



Rethinking Marriage Guardians for Widows in Indonesia: Perspective of Legal Certainty and *Maslahat* Theory

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Abstract: The issue of marriage guardianship (*wali nikah*) for widows remains crucial in Indonesia. BPS 2022 data shows over 13 million widows (*cerai mati*) and 2.7 million divorced women (*cerai hidup*). The absence of explicit regulation in Article 14 of KHI creates legal uncertainty, often leading widows to unregistered marriages (*nikah sirri*), risking their legal protection and rights. It is at this point that the study of this article aims to examine more deeply the stipulation of the “marriage guardian” requirement for widows in the Compilation of Islamic Law, reviewed according to the theory of legal certainty and benefit. At the same time, this article also aims to identify and analyze the form of reformulation of the provisions of marriage guardianship for widows according to the theory of legal certainty and legal benefit. The research method used in this article is a qualitative prescriptive method with a normative juridical approach, utilizing legal interpretation and literature review. The findings indicate that Article 14 of the Compilation of Islamic Law does not explicitly regulate the marriage guardian for widows, causing legal uncertainty and increasing unregistered marriages (*nikah sirri*), which result in unclear legal status and administrative obstacles. The study recommends the reformulation of clear and fair provisions affirming the widow's authority in marriage, ensuring legal certainty and alignment with the principles of Islamic law and national legal norms. The contribution of this article lies in offering a specific legal reformulation of Article 14 of the KHI regarding the marriage guardian for widows.

Keywords: guardian of the marriage; widows; legal certainty theory; *maslahah* theory.

Abstrak: Isu tentang kewenangan wali nikah bagi janda tetap menjadi permasalahan krusial di Indonesia. Data BPS tahun 2022 mencatat lebih dari 13 juta janda karena cerai mati dan 2,7 juta perempuan cerai hidup. Ketidadaan pengaturan yang tegas dalam Pasal 14 Kompilasi Hukum Islam (KHI) menimbulkan ketidakpastian hukum, yang kerap mendorong para janda melakukan pernikahan tidak tercatat (*nikah sirri*), sehingga berisiko pada perlindungan hukum dan hak-hak mereka. Pada titik inilah

kajian dalam artikel ini bertujuan untuk mengkaji lebih dalam ketentuan “wali nikah” bagi janda dalam KHI, ditinjau berdasarkan teori kepastian hukum dan kemanfaatan hukum. Artikel ini juga bertujuan mengidentifikasi dan menganalisis bentuk reformulasi ketentuan wali nikah bagi janda yang sesuai dengan prinsip kepastian hukum dan kemanfaatan. Metode penelitian yang digunakan dalam artikel ini adalah metode preskriptif kualitatif dengan pendekatan yuridis normatif, melalui interpretasi hukum dan telaah literatur. Temuan penelitian menunjukkan bahwa Pasal 14 Kompilasi Hukum Islam tidak secara tegas mengatur tentang wali nikah bagi janda, sehingga menimbulkan ketidakpastian hukum dan meningkatkan praktik nikah sirri, yang berujung pada ketidakjelasan status hukum serta kendala administrasi. Studi ini merekomendasikan reformulasi ketentuan yang tegas dan adil yang menegaskan kewenangan janda dalam pernikahan, guna menjamin kepastian hukum dan kesesuaian dengan prinsip syariat Islam serta norma hukum nasional. Kontribusi artikel ini terletak pada tawaran reformulasi hukum secara spesifik terhadap Pasal 14 KHI tentang wali nikah bagi janda.

Kata Kunci: wali nikah; Janda; teori kepastian hukum; teori kemaslahatan hukum.



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Introduction

Legally, Article 14, Chapter IV of the Compilation of Islamic Law (KHI) regulates the pillars and conditions of marriage, which include the prospective groom, the prospective bride, the marriage guardian (*wali*), two witnesses, and the *ijab* and *qabul* (offer and acceptance). However, this provision does not explicitly clarify the status of the marriage guardian for a widow, causing a bias in public understanding. This lack of legal certainty has created issues affecting the marriage process of widows, particularly those facing problems with their marriage guardians.

A study conducted by Paryadi and Jumni Nelli, titled 'Marriage of Widows Without Guardians,' highlights a real case in Balikpapan, where a widow proceeded with marriage without a guardian because her guardian did not approve of her prospective husband. Although the widow attempted to marry through the Office of Religious Affairs (KUA) using a judicial guardian (*wali hakim*), she was hindered by social stigma from her family, who believed that, according to KHI, a widow is the family's responsibility.¹ On the other hand, the widow was supported by a

¹ Jumni Nelli, "Perkawinan Janda Tanpa Wali," *Moderation | Journal of Islamic Studies Review* 1, no. 2 (2021): 45–58.

service provider for unregistered (*siri*) marriages, which were based their actions on the Hanafi School of thought, stating that a marriage without a guardian is valid under Islamic law.

This phenomenon reflects a social reality that persists in society, where KHI has not been able to fully provide justice for widows who wish to marry without a guardian. Legally and socially, experienced and legally mature widows deserve more consideration in marriage. KHI, which is supposed to function as a tool for social engineering and social control, has also not been able to provide justice in regulating and controlling the conditions of widows' marriages without guardians, which are often stigmatized as a social disgrace.²

In this context, the proliferation of unregistered marriage service providers has exacerbated the issue. It is recorded that 155 regions in Indonesia, as well as one location in Singapore³, have service providers facilitating widows to marry without a guardian, using the legitimacy based on the Hanafi School of thought. These agents justify their legal stance on the view that a widow can marry herself without a guardian. Based on the correspondence that the researchers conducted with the unregistered marriage service providers, they stated: 'The best marriage is with the presence of a legitimate guardian because the purpose and benefits are clear. However, not everyone can provide a guardian, so marriage without a guardian is not ideal but permissible under certain conditions, to avoid sin.'⁴ This indicates that the Hanafi School's teaching, allowing widows to marry without a guardian, still exists and is adhered to by certain groups.

This view is based on the interpretation of the Quran, particularly Surah Al-Baqarah verse 232, which, according to Imam Abu Hanifah and Akmal al-Din al-Babarti, both scholars of the Hanafi school of thought, grants a widow the right to marry without a guardian (*wali*) if the guardian obstructs her.⁵ This is further affirmed by Burhanuddin Al-Marghinani, who states that marriage without a marriage guardian remains valid because, according to them, a marriage guardian is not considered a requirement for the validity of the marriage contract.⁶ In addition, the Prophet's hadith that states, "A previously unmarried woman has more

² Donald Black, *The Behavior Of Law*, Special Ed (Bingley: Emerald Group Publishing, 2010).

³ Nikahsiri.id, "Site Map," nikahsiri.id, 2024, <https://www.nikahsiri.id/p/sitemap.html>.

⁴ Jasa Nikah Sirrih, "Our Services," nikahsirijakarta.my.id, 2024, <https://nikahsirijakarta.my.id/services/>.

⁵ Akmal al-Din Muhammad bin Muhammad al-Babarti Al-Hanafi, *al-'Inayah Sharh al-Hidayah*, 3 ed. (Kairo: Shirkah Maktabah wa Matba'ah Mustafa al-Babi al-Halabi wa Auladuh, 1970).

⁶ Burhan al-Din Ali bin Abi Bakr Al-Marghinani, *al-Hidayah fi Sharh Bidayah al-Mubtadi*, 1 ed. (Beirut: Dar Ihya' al-Turath al-Arabi, t.t.).

right over herself than her guardian" (HR. Muslim, Abu Daud, Tirmidhi) and "A widow has more right over herself than her guardian" (HR. Muslim, no. 1421), supports this view.⁷ According to Abu Bakr Ahmad ibn Ali al-Razi Al-Jassas, this also serves as a basis for the belief that a widow has full authority over herself in marriage.⁸

However, marriages performed through unofficial marriage agents (*nikah siri*) have no formal legal standing in Indonesia. Widows who marry without a marriage guardian through *nikah siri* services do not have legal protection in cases of domestic violence (KDRT), inheritance rights, financial support, or child custody, as such marriages are not officially registered.⁹ A case involving a widow in Solok¹⁰, who was found guilty of adultery for entering into a *nikah siri* with a man still in a valid marriage, highlights the legal consequences faced by widows due to the lack of clear regulations regarding marriage without a marriage guardian.¹¹

The ambiguity in the Compilation of Islamic Law (KHI) regarding the role of a marriage guardian for widows has led to other sociological phenomena, such as the rise of secret marriages or temporary marriages with Middle Eastern tourists.¹² According to studies by Harahap Pangeran,¹³ Zaitun Abdullah, Kunthi Tridewiyanti,¹⁴ and Safira Amalia Nuranisa,¹⁵ this phenomenon often occurs among widows who choose to marry themselves without a wali, facilitated by *nikah siri* agents who justify the practice through the Hanafi school of thought. However, previous studies have not offered a comprehensive legal reformulation addressing this gap in Article 14 of KHI. The novelty of this research lies in its proposal for an explicit and systematic legal reformulation of marriage guardian provisions for widows, integrating the principles of legal certainty (legal certainty theory) and public benefit (*maslahah*), to protect widows from legal uncertainty and potential exploitation.

⁷ Abu Bakr Ahmad ibn Ali al-Razi Al-Jashash, *Ahkam Al-Qur'an*, 2 ed. (Beirut: Dar IhyaTurath Al-'Arabi, 1405).

⁸ Al-Jashash.

⁹ Galuh Retno Setyo Wardani dan Khoirul Hidayah, "Sanksi Pidana Pelaku Poligami Siri Di Indonesia Perspektif Maqashid Syari'ah Jasser Auda," *Hukum Islam* 22, no. 1 (2022): 95–123.

¹⁰ Direktori Putusan Mahkamah Agung Republik Indonesia, "Putusan No. 56/Pid.B/2014/PN.Slk" (Solok, 2014).

¹¹ Arina Novitasari, Dian Rosita, dan Muhammad Ayub, "Tinjauan Yuridis Pernikahan Siri dari Segi Hukum Perdata dan Hukum Pidana," *Jurnal Keadilan Hukum* 4, no. 1 (2023): 1–9.

¹² Observasi, Bogor, 02 April 2024

¹³ Safira Amalia Nuranisa, "Kawin Kontran di Desa Tugu Selatan Puncak Bogor" (Universitas Padjajajaran, 2023).

¹⁴ Zaitun Abdullah dan Kunthi Tridewiyanti, "Penyalahgunaan Konsep Kawin Mut'ah Pada Praktik," *Journal of Islamic Law Studies(JILS)* 2, no. 1 (2019).

¹⁵ Nuranisa, "Kawin Kontran di Desa Tugu Selatan Puncak Bogor."

Legally, Law No. 1 of 1974 on Marriage and the Compilation of Islamic Law (KHI) stipulates that the presence of a marriage guardian (*wali nikah*) is an absolute requirement for marriage, both for women who have never been married and for widows. However, the existing provisions in KHI, particularly Article 14, only implicitly regulate the role of a marriage guardian for widows without clear and explicit guidelines. This legal ambiguity has created loopholes that are often exploited by *nikah siri* agents, resulting in practices such as secret marriages (*nikah siri*) and temporary marriages (*nikah kontrak*) that disproportionately affect widows. The absence of a clear formulation not only undermines the legality of these marriages but also deprives widows of their legal rights, including property rights, inheritance claims, and protection from domestic violence.^{16 17} Therefore, the urgency of reformulation lies in the need to strengthen and clarify existing legal provisions, not to change the fundamental substance, but to provide explicit and detailed regulations that close potential loopholes. This reformulation is essential to ensure legal certainty, protect widows from exploitation, and uphold justice following the principles of *maslahah* and the theory of legal certainty.

This article seeks to explore the issue of marriage guardianship for widows from philosophical, legal, and sociological perspectives, with the objective of formulating a more just, explicit, and transformative legal solution.¹⁸ Specifically, this research aims to clarify the urgency of reformulating the provisions regarding marriage guardianship for widows in the Compilation of Islamic Law (KHI), ensuring legal certainty and protection for widows in their marriage rights. The implications of this research are twofold: first, it offers theoretical contributions by strengthening the discourse on legal certainty and justice in Islamic family law; second, it provides practical recommendations for policymakers and legal practitioners to revise and explicitly formulate regulations that prevent legal loopholes, protect widows from exploitation, and ensure the legitimacy of their marriages within the framework of national law.

¹⁶ Anisya Devi Aprilia Damasynta, "Kedudukan Hukum Istri Siri dan Anak Hasil dari Perkawinan Siri dalam Pembagian Waris yang Berbasis Keadilan" (Universitas Islam Sultan Agung (Indonesia), 2021).

¹⁷ Muhammad Wildan Arrosyid, Sutisna Sutisna, dan Hambari Hambari, "Nikah Sirri dan Pengaruhnya pada Kesejahteraan Keluarga (Studi Kasus di Desa Puspanegara, Kecamatan Citeureup)," *KOLONI* 2, no. 4 (2023): 68-79.

¹⁸ Ahmad Qiram As-suvi dan Moh Zainullah, "Sociology of Law in The Perspective of Roscoe Pound and Donald Black and Its Relevance in The Indonesian Context," *PJLS: Peradaban Journal of Law and Society* 1, no. 2 (2022): 82-95, <https://doi.org/10.59001/pjls.v1i2.39>.

The method used in this research is a qualitative prescriptive approach with a normative juridical method. This study focuses on analyzing legal norms contained in primary legal materials, including Law No. 1 of 1974 on Marriage and the Compilation of Islamic Law (KHI), particularly provisions related to marriage guardianship for widows. Secondary legal materials, such as scholarly articles, previous research, and legal opinions, are also utilized to support the analysis. Data are collected through document studies and literature reviews, then analyzed using a deductive approach. The analysis is carried out by interpreting legal norms based on the theory of legal certainty, justice, and benefit (*maslahah*), and supported by sociological facts regarding widow marriage practices in society. This methodological approach allows for a comprehensive understanding of the legal ambiguities and formulates recommendations for reformulating marriage guardian regulations in KHI.

Rethinking The Formulation of Marriage Guardians for Widows in the Compilation of Islamic Law from the Perspective of Legal Certainty Theory and *Maslahah* Theory

In discussing the existence of law, philosophically, the legitimacy of a law is always intertwined with the values of legal justice and legal utility. According to Radbruch, the existence of law with only legal certainty, without being based on the spirit of justice and utility, turns law into a product of authoritarianism. Therefore, beyond legal certainty, justice and utility are essential aspects integrated into the very dimensions of law itself.¹⁹

Philosophically, Radbruch argues that legal justice is one of the three fundamental values of law, along with legal certainty and utility.²⁰ He posits that law should primarily provide justice, but it must also consider legal certainty and utility to be applied effectively in society. In his view, when there is a conflict between justice and legal certainty, justice must take precedence.²¹

Simultaneously, Radbruch also elaborates on the importance of utility and the benefit of law as inseparable from its existence. In his work *Rechtsphilosophie*, Radbruch asserts that law is not merely a set of rules regulating behavior but must

¹⁹ Gustav Radbruch, *Legal Philosophy* (Massachusetts: Harvard University Press, 1950).

²⁰ Gustav Radbruch, "Statutory lawlessness and supra-statutory law (1946)," *Oxford Journal of Legal Studies* 26, no. 1 (2006): 1-11.

²¹ Gustav Radbruch, "Five Minutes of Legal Philosophy (1945)," *Oxford Journal of Legal Studies* 26, no. 1 (24 November 2006): 13-15.

also bring benefits to society.²² He emphasizes that the law should be assessed based on its contribution to human well-being and happiness.²³ So, in the context of marriage guardians for widows who are not recognized and not written in administrative law in Indonesia, on the basis of legal objectives, namely legal certainty, philosophically, according to Radbruch, administrative rights must be given.²⁴

From these various philosophical and theoretical reviews, it becomes relevant whether the various perspectives are presented by researchers as an analytical tool to distinguish the determination of the requirements for marriage guardians for widows in KHI. So that the construction of the ratio legis of classical jurists and contemporary jurists regarding the provisions of marriage guardianship for widows can be understood philosophically and deeply.

In the perspective of classical jurists, the stipulation of the marriage guardian requirement for widows has a variety of perspectives and is patterned into two major groups, as divided into two views regarding the method of approach to Islamic law, namely the *ahlu hadist* group which tends to be textualist and *ahlu ra'yi* which upholds the contextuality and universality of Islamic law.²⁵ These two groups hold differing arguments from each other, although the supremacy still refers to the Qur'an and as-Sunnah.²⁶ The *ahlu hadith* base their arguments on textual values drawn from the provisions of Sharia itself, as mentioned in Surah An-Nur verse 32, Al-Baqarah verse 221, and Al-Baqarah verse 232, as well as the hadith "A marriage without a guardian is invalid" (Narrated by Ahmad and the four Imams, and authenticated by Ibn Madiniyyi, At-Tirmidhi, and Ibn Hibban). This perspective drives the understanding that a marriage guardian is an absolute requirement in the marriage contract process.

Although the *ahlu hadith* group, both philosophically and theoretically, also derives from the values of justice and utility, their concept of justice and utility is

²² Radbruch, *Legal Philosophy*.

²³ Zahrah Salsabillah Ashari, "Exceptio Dilatoria in the Indonesian Context: Implementation of Justice and Legal Certainty from Radbruch's Perspective," *Peradaban Journal of Law and Society* 3, no. 1 (2024): 31-47.

²⁴ Mohammad Wildan Raja Mahasina, Isroqunnajah Isroqunnajah, dan Khoirul Hidayah, "Pemberian Hak Administrasi Kependudukan Bagi Pasangan Kawin Belum Tercatat Perspektif Tujuan Hukum Gustav Radbruch," *Mahakim: Journal of Islamic Family Law* 7, no. 2 (2023): 186-214.

²⁵ Thohir Luth dan Md Yazid Ahmad, "Universality and Contextuality of Islamic Law: a Perspective from Wael B. Hallaq and Thaha Jabir Alwani," *Peradaban Journal of Law and Society* 2, no. 2 (2023): 106-16.

²⁶ Moh Anas Kholish dan Ilham Fitra Ulumuddin, "Supremasi Hukum Dan Perubahan Sosial: Sebuah Tinjauan Hukum Barat Dan Hukum Islam," *Peradaban Journal of Law and Society* 1, no. 1 (2022).

centered on legal utility and justice as covered within the *law in text*.²⁷ They believe that rules clearly outlined in sacred texts do not need to be changed or adapted to contemporary conditions, as Sharia is universal and eternal.

Conversely, the *Ahlu Ra'yi* group tends to base its views on rational and contextual considerations.²⁸ They believe that utility is not derived solely from sacred texts but must also be examined based on social realities and changing times. Therefore, in the case of a marriage guardian (*wali*) for widows, the *ahlu ra'yi* group might argue that a guardian's approval remains necessary, especially if it is more relevant to societal needs and maintains broader social order.

Philosophically, the *ahlu ra'yi* group emphasizes the epistemology of law through the rationalization of the sources of law, such as the Qur'an and Sunnah, focusing more on the rationale behind law in context.²⁹ Hence, these two classical jurist groups have their respective legal source demarcations. From the perspective of the *ahlu hadith* scholars, represented by Imam Malik, the position of a marriage guardian is a condition that must be fulfilled in marriage, even for a widow, as it is seen as part of maintaining social and family order and protecting women in marriage. Similarly, Ahmad bin Hanbal shares the same legal argument, asserting the importance of the guardian's role in preserving the legitimacy and validity of marriage according to Sharia teachings.

Meanwhile, from the perspective of contemporary jurists, the *ahlu hadith* and *ahlu ra'yi* groups have also gained prominence. The *ahlu hadith* group is represented by conservative and traditional jurists, while the *ahlu ra'yi* group manifests in more liberal juristic approaches. Some prominent contemporary scholars who continue the spirit of *ahlu hadith* include Abul 'Ala al-Maududi, Abdullah bin Basy, Hasan al-Banna, Sayyid Qutb, Rasyid Ridho, and others. These figures are often associated with conservative and revivalist movements aimed at returning Muslim societies to what they believe to be a pure understanding and practice of Islam, as found in the Qur'an and Sunnah.³⁰ This movement typically focuses on rejecting innovations

²⁷ Inas Setyaningtyas dkk., "The Basis of Legal Ijtihad in the Umayyah Period," *Interdisciplinary Journal of Social Science and Education (IJSSE)* 2, no. 1 SE-Articles (5 April 2024): 59–70, <https://doi.org/10.53639/ijssse.v2i1.20>.

²⁸ Teguh Prawiro, "Bahasa dan Akal Dalam Ijtihad Mazhab Hanafi," *Jurnal Alasma: Media Informasi dan Komunikasi Ilmiah* 4, no. 2 SE-Articles (25 Oktober 2023): 148–56.

²⁹ Sarfika Datumula Zaifullah, Hairuddin Cikka, Wahyuningsih Thahir, "Sejarah Perkembangan Perbandingan Mazhab Dan Hukum," *Munaqib* 2, no. 1 (2023): 163–81.

³⁰ Azharudin Mohamed Dali, "Ulama dan Gerakan Revivalis Islam di India Antara 1700- 1850 an," *Jurnal Usuluddin* 16, no. 0 SE-Articles (31 Desember 2002): 51–74.

deemed inconsistent with classical Islamic texts and advocates for the application of Islamic law in various aspects of life, both individual and social.

For instance, Abul 'Ala al-Maududi, a prominent Islamic thinker from Pakistan and founder of Jamaat-e-Islami, championed the idea of "the sovereignty of God" (*hakimiyyah*), which he believed should be embodied in Islamic law.³¹ His thoughts significantly influenced political Islam movements, which emphasize the necessity of implementing sharia law in both the state and society. Al-Maududi adhered firmly to a literal approach to the Qur'an and Sunnah, opposing all forms of modernization that were not in alignment with religious texts.

Hasan al-Banna, founder of the Muslim Brotherhood (*Ikhwanul Muslimin*) in Egypt, held a similar view, advocating the revival of pure Islamic teachings and their application in social and political life. According to al-Banna, Islam is not merely a spiritual religion but a complete system of life encompassing politics, economics, law, and morality.³² Alongside Sayyid Qutb, another prominent thinker within the Muslim Brotherhood, they emphasized the importance of implementing Sharia law and rejected the influence of Western ideologies, which they believed were corrupting Islamic morals and values.³³

Rasyid Ridha, a reformist thinker from Egypt, is also known for his conservative-revivalist approach, although with certain reformist nuances. He criticized the practices of *bid'ah* (innovations in religion) and called for a return to the authentic teachings of Islam, based on sacred texts.³⁴ Ridha was greatly influenced by his teacher, Muhammad Abduh, although he was more conservative than Abduh in certain aspects, especially regarding his rejection of modernity, which did not align with Islamic values.

The Wahhabi movement, often associated with *ahlu hadith* views, is another prominent revivalist movement in the Islamic world. This movement was founded by Muhammad bin Abdul Wahhab in the 18th century in Najd, Saudi Arabia. The Wahhabi movement emphasized the purification of Islam from deviations, innovations, and practices that were inconsistent with the original teachings of Islam

³¹ Agustina Damanik, "Konsep Negara Menurut Abu A'la Al-Maududi," *Jurnal Al-Maqasid: Jurnal Ilmu Kesyariahan dan Keperdataan*; Vol 5, No 1 (2019)DOI - 10.24952/almaqasid.v5i1.1720 , 10 Juli 2020.

³² Lukmanul Hakim, "Konsep Negara Menurut Hasan Al-Banna Ditinjau Dari Perspektif Fiqh Siyasah," *Prosiding Seminar Nasional Unars*; 2 no 1 (2023): Prosiding Nasional Sinars 2023 Skema Penelitian, 18 Agustus 2023.

³³ Saiyid Qutb and William E. Shepard, "'Sayyid Qutb and Islamic Activism: A Translation and Critical Analysis of Social Justice in Islam,'" *Social, Economic and Political Studies of the Middle East*, 1996.

³⁴ Susilawati Susilawati, "Pandangan Modernisme Muhammad Abduh dan Rasyid Ridha," *Jurnal al-Aqidah*; 14, no 2 (2022): DOI - 10.15548/ja.v14i2.4900 , 16 Desember 2022.

as understood from the Qur'an and Sunnah.³⁵ The group firmly rejects any form of rationalization or reinterpretation of Islamic law that is not based on classical texts.

These conservative and revivalist movements generally reject the more modern rationalist or contextual approaches to Islamic law, as championed by the *ahlu ra'yi* group. They believe that Islamic law should be applied literally and textually, leaving little room for flexibility or adaptation to changing times.³⁶ Their focus is on law in text, which means the application of law as written in sacred texts, with little to no new interpretation in light of changing social contexts.³⁷

On the other hand, contemporary scholars who continue the *ahlu ra'yi* tradition include Fazlur Rahman, Abdullahi Ahmad an-Naim, Abdullah Saeed, Fatimah Mernissi, Amina Wadud, and Husein Muhammad. These scholars are known for emphasizing a contextual and rational approach to understanding Islamic law, seeking to balance textual principles of *shariah* with the realities of social change and contemporary developments.³⁸

In the context of Indonesia, the requirement of a guardian (*wali*) for a widow in marriage is regulated in the *Kompilasi Hukum Islam* (KHI), which stipulates that a widow still requires a marriage guardian in the marriage process. This perspective tends to align with the *ahlu hadith* approach, adhering to the textual rules in the Qur'an and Sunnah with little space for contextual reinterpretation. This provision is often seen as part of the adherence to classical legal traditions, aiming to preserve the validity and legitimacy of marriage within the framework of Islamic law.³⁹

However, through the lens of Fazlur Rahman's "Double Movement" theory, the requirement of a marriage guardian for a widow can be understood through two movements involving historical and contextual processes.⁴⁰ The first movement in this theory is to review *shariah* texts historically-understanding the social, cultural, and real-life conditions that underpinned the emergence of these rules. For example,

³⁵ Moch Choirul Rizal, Fenolia Intan Saputri, dan Siti Annisa Rahmi Imanda, "Sejarah Pemerintahan Islam: Suatu Tinjauan Singkat," *Verfassung: Jurnal Hukum Tata Negara* 2, no. 1 (15 Juni 2023): 41-62, <https://doi.org/10.30762/vjhtn.v2i1.212>.

³⁶ Nor Salam Moh. Anas Kholish, *Epistemologi hukum Islam transformatif: sebuah tawaran metodologis dalam pembacaan kontemporer*, I (Malang: UIN-Maliki Press, 2015).

³⁷ Fazlur Rahman, *Revival and Reform In Is Lam: A Study of Islamic Fundamentalism*, ed. oleh Ebrahim Moosa (England: Oneworld Publications, 2000).

³⁸ Fazlur Rahman, *Islam & Modernity: Transformation of an Intellectual Tradition*, Paperback (Chicago: The University of Chicago Press, 1982).

³⁹ Zezen Zainul Ali, Mega Puspita, dan Zainab Zainab, "Kepastian Hukum pada Dispensasi Kawin Janda/Duda dibawah Umur (Analisis Pandangan KUA dan Pengadilan Agama di Kota Yogyakarta)," *Al-Syakhshiyyah: Journal of Law & Family Studies* 4, no. 2 (2022): 156-156.

⁴⁰ Fazlur Rahman, *Major Themes Of The Qur'ān* (Chicago: Universitas Chicago Press, 2009).

in the early Islamic period, the rule of requiring a *wali* in marriage served as a protective mechanism for women, who at that time might not have had full authority over their own marital decisions.

The second movement involves examining the rule within the contemporary and local context, understanding how the provision can be applied or adapted to today's modern conditions, which are different from those in the classical period. In today's context, women, including widows, are more independent both legally and socially compared to the conditions in earlier times. Therefore, in this second movement, Fazlur Rahman would advocate for a reinterpretation of *Sharia* by considering the principles of justice and *maslahah* (public interest) that are relevant to the needs of today's society.

For Rahman, the spirit of justice and benefit are universal values that serve as moral ideals when the law is established.⁴¹ Therefore, Islamic law should always refer back to these foundational principles. In the context of a guardian (*wali*) in the marriage of a widow, if the rule no longer reflects justice or public interest for the individual concerned in modern conditions, Rahman would recommend that the law be reinterpreted following the demands of the times. Law should not be rigidly applied without considering the evolving social and moral dynamics.

What Fazlur Rahman articulated has been theoretically justified by Abdullah Saeed. According to Saeed, the values of justice and *maslahah* contained in various sacred texts are *qath'i dhilalah* (definitive in meaning), and these should take precedence over textual stipulations themselves.⁴² In other words, the essential, definitive meanings of these texts, which emphasize justice and benefit, should be the main foundation in the application of Islamic law, rather than simply following the literal meanings of the texts that may not be relevant in different social contexts.⁴³

Furthermore, Jasser Auda, through his work *Maqasid al-shariah* as Philosophy of Islamic Law: A Systems Approach, also emphasizes the importance of the *maqasid al-shariah* (objectives of Islamic law) as the core of Islamic teachings. For Auda, the primary goal of *Sharia* is to achieve justice, public welfare, and the well-being of humanity.⁴⁴ According to him, the application of Islamic law must always be aimed

⁴¹ Sibawaihi, *Hermeneutika Alquran Fazlur Rahman*, ed. oleh MH.Abid, I (Yogyakarta: Jalasutra, 2007).

⁴² Abdullah Saeed, *Interpreting the Qur'an: Towards a Contemporary Approach*, I (London: Routledge, 2005).

⁴³ Abdullah Saeed, *The Qur'an: An Introduction*, I (London: Routledge, 2008).

⁴⁴ Nur Chanifah et al., "Ecological Wisdom of The Bajo Tribe in The Perspective of Fiqh al-Bi'ah and Green Constitution," *Al-Ihkam: Jurnal Hukum & Pranata Sosial* 19, no. 2 (2024): 470-95.

at achieving these objectives, rather than merely following formalistic rules without considering their impact on society.⁴⁵

Regarding the requirement of a guardian for a widow, Yusuf al-Qardhawi sees this as an example where a textual provision in Islamic law must be reconsidered in light of the priority objectives of *maqasid al-shariah*.⁴⁶ If the rule no longer upholds the principles of justice and public welfare in modern times, then the law should be able to be changed or reinterpreted. Auda argues that *Sharia* is not meant to impose rules that hinder social justice but rather should be flexible and adaptable to its primary goal, which is to protect individual rights and achieve the welfare of society.

In the context of marriage guardians for widows who believe that marriage is valid without a guardian, this value should be accommodated into the KHI as a guide to legal sources recognized in the Indonesian national legal system. Moreover, the discussion of the determination of marriage guardians for widows who are a minority group is a debate in the field of *muamalah*, which should not be absolute and is always in an open reinterpretation space following social problems that develop according to Hasbi Ash-Shidieqy.⁴⁷ With consideration of justice and benefit for widows, amid widowed women who are always victims and commodities to be exploited.

Reformulation Of The Provisions Of Marriage Guardianship For Widows In The Compilation Of Islamic Law From The Perspective Of Legal Certainty Theory And Maslahat Theory

The normative reformulation proposed in this study does not merely arise from theoretical assumptions but is deeply rooted in the dialectical interaction between Indonesia's prevailing positive legal texts and the evolving thought of both classical and contemporary Islamic jurisprudence.⁴⁸ A primary point of departure for this reformulation lies in the differing perspectives among various schools of Islamic law (*madhhab*) regarding the position of a marriage guardian (*wali*), particularly in the

⁴⁵ Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law a Systems Approach* (Washington: IIIT, 2008).

⁴⁶ Prayudi Rahmatullah dkk., "Comparative Study of Polygamy Marriage Regulations in Turkey, Russia, and Jordan: A Priority Fiqh Perspective," *Diktum: Jurnal Syariah dan Hukum* 21, no. 2 (2023): 137–46, <https://doi.org/10.35905/diktum.v21i2.5934>.

⁴⁷ Jamal Jamal dan Fahad Muhanna Salem Al Ahmadi, "Renewal of the Epistemology of Fiqh by Hasbi Ash-Shiddieqy and Its Implementation in Minority Muslim Communities," *Peradaban Journal of Law and Society* 2, no. 2 (2023): 117–29.

⁴⁸ Ahmad Qiram and Erfaniah Zuhriah As-Suvi, "Ratio Legis Of Interfaith Inheritance Reformulation From The Perspective Of Fiqh Minority: A Study Of The Thoughts Of Yusuf Al-Qardhawi And Taha Jabir Al-Alwani," *Jurnal Pembaharuan Hukum : Unissula* 10, no. 03 (2023), <http://dx.doi.org/10.26532/jph.v10i3.33335>.

case of widowed women (*al-tsayyib*). The Hanafi school, known for its rationalist approach in employing *ijtihad* (*ahlu ra'y*), holds that a widowed woman who has reached legal adulthood (*baligh*) and possesses sound judgment (*mumayyizah*) has full legal autonomy over herself, including the authority to contract her marriage (*tanfidz al-nikah*) without the involvement of a wali. According to this view, as long as the marriage fulfills the essential pillars (*arkan*) and conditions (*shurut*) following Islamic law, the widow may independently enter into the marriage contract. This stance contrasts with the positions of the Shafi'i, Maliki, and Hanbali schools, which require the presence of a wali in all marriages, whether for virgins or widows.

Based on these considerations, the proposed normative reformulation aims to address the needs of Indonesia's Muslim society, which is highly pluralistic in its understanding of Islamic law.⁴⁹ It also aligns with the principle of legal certainty as theorized by H.L.A. Hart, emphasizing the necessity of legal norms that are clear, unambiguous, and responsive to social change.⁵⁰ Accordingly, the reformulation is not intended to negate the existing provisions on the requirement of a wali as codified in the KHI, but rather to create an alternative legal framework for widowed women who consciously choose to contract their marriage without a wali, following the school of thought they follow. This is consistent with the well-known Islamic legal maxim, *al-umūr bi maqāsidihā* (matters are judged by their objectives), as well as the principle of *taghayyur al-ahkām bi taghayyur al-azminah wa al-amkinah* (legal rulings change with the changes in time and place).⁵¹

Furthermore, referencing the thought of Imam al-Suyuthi in his seminal work *Al-Ashbah wa al-Nazair*, it is articulated that Islamic legal rulings are not stagnant, but rather adaptive to the needs of society, provided they do not contravene the objectives of the Shari'ah (*maqāsid al-sharī'ah*), namely the preservation of religion, life, intellect, progeny, and wealth.⁵² In this context, recognizing a widow's right to contract her marriage without the intervention of a wali can be seen as part of safeguarding personal dignity and individual rights in determining one's life path. This is especially relevant in modern societies that emphasize individual autonomy,

⁴⁹ Siti Rohmah dan Moh Kholish, "authoritarianism in the halal product guarantee act of indonesia: a contribution to an ongoing debate," *Indon. L. Rev.* 10 (2020): 294.

⁵⁰ Philippe Nonet dan Philip Selznick, *Hukum Responsif, Pilihan di Masa Transisi* (Jakarta: Ford Foundation-HuMa, 2003).

⁵¹ Ali Sodikin, *Fiqh, dan Ushul Fiqh Sejarah, Metodologi dan Implementasinya di Indonesia*, I (Yogyakarta: Beranda Publishing, 2012).

⁵² Jalaludin As-suyuti, *Al-ashbah Wa an-nadzair* (Beirut: Dar Al-Kutub Al-Ilmiyah, 1403).

including women's rights to shape their futures without disproportionate interference.

According to Lon L. Fuller, in his work *The Morality of Law*, public welfare and justice must reflect the social realities and needs of the society they serve.⁵³ Fuller argues that the success of a legal system lies in its ability to accommodate and respond to the existing needs of society, including vulnerable groups such as widows.⁵⁴

Similarly, H.L.A. Hart, in his book *The Concept of Law*, emphasizes that law is not merely a set of rigid rules but must also consider the moral and social aspects of the society it governs.⁵⁵ In this context, addressing the sociological needs of widows is part of the legal system's responsibility to ensure justice and social welfare.

These perspectives show that Islamic law strongly influences societal beliefs.⁵⁶ For example, there is a belief in some communities that a widow does not require a guardian (*wali*) to remarry. This belief is based on several Islamic jurisprudential views that allow a widow to marry without the presence of a guardian, such as the view of Imam Abu Hanifa, who opined that a widow could marry without a guardian and only needs to obtain the consent of her prospective husband, provided she has reached the age of maturity and possesses sound judgment.⁵⁷ The basis for this opinion is a *hadith* of the Prophet Muhammad (peace be upon him), which states, "A virgin must be asked for permission (by her guardian), and a widow must give her consent (to her prospective husband), and her consent is her silence" (Narrated by Bukhari and Muslim).

This legal perspective differs from the views of Imam Shafi'i and Imam Hanbali, both of whom mandate the presence of a marriage guardian (guardian) in the marriage of a widow. According to Imam Shafi'i, a widow cannot marry without the permission of her marriage guardian, regardless of whether she has reached the age of maturity or has sound judgment.⁵⁸ The basis for this opinion is the *hadith* of

⁵³ L L Fuller, *The Morality of Law*, Storrs lectures on jurisprudence (Yale University Press, 1969).

⁵⁴ Najmadeen Ahmed Muhamad, "The Legal Philosophy of Lon L. Fuller: Profile," *Fuller: Profile* (December 15, 2020). *The Social Contract Journal* SCJ, 2020.

⁵⁵ Herbert Lionel Adolphus Hart dan Leslie Green, *The concept of law* (oxford university press, 2012)..

⁵⁶ Siti Rohmah, Ilham Tohari, dan Moh Anas Kholish, "Menakar urgensi dan masa depan legislasi fiqih produk halal di Indonesia: Antara otoritarianisme mayoritas dan jaminan konstitusional mayoritas muslim," *Al-Manahij: Jurnal Kajian Hukum Islam* 14, no. 2 (2020): 177-90.

⁵⁷ Putra Diyansyah, "Analisis Hukum Terhadap Kedudukan Wali Nikah Bagi Seorang Janda Menurut Imam Abu Hanifah," *JYRS: Journal of Youth Research and Studies* 3, no. 1 (2022): 32-45.

⁵⁸ Muzemmil Aditya, "Konsep Wali Nikah Dalam Undang-Undang Perkawinan Nomor 1 Tahun 1974 Menurut Pandangan Ulama' Hanafiyah Dan Syafi'iyah," *Al-Muqaranah* 1, no. 1 (2023): 1-15.

the Prophet Muhammad (peace be upon him), which states: "Any woman who marries without her marriage guardian's permission, her marriage is invalid" (Narrated by Abu Dawud and Tirmidhi). Similarly, in *Jawahir al-'Uqud*, it is emphasized that a widow cannot marry without a marriage guardian. It is not permissible for her to marry herself, even with her marriage guardian's consent.⁵⁹ Imam Shafi'i's opinion aligns with that of Imam Hanbali, who also holds that a widow cannot marry without the presence of a marriage guardian, regardless of her age or mental capacity.⁶⁰ This view is supported by the *hadith* of the Prophet (peace be upon him) that states: "There is no marriage without a marriage guardian and two just witnesses" (Narrated by Ahmad and Baihaqi).

These differing opinions have resulted in inconsistencies in marriage practices within the community. Some widows choose to marry without a marriage guardian, relying on the jurisprudential view that supports such a practice. At the same time, the explanation of the *Kompilasi Hukum Islam* (KHI, Compilation of Islamic Law) regarding the requirement of a marriage guardian for widows creates legal uncertainty, as it implicitly leaves room for widows to marry themselves. This raises the risk that their marriages may not be legally recognized by the state, thus denying them certain rights as spouses.

In light of this, this article not only proposes a reformulation of the KHI to be more inclusive but also seeks to accommodate the legal needs of vulnerable groups such as widows. Widows often face a dual dilemma: on one hand, they encounter religious beliefs that support marriage without a marriage guardian, while on the other hand, they struggle against the negative stigma imposed by society. The proposed reformulation aims to provide clearer and more definitive legal protection for widows wishing to marry without being subjected to discriminatory social views or trapped in legal loopholes that fail to offer them certainty.

Therefore, the conditions and pillars of marriage, as regulated in the KHI, which tend to be implicit-especially concerning the role and position of the marriage guardian for widows, must be made explicit. This is crucial to ensure that widows who choose to marry without a marriage guardian, based on certain schools of thought, are neither discriminated against nor considered in violation of the law, as

⁵⁹ Muhammad bin Ahmad Al-Asyuti, "Jawahir al-'Uqud wa Mu 'in al-Qada'wa al-Muwaqqi 'in wa al-Shuhud," dalam *Jilid II* (Beirut: Dar al-Kutub al-'Ilmiyyah, 1996)..

⁶⁰ Rahayu Oktari, "Analisis Tentang Kedudukan Anak Laki-Laki Menjadi Wali Nikah Bagi Ibu Kandungnya (Pendapat Empat Imam Mazhab)" (UIN Raden Intan Lampung, 2022)..

long as their decision is grounded in a sound *shari'ah* basis.⁶¹ The hope of the researcher is that with a more explicit reformulation, the KHI can become a more responsive legal instrument to the diversity of religious practices and social needs of society, while also reducing the legal uncertainty that has long been an obstacle for widows seeking recognition of their marriages within the national legal framework.

Therefore, the proposed legal provisions in this study include several new regulations and revisions to existing articles. First, the introduction of a new article: "A widowed woman who has reached legal adulthood and possesses legal capacity (*mumayyizah*) is entitled to contract her marriage (*tanfidz al-nikah*), provided that the marriage fulfills the pillars and conditions stipulated by Islamic law and the statutory regulations of Indonesia." This article is designed to provide legal certainty for widows who wish to exercise their right to marry without a wali, following the permissibility recognized by the Hanafi school.

Second, a provision is proposed regarding state recognition of such marriages: "The state recognizes the legal validity of a marriage contracted by a widowed woman without a wali, provided it fulfills the requirements of Islamic law as acknowledged within the Indonesian legal system." This formulation underscores the principle that Islamic law in Indonesia adheres to pluralism in legal schools (*ta'addud al-madhahib*), thereby justifying the adoption of the Hanafi perspective as a legal option.

Additionally, an amendment to Article 16 of the KHI is proposed to read: "The presence of a wali is obligatory for women who have never been married (*al-bikr*). For widowed women (*al-tsayyib*), the presence of a wali is optional and subject to the madhhab followed by the parties involved in the marriage." In this way, the state not only respects individual religious convictions but also broadens the principle of legal benefit (*maslahah*) and mitigates potential legal uncertainties that have long been highlighted by both legal scholars and practitioners.

This reformulation is also in harmony with the principles of justice and legal benefit as mandated by Article 24, paragraph (1) of the 1945 Constitution of the Republic of Indonesia, which stipulates that judicial power must uphold law and justice. Furthermore, this reformulation aligns with Article 28D paragraph (1) of the 1945 Constitution, which guarantees fair legal recognition, protection, and certainty,

⁶¹ Adel Ibrahim A. Alturki, Jamal, Ahmad Wasito, "Good Muslims and Good Citizens : How Fiqh al-Aqalliyat Solves the Problems of Muslim Minorities in the West," *PJRS: Peradaban Journal Of Religion and Society* 2, no. 1 (2023): 85-104.

as well as equal treatment before the law. Therefore, this new normative formulation does not conflict with national legal principles but rather enriches the body of Indonesian Islamic law in a responsive manner, just, and contextual, following contemporary developments.

Conclusion

This study concludes that the legal provisions regarding marriage guardians for widows in the Compilation of Islamic Law (KHI) remain unclear and are not explicitly regulated. As a result, many widows, relying on classical *fiqh* interpretations that permit them to marry without a guardian, engage in marriages without legal certainty. This legal vacuum contradicts the principles of legal certainty, justice, and *maslahat* (benefit), potentially exposing widows to vulnerable conditions, including unregistered marriages and practices that may lead to exploitation or misuse of Islamic law. The novelty of this research lies in its proposal for a legal reformulation of Article 14 of KHI by explicitly regulating the role and requirements of marriage guardians for widows. Such reformulation is essential to prevent further legal ambiguities and to protect widows from practices that undermine their rights and dignity. This study highlights the urgent need for lawmakers, legal practitioners, and Islamic scholars to reexamine and reconstruct the existing legal framework governing marriage guardianship in Indonesia. For future research, further empirical studies are recommended to explore the socio-cultural factors influencing public perceptions of widow remarriage and the practical implications of legal reforms on the protection of widows' rights in diverse Indonesian communities.

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