilan Islam Di Negara-Negara Muslim* (Yogyakarta : LKiS, 2011) cet.ke-1, 42-45.

<sup>40</sup> Ahmad Djazuli, *Kaidah-Kaidah Fikih : Kaidah-Kaidah Hukum Islam Dalam Menyelesaikan Masalah Yang Praktis* (Jakarta : Kencana Prenada Media Group, 2007), cet.ke-2, 95-96.

conclusion differs from the opinion of Abu Hanifah, who only allowed female relatives to become guardians of marriage when no male relatives were found from the 'asabah bi al-nafsi group as previously explained. This model of Islamic legal reform can be said to be in accordance with one of the methods of Islamic law coined by Yusuf Qardawi, namely the insha 'i-insha'i integration method, which is a method used to select various legal opinions of previous scholars to be taken that are relevant to the context. currently. Then add new elements of ijtihad in providing legal conclusions, so that it can produce a legal opinion that is different from previous opinions.<sup>41</sup>

Although the above discussion shows that there are still opportunities for women as guardians of marriage in the Indonesian context, the author realizes that this discourse can lead to pros and cons debate in society.<sup>42</sup> This is due to the existence of KHI and most Muslims in Indonesia follow the shafiiyah school of thought which prohibits men from becoming marriage guardians.

## G. CONCLUSSION

The conclusion from the discussion in this study is that based on the consideration of the pattern of gender equality relations of Indonesian society in daily social life, both in the domestic and public sphere, legal reform by giving the right of authority as marriage guardian to female relatives can be said to be a form of istihsan bi al. -'urf, namely the change of law from general law (kulli) to special or casuistic law (*juz'i*) on the basis of existing culture or customs. Borrowing the language in Ibn Qayim al-

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<sup>41</sup> Yusuf al-Qardawi, *al-Ijtihad al-Mu'asirah Baina al-Indibat wa al-Infirat* (Kairo : Dar al-Tauzi' wa al-Nashr al-Islamiyah, 1414H/1994M), 20-36.

<sup>42</sup> Athoillah Islamy, "The Problem of Liberalizing Islamic Marriage Law In Indonesia : The Perspective of Science Phylosophy," *Al-Syakhshiyah: Jurnal Hukum Keluarga Islam dan Kemanusiaan*, Vol.2, No.1 (2020) : 53.

Jauzi's theory of legal change, the consideration of the pattern of gender relations of the Indonesian people can be a factor of conditions and customs that underlie legal changes to allow women to accept the authority of rights as guardians of marriage.

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