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THE MEANING OF GUARANTEE'S RESISTANCE (KADLALAN) IN ISLAMIC MARRIAGE LAW OF INDONESIA

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ABSTRACT

This study aims to examine the meaning of the guardian's reluctance to Islamic marriage law in Indonesia. This research uses normative legal research. The results of this research explain that the prohibition of *adlal* basically cannot be separated from the legal status of guardians in marriage. The difference between the jurists in viewing whether the guardian is the main requirement or only a complement to marriage is also a reference in the issue of determining the fairness of the guardian. The legal status of a guardian gives rise to differences of opinion among the jurists, in which some see it as the main requirement, while others only see it as a complement. If examined in the *maqashid sharia* review, this distinction in the legal status of guardians is directly proportional to the condition of girls who are not all the same, both from a social and cultural standpoint, so the various views that exist can accommodate the diversity of existing social and cultural conditions.

KEY WORDS

Law, meaning, Wali's refusal, marriage.

Legally, marriage or marriage is a constitutional right guaranteed by the state to each individual. The 1945 Constitution of the Republic of Indonesia Article 28 B (1) regulates this, "Every person has the right to form a family and continue offspring through a legal marriage." Then it is mentioned in Law Number 16 of 2019 concerning changes to Law Number 1 of 1974 concerning marriage, namely forming a happy and eternal family (household) based on belief in One Almighty God.

The purpose of marriage is found in Law Number 1 of 1974 concerning marriage. Article 1 of the law states that marriage is: "A physical and spiritual bond between a man and a woman as husband and wife to form a happy and eternal family (household) based on God Almighty." (al-Jurjani, 1974).

Similarly, in Article 2 of the Compilation of Islamic Law (KHI) it is stated that marriage is: "A very strong contract or *mitsaqon ghalizan* obeying God's commands and carrying it out is worship (Aulawi, 1975).

Based on some of the definitive meanings of marriage that exist, there is a content of rules indicating that marriage is only valid if the conditions and pillars are met. In the rules of Islamic law (*fiqh*), among the conditions that must be met to form a marriage institution is the existence of a guardian (Rofiq, 1997). A guardian is someone who acts to carry out a marriage contract on behalf of a woman who is under his guardianship. The marriage contract is carried out between two people, namely the man or prospective husband who acts alone and the prospective wife or woman who is played by his guardian (Syarifuddin, 2009). The position of guardian in this case is very important because a woman cannot marry herself let alone marry another woman. According to the Al-Qur'an and hadith, the provision of guardianship in marriage is precisely a protective measure aimed at women in accordance with their *qudrat* as weak creatures, it is feared that they will fall into a marriage with an irresponsible husband.

However, Law Number 1 of 1974 does not mention in writing the rules regarding marriage guardians, except for only the requirement that if the bride and groom are under 21 (twenty-one) years old, they must obtain permission from their parents. In Indonesia, this law



is used as the basis for holding marriages, especially for Muslims. Article 2 paragraph (1) of the law stipulates that Islamic law is the legal basis for the validity of marriage (Ramuly, 2006).

Article 21 of the “Compilation of Islamic Law” classifies the order of guardians from the *nasab* line based on the degree of proximity to the prospective bride. Closer groups take precedence over distant groups. The grouping is: (1) the group of male relatives goes straight up, i.e. father, paternal grandfather, and so on upward; (2) group of relatives of biological or paternal brothers and their male descendants; (3) uncle's kin group, i.e. father's biological brothers, paternal uncles, and their male descendants; (4) group of grandfather's biological brothers, half-brothers, and their male descendants.

In some cases and for certain reasons, the guardianship that should be carried out by a *nasab* guardian can be replaced by a judge's guardian. For example, when the guardians from the lineage line are no longer available or when they are within travel distance who allow *qashar* prayers or the guardian is being detained and the detained person does not allow marriage to be carried out with the guardian and when the guardian is reluctant (*adlal*) to marry off even though the prospective bride and groom have already made their choice to a candidate who is already in *kufu* (al-Bantany, 2002). As understood from the Hadith of the Prophet:

فالسُّلْطَانُ وَلِيُّ مَنْ لَا وَلِيَّ لَهُ

For the case of a guardian who refuses to marry (*adlal*), the transfer of his guardianship rights to a judge can be carried out when the reason for the refusal is not based on justifiable legal regulations or based on unreasonable reasons. This means that if the lineage guardian cannot base his refusal on justifiable/reasonable reasons, then the bride can complain about her case to the judge. And then the guardian is designated as a reluctant person (*adlal*). In this case, the guardianship will not be transferred to the guardian at the lower level, but directly transferred to the judge.

The reason for the transfer of guardianship rights to the judge in the case of the *adlal*/reluctant guardian is because the bride-to-be has acted properly by choosing a similar candidate. So that the guardian does not have good reasons to prevent the marriage from happening, because none of his rights have been violated.

Unlike the case when a guardian's rights are violated, he has the right to refuse to marry off his guardian's child to ensure that his rights are fulfilled. Therefore, exploring the reasons that cause the guardian's reluctance to marry is an important consideration for the judge to sort out which reasons are related to the guardian's rights and which are the reasons related to the rights of his foster children. Because of the several cases of requests for guardian *adlal* that have been decided by the court, the implementation of the transfer of the guardian of the lineage to the guardian of the judge has caused problems in the future, so a solution is needed to resolve them.

This problem arose against a background of several reasons, including when the judge determined the fairness of the guardian only based on a unilateral statement from the applicant explaining that the guardian refused to marry him, even though the guardian as the respondent had declared himself not reluctant. The determination of the transfer of guardianship rights does not meet the aspects of justice and benefit for the respondent, namely the guardian. His reluctance which is not stated should be understood as the existence of things that are put forward as 'requirements' for marriage. This is what needs to be considered as a material consideration.

An example is the case of determining the *adlal* application determined by the Religious Court of the First Level of Nganjuk Regency with case number: 0004/Pdt.P/2019/PA.Ngj, where the panel of judges granted the applicant's request to determine the status of *adlal* guardian. The case outlined in the decision was that the applicant's husband-to-be had brought a land certificate belonging to the guardian as the respondent. This is why the guardian is not willing to marry the applicant to her husband-to-be. The guardian as the respondent has also stated that if the certificate is returned then he



is willing to be the guardian of the applicant. However, the applicant's husband-to-be was not willing to return the certificate and the judge still granted the applicant's request even though the certificate had not been returned. So here the interests of the guardian to get the land certificate are neglected.

Sometimes the guardian's right is neglected because the judge's decision to grant the guardian's request is only based on the applicant's statement referring to general reasons, such as the reason of *dar'ul mafasid* and only based on the absence of a guardian who has been properly summoned. This case was found in the determination of the judge of the Religious Court in Kediri Regency with case number 383/Pdt.P/2018/PA Kediri Regency, PA judge determination. Case Number 13/Pdt.P/2018/PA Kediri Regency and case number 406/Pdt.P/2018/PA Kediri Regency and the determination of judges with number 16/Pdt.P/2019/PA Kediri Regency.

So basically, from several cases of determining guardian *adlal* that was granted by the judge, some still have the effect of injustice for the legal subject (guardian) where the considerations for the determination have not been fully explored so that justice which is the essence of law cannot be achieved.

The descriptive descriptions of the several paragraphs above lead to the legal issues underlying this research, namely the absence of legal norms in Law Number 1 of 1974 concerning Marriage, particularly regarding the basic considerations that need to be used by judges in determining the fairness of guardians based on the value of justice. Because the law only provides a solution when a guardian refuses to marry, but does not provide specific details about the reasons for the refusal. So the urgency of this research is to propose the existence of a legal construction for determining the fairness of guardians based on the value of justice as a basis for judges' considerations in deciding on a guardian's application for *adlal*.

Because of the importance of the guardian's position, both during the implementation of the marriage contract and afterward, if the determination of fairness is not accompanied by a detailed basis or reasons that govern it, the potential for problems to arise will always be open. It is this void of legal norms that can give rise to several philosophical problems in terms of ontology, epistemology, and axiology (Prajna, 2011). In the Ontology Aspect, if there is a void in legal norms, then the concept of marriage according to law number 1 of 1974 Article 2 Paragraph 1 will not be implemented. As a result, the ideal concept of the institution of marriage becomes blurred. In practice, the case for determining Wali Adhol is categorized as a request (volunteer) which only involves the prospective bride as the Petitioner without any other party being the Respondent. Even though in reality, in this case, there was a dispute between the prospective bride and her *nasab* guardian. So because there is a dispute, this case should be classified as a contentious case. One of the characteristics of voluntary cases is the absence of disputes with other parties, which means that what is disputed by the prospective bride as the applicant is not related to the rights of other people (*wali nasab*). Therefore the legal principle of "*audie et alteram partem*" must be upheld. This means that the court must "hear both sides". The *nasab* guardian is not enough to just be a witness, but must also be made one of the parties in establishing himself as Wali Adhal. In addition, if the Wali Adhol case is still classified as a voluntary case, then the principle of "equality before the law" will be violated. The result of this Application is a Determination, not a Decision. Because parents or lineage guardians are not considered as one of the parties to the dispute, they do not have legal standing to pursue legal remedies such as *verzet*, appeal, and cassation. Conversely, if the application is rejected, the prospective bride can file an appeal.

Epistemological aspects, the values of justice as an effort to implement *maqashid sharia* have not been concretely internalized in the court's determination of the transfer of *nasab* guardians to magistrate guardians. As a result, the value of justice as a legal ideal cannot be felt by legal subjects. The meaning of justice (*al-'adlu*) is something that is felt in the heart as something straight (should be), the opposite of the word *al-Jaur* (tyranny) (Mandzur, 1994). That's why it is necessary to construct legal arrangements for determining *keadlalan* of guardians with a fair and proportional mechanism that satisfies a sense of



justice. Justice is the substance of the legal order and the main function of the law, which ultimately aims to uphold justice. Justice is also a concept that is relevant to human relations. Justice has two kinds, namely individual justice and social justice. Individual justice is justice that is created in an individual sphere, namely justice that is manifested is not related to humans in general. Social justice is justice that is created within a social sphere, namely justice that is realized within the human sphere in general.

The axiological aspect, the purpose of marriage as a *mitsaqon gholdhon* contract to form a harmonious family by not only connecting the bride and groom but also uniting the two families becomes neglected. The positive benefits that arise from the institution of marriage are not realized. The benefits of marriage in Islam not only unite two men and women, but marriage also unites two families, namely the family of a man and a woman. This means that from both sides, both the woman and the man will get new parents, namely the so-called parents-in-law. So that family harmony in family life does not only mean that husbands and wives are guided to maintain good relations and create a harmonious atmosphere, that is, by creating mutual understanding between the two of them, but also to maintain mutual relations with both families, respect each other, and respect each other with their respective circumstances.

Apart from that, there are still several legal problems that need to be explained as a result of the vacancy based on the transfer of the *nasab* guardian to the judge's guardian. Among them are juridical problems, namely the occurrence of a legal vacuum (vacuum of norm); the absence of rules both substance and procedure as a result of not having set the basis for determining the fairness of guardians based on the values of justice. In a narrow sense "legal vacuum" can be interpreted as "a state of emptiness or absence of legislation (law) governing (certain) order in society", so the legal vacuum in positive law is more accurately described as a "vacuum of laws/statutory regulations". Drafting laws and regulations both by the Legislature and the Executive takes a long time so that by the time the laws and regulations are declared effective, the matters or conditions that are to be regulated by said regulations have changed. In addition, a legal vacuum can occur because things or circumstances that occur have not been regulated in a statutory regulation or even though it has been regulated in a statutory regulation but is not clear or even incomplete. This is actually in line with the saying which states that "the formation of a statutory regulation is always left behind or underdeveloped compared to events in the development of society.

Based on the problems described earlier, the formulation of the problem in this study is what the meaning of guardian reluctance is in Islamic marriage law in Indonesia.

METHODS OF RESEARCH

This research uses a normative research type because it refers to the concept of law as a rule with a doctrinal-nomological method that starts from the doctrinal rules that guide behavior, namely uncovering legal materials related to the application of Law Number 1 of 1974 concerning marriage and the Compilation of Islamic Law which still leaves a void in legal norms regarding the determination of *adlal* guardian. This study uses a statute approach, which is an approach based on applicable laws and regulations. The legal method is used because it is clear that in normative legal research/research, law is the source of such research. Primary legal materials related to the problems in this study, such as the Al-Qur'an, Hadith, and Law Number 1 of 1974 concerning marriage. The analytical technique used in this study uses the deductive method to solve the legal issues under study based on the legal theories and principles put forward by experts.

RESULTS AND DISCUSSION

In al-Munawwir's dictionary, the word *'adlala*, *adlala 'alayh* is equated with the meaning of *dlayyaqa 'alayh* which means to suppress or narrow. The word is also equated with the word *mana'a* which means to block or prevent (Munawwir, 1997).



If the word is juxtaposed with the word *al-mar'ati* in the form of the *idlofah* arrangement "*adlu al-mar'ati*" then linguistically it can be interpreted as an act of narrowing a woman's rights by preventing her from marrying. In the elaboration of the meaning of the term, the word is interpreted as a form of obstruction by a guardian against his *maula alaih* who asks to be married to a man who is in the same league and likes.

The precautionary attitude carried out by the guardian is referred to as a forbidden attitude in the Al-Qur'an. A guardian who is declared *adlal* is the same as a person who does not want to carry out the responsibilities he carries. So that the authority can be transferred to other people who have the same authority.

This prohibition of *adlal* becomes a normative rule which is understood from surah Al-Baqarah verse 232. The chronology of the verse's revelation tells of a rebuke to a friend of the Prophet SAW named Ma'qil who forbade his sister to reconcile with her husband who had divorced her. In *istinbath* this law of rebuke is understood as an affirmation of Ma'qil's existence over his sister. Furthermore, the statement of *taradli bi al-ma'ruf* which is alluded to in the verse describes the existence of a household that is developed in a *ma'ruf* manner in the view of *syara'*. So that Ma'qil is not allowed to intervene in the rejection of his sister's household which is already in a *ma'ruf* condition.

The chronology of the events behind this descent is taken into consideration by the *fuqaha* in determining the status of a guardian for the women they care for. The explanation is, that when the holy book in the verse *فَلَا تَعْضُلُوهُنَّ* is addressed to the saints, then the holy book clearly shows the important role of the guardian. There will be no *adlal* prohibition if they are not considered to have the right as marriage guardians. According to Qurays Shihab, the prohibition becomes meaningless if the guardian is considered to have no significant role in the marriage (guardianship) (Shihab, 1996).

If examined from the Arabic grammatical rules, the prohibition of *adlal* in the verse is not absolute. Because the prohibition depends on a condition, namely the existence of *taradli bi al-ma'ruf*, namely a condition where the two prospective brides and groom are willing to each other and the marriage that is carried out is *ma'ruf*, both according to the views of society and the Shari'a. Therefore, the guardian has the right to prevent a marriage from occurring if he knows that the marriage being fostered will lead to *mafsadah* and damage. This obstacle is in the context of giving advice and ensuring the benefit of their daughter.

From this, one can see the *maqashid* that is to be achieved from the existence of this *adlal* prohibition. That is, the guardian is described as a figure whose role is to assist his daughter in achieving the benefit of living a married life. So if there is a suitor who has a bad character or there is a record of bad behavior in his family, then the guardian has the right to reject the man because it is contrary to the benefit he wants to achieve.

However, if he refuses without being based on reasons that can be considered, then this is what is called *adlal* which is forbidden. The involvement of the guardian in the marriage of his *maula alaih* illustrates the existence of a relationship that is shown in the form of *ri'ayatu al-maslahah* (maintaining the benefit) that must be carried out by a guardian. The interests of girls are the main issues that must be considered carefully. Therefore, such a relationship must be avoided with attitudes and behaviors that can be destructive.

The position of daughters as protected parties and the role of guardians as protective parties must be cleared of each other's ego which can eliminate the form of *ri'ayah*. However, this form of relationship between the guardian and the *maula alaih* does not always apply equally to all girls, because not all girls are born with the same socio-cultural conditions. There are differences in many ways, especially in outlook on life and psychological conditions. This affects the pattern of independence and experiences that will color his future household life.

This *adlal* prohibition basically cannot be separated from the legal status of a guardian in marriage. The difference between the jurists in viewing whether the guardian is the main requirement or only a complement to marriage is also a reference in the issue of determining the fairness of the guardian.

The legal status of a guardian gives rise to differences of opinion among the jurists, in which some see it as the main requirement, while others only see it as a complement. If



examined in the *maqashid sharia* review, this distinction in the legal status of guardians is directly proportional to the condition of girls who are not all the same, both from a social and cultural standpoint. So that the various views that exist can accommodate the diversity of existing social and cultural conditions.

Both guardians and daughters as marriage actors have their considerations for getting married or not getting married. Among these considerations are position, social status, high position, and other considerations. These things are something that cannot be ruled out in finding a partner. So the existence of various considerations is not a despicable act. It is this determination of priority among the various considerations that the jurists refer to in determining the appropriateness of the size of the *kafa'ah*. This *kafa'ah* is needed to examine the consideration of the guardian and his daughter whether it is in accordance with the customs or not. Because the desires and desires that drive marriage are not always the same, it needs to be returned to the Shari'a order and custom (*'urf*). So that the achievement of *maslahat* which is the ideal of marriage can be realized.

CONCLUSION

Based on the description above, the meaning of the guardian's reluctance (*keadlalan*) in Islamic marriage law in Indonesia if a woman wants to marry and her parents (*wali*) refuse to comply with the provisions stipulated in the Islamic religion, namely *Kafa'ah* and *Mahar Mishil*, if the guardian refuses to marry off her child without these conditions it is not interpreted as reluctant or *adlal*, but the act is said to be a sin for the guardian because it hinders *maula alaih* from carrying out the constitutional mandate in terms of continuing offspring.

From the discussion above the author can provide recommendations:

- If the child is carrying out his constitutional guarantees by wanting to carry out the marriage while the guardian is reluctant and it turns out that his reluctance is without Islamic Shari'a basis, if the prospective husband is already complete and there is a missile dowry, then the guardian's rights should not be transferred to the judge's guardian;
- If the prospective husband submitted by the *maula alaih* (the child) does not comply with the provisions of the shari'a, then the right to continue the offspring is postponed first without obscuring the guardian judge's request. In other words, the guardian's rights are still fulfilled without eliminating the *maula alaih's* right to marry.

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