

GENDER PERSPECTIVE IN CONTEMPORARY ISLAMIC LAW: PERCEPTIONS OF RELIGIOUS COURT JUDGES

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Abstract. The presence of a gender perspective plays a role in the dynamic application of Islamic law in the religious justice environment. A gender perspective requires religious court judges to reconsider past legal products related to women's rights, including women's rights to access marriage, such as the issue of marriage guardians, which has major implications in considering cases of isbat (validation) of marriage and marriage annulment. In this research, the author will examine the perceptions of religious court judges regarding how to place gender equality considerations in religious court decisions, related to the position of marriage guardians. This research is empirical legal research with 52 religious court judge respondents. The results of this research were analyzed descriptively qualitatively. The results of the research show that the majority of judges understand that the issue of marriage guardians is not absolute, accept the consideration of gender equality in the law on marriage guardians, but reject the discriminatory label on the legal regulations for marriage guardians in the KHI. Considerations regarding gender equality and non-discrimination do not stand alone, but must consider the effect of the law whether its implementation hinders the realization of women's constitutional rights.

Keywords: Gender perspective, Religious court judge, Marriage guardian.

INTRODUCTION

Supreme Court Regulation Number 03 of 2017 concerning Guidelines for Trying Women's Cases in Conflict with the Law (PERMA of Women) emphasizes that judges in trying women's cases in conflict with the law must be based on the principle of gender equality. The presence of this contemporary perspective, like it or not, plays a role in the dynamic application of Islamic law in the religious justice environment. One by one, past legal products were updated with this spirit of gender equality. It can be seen in several Circular Letters from the Supreme Court (SEMA), especially the Religious Chamber, that there are updates on legal issues with reference to the PERMA of Women. For example, the Compilation of Islamic Law (KHI) determines that husbands are not obliged to provide idah maintenance to wives who are sentenced to divorce, and KHI also determines that husbands are not obliged to provide mut'ah to wives if divorce is not the husband's will. This provision is different from SEMA Number 3 of 2018 which stipulates that in cases of contested divorce the wife is still entitled to idah and mut'ah maintenance, as long as she is not nusyūz.

A gender perspective forces religious court judges to re-examine past legal products. Some of these products have been slowly updated by SEMA, especially those related to the rights of wives after divorce. However, SEMA has not touched on the equal rights of women and men in the marriage process, such as the issue of marriage guardians, which has major implications in considering cases of isbat (validation) of marriage and annulment of marriage. In fact, the issue of marriage guardians itself has received quite a lot of attention in various parts of the Islamic world. Some critics consider the guardianship system for women to be a system that can hinder the realization of women's rights (Syed et al., 2018), is the basis for women's legal and social subordination (Almala, 2014), and is a conservative rule that discriminates against women (Nagar & Tønnessen, 2017). The impact is that in countries that strictly implement this rule, such as Saudi Arabia, the feminist social movement has emerged which is campaigning to end the system of male guardianship over women (Alsahi, 2018).

The issue of marriage guardians for women is not resolved and remains hot and invites debate when discussed from the past until now (Nasution & Rokan, n.d.). In fiqh, the majority of ulama

determine the obligation to have a marriage guardian strictly for a woman, whatever her age and whatever her marital status (Syaukani, 2000). Meanwhile, Abū Ḥanīfah, Abū Yūsuf and Zufar, emphasized that marriage guardians are only required until a woman is mature and sane; which opinion has been corroborated by Maḥmūd Syaltūt and M. 'Ali As-Sāyis (Syaltut & al-Sayis, 1953). Muslim countries regulate it differently: In Saudi Arabia, as in Malaysia, it is clearly regulated that a woman, regardless of age, can only marry with the consent of a guardian (Anwar & Rumminger, 2007). Meanwhile, Turkish family law determines that guardianship is determined over children, where a guardian has the right to annul a marriage held without her consent, unless she becomes pregnant or the guardian has ratified the marriage (Muhammad, 1972). Jordanian family law places women under guardianship until the age of 30 (Almala, 2014). Meanwhile, in the family law reform in Morocco in 2004, the role of marriage guardian was determined to be optional and not mandatory, so that adult women could carry out the marriage contract themselves (Engelcke, 2018).

In this article, the author will examine the perceptions of religious court judges regarding how to place gender equality considerations in religious court decisions, related to the position of marriage guardians. The regulation of marriage guardians in the KHI itself is quite ambiguous, so it can give rise to different interpretations, although Article 19 of the KHI emphasizes that marriage guardians are the pillars of marriage that must be fulfilled when entering into a marriage, but Article 71 of the KHI groups them into the legal family of polygamy permits, marriage age and etc., which if not fulfilled then the marriage can be annulled, not null and void, thus opening up the opportunity for the marriage to be legalized as well. Apart from that, there are also previous Supreme Court decisions which do not absolute the issue of guardianship in marriage (Nasution & Rokan, n.d.).

RESEARCH METHOD

This research is empirical legal research because although this research ultimately examines the legal norms of marriage guardians in statutory regulations, to study them, the author first conducted research on the perceptions of religious court judges by distributing questionnaires via Google Form. This research examines how legal norms are understood and applied by law enforcers. The sample of respondents in this study included 52 religious court judges from various levels of religious courts: first level judges, Class II, Class IB, Class IA, judicial judges, and appellate level judges. Thus, this research also uses questionnaire and documentation techniques. The results of this research were analyzed descriptively qualitatively.

RESULT AND ANALYSIS

1.1 Judges' understanding of marriage guardian law

The results of the author's research revealed that 51.9 percent of the Religious Court judges who were respondents in this study understood that marriage guardians must be fulfilled for prospective brides, whatever their age and whatever their status, whether they are girls or widows. Meanwhile, 30.8 percent of respondents understood that marriage guardians must be fulfilled for prospective brides, but because there are no restrictions on the age and status of women in the KHI, the interpretation is open, just looking at the benefits. Then 15.4 percent of respondents understood that marriage guardianship must be fulfilled for prospective brides, but is limited to children who have not reached the age of 21 years and or have never been married.

More than half of respondents understand that the existence of a marriage guardian applies absolutely in marriage. However, what if a marriage has taken place, and perhaps children have been born from that marriage? Should a marriage with an unauthorized guardian or without a guardian be annulled? Bearing in mind that Mukti Arto himself is of the opinion that the obstacles to marriage in Article 71 KHI, which include marriages solemnized by an unauthorized guardian or without a guardian, are temporary and procedural obstacles (Arto & Yuniarto, 2015). The results of the author's research show that 40.4 percent of respondents did not agree with Mukti Arto's opinion, and understood that marriage guardians are absolute. Meanwhile, as many as 23.1 percent of respondents were of the opinion that guardians in marriage are not absolute, so that marriages that take place without a guardian or are carried out by a guardian who has no rights, there is a possibility that it "can be ratified" or "not annulled." For example, if at the time the marriage isbat is being held or a

marriage annulment case is being filed, the guardian is happy with his daughter's marriage. Meanwhile, 25 percent of respondents understood that guardianship in marriage is more accurately referred to as a condition, or at least a harmony that is *ghiru žātiyyah*, so that its application is not rigid for ordinary people.

There is a shift in the understanding of religious court judges in understanding the position of marriage guardians. In the first questionnaire, 51.9 percent of judges understood that marriage guardians were absolute, but in the second questionnaire, relating to marriage annulment, only 40.4 percent of judges understood that the position of marriage guardians was absolute. Furthermore, when respondents were asked about the existence of a Supreme Court decision that did not absolute guardianship issues, 57.7 percent of respondents agreed, 26.9 percent of respondents disagreed, and 9.6 percent of respondents were still unsure. Thus, it can be said that the majority of judges understand that the issue of marriage guardians does not apply absolutely, and there is a possibility that marriages entered into with unauthorized guardians can be legalized.

1.1 Consideration of Gender Equality in Judges' Perceptions

Supreme Court Decision Number 02 K/AG/1985 gave birth to legal rules regarding marriage guardians that are more gender-oriented than the legal provisions for marriage guardians in the KHI (Nasution, 2023) (Nasution & Rokan, n.d.). Where, in its legal considerations, the Supreme Court was of the opinion that the marriage between Astida bint Suma and Rois Qodim bin Qodim was valid according to Islamic law, because Astida bint Suma was 24 years old and was a widow, so permission to marry from her parents or guardianship issues was not absolute. /no longer needed. The Supreme Court's decision does not absolute the issue of guardianship, but the problem is that the decision was born before the KHI, so that 36.5 percent of respondents answered that the provisions in the KHI which determine guardians as marriage partners override the legal rules in the Supreme Court's decision, because the KHI was born later than the decision. the MA. Then, as many as 11.5 percent answered that in the hierarchy of legislation the KHI's position was higher than the Supreme Court's jurisprudence. However, as many as 42.3 percent answered that the legal rules in the Supreme Court Decision could be applied to interpret the provisions on marital guardianship in the KHI.

The author adds an explanation of why the rules in the Supreme Court Decision must be applied even though the KHI regulates otherwise, that the rules in the decision are more in line with the application of the principle of gender equality as desired in PERMA Perempuan. Why do you have to maintain KHI provisions, even though the latest legal products support older legal rules? As many as 55.7 percent of respondents agreed to apply the rules of the Supreme Court Decision, and as many as 23.1 percent remained in their stance of not agreeing to apply the rules of the Supreme Court Decision, while 15.4 percent were undecided. Then there were several respondents who provided other answers that the application was based on the situation and conditions or the facts revealed at the trial. Another respondent commented that the rules of the Supreme Court Decision could be applied but in limited cases, especially widows who do not have a birth guardian or whose birth guardian lives far away, which makes it impossible for them to attend. These results show that the majority of respondents agree that the legal rules regarding marriage guardians in the Supreme Court Decision prioritize the principle of gender equality rather than the legal provisions for marriage guardians in the KHI.

1.3. Non-Discriminatory Considerations in the Application of the Marriage Guardianship Law

Law Number 7 of 1984 concerning Ratification of the Convention Concerning the Elimination of All Forms of Discrimination Against Women, in the 16th article, emphasizes that in order to eliminate discrimination against women in all matters relating to marriage and family relations, in particular it must guarantee, on the basis of equality between men and women, among other things, to guarantee (a) the same right to marry. With the implementation of marriage guardians for women, it has shown the differentiation of marriage rights between men and women, so it can be said that there has been discrimination against women, and because the position of this Law is higher than the KHI, the provisions of the KHI should be subject to the provisions of the Law. This.

Researchers asked respondents questions regarding this issue, namely whether the KHI regulations regarding marital guardianship which only apply to adult women without the same provisions for men are considered a form of discrimination against women. As many as 75 percent

of Religious Court judges rejected claims that the regulations were discriminatory against women, while 21.2 percent agreed that the regulations were indeed discriminatory, and 3.8 percent expressed uncertainty regarding their views. Why do respondents reject the marriage guardian clause in the KHI as a form of discrimination against women? As many as 86.5 percent of respondents stated that differences in the marriage guardian clause in the KHI were not considered a form of discrimination because they were considered as regulations aimed at improving women's welfare. This perspective is different from research findings by Jawad Syed, Faiza Ali, and Sophie Hennekam (Syed et al., 2018), Afaf Almala (Almala, 2014), and Samia El Nagar and Liv Tønnessen (Nagar & Tønnessen, 2017), who concluded that there are elements of discrimination and subordination against women in the marriage guardian regulations. As many as 9.6 percent of respondents believed that this regulation could actually be considered a form of discrimination because of differences in treatment between men and women which could limit women's rights.

The results of this research show that the majority of respondents do not agree that the legal regulations for marriage guardians are said to be discriminatory against women, even though it has been stated above that the majority of respondents agree that the legal provisions for marriage guardians in the Supreme Court Decision have a more gender equality perspective, and agree that these regulations are applied in Islamic law. These results indicate that considerations for upholding gender equality are more accepted by respondents than considerations for eliminating discrimination in marriage guardian laws. Not rejecting the elimination of discrimination, but rejecting the marriage guardian law in the KHI as a discriminatory rule against women, because respondents still see the embodiment of benefit in the marriage guardian regulation. In the Constitutional Court's decision itself, it is stated that the distinction between men and women is considered discrimination if it has an impact on or prevents the fulfillment of basic rights or constitutional rights of citizens. Thus, considerations of gender equality and non-discrimination are returned to considerations of whether the law hinders the realization of women's constitutional rights; It's not just that women and men have to be equal and the same.

CONCLUSION

The majority of judges understand that the issue of marriage guardians is not absolute, and there is a possibility that marriages entered into with guardians who do not meet the requirements can be recognized as valid. Most respondents agreed that the legal principles regarding marriage guardians in the Supreme Court Decision prioritize the principle of gender equality rather than the marriage guardian regulations in the KHI. However, the majority of respondents did not agree, calling the marriage guardian law a form of discrimination against women. This shows that considerations to promote gender equality are more accepted by respondents than efforts to eliminate discrimination in marriage guardian regulations. In the judge's view, considerations regarding gender equality and non-discrimination depend on whether the law hinders the realization of women's constitutional rights; not just determining that women and men must be equal and equal.

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