

WALI AS AN AGENT OF WOMEN IN ISLAMIC MARRIAGE LAW: Maliki School as a Basis for Reinterpretation

*Ratno Lukito**

Abstrak

Artikel ini mendiskusikan masalah wali nikah, khususnya menurut mazhab Maliki. Apabila dicermati, wali nikah, yang harus laki-laki, dalam pandangan mazhab Maliki ini pada dasarnya tidak dimaksudkan mensubordinasi otonomi dan hak perempuan, karena secara tegas mereka menyatakan bahwa wali tidak harus bapak atau keluarga laki-laki, tetapi calon mempelai perempuan dapat juga menyerahkan perwaliannya kepada hakim, apabila wali menolak untuk menikahkannya. Karena itu, fungsi wali nikah dalam mazhab Maliki adalah lebih sebagai wakil (agent) dari calon mempelai perempuan untuk memastikan terwujudnya tujuan perkawinan. Adanya konsep wali nikah dalam mazhab Maliki, dengan demikian, pada dasarnya diformulasi untuk membantu calon mempelai, baik laki-laki maupun perempuan, untuk mendapatkan perkawinan yang bahagia, tentu saja dengan cara yang sesuai dengan konteks ketika itu. Dengan perkembangan masyarakat dan bentuk keluarga saat ini, masalah perwalian dalam nikah ini perlu direinterpretasi sesuai dengan konteks masa sekarang, dan reinterpretasi tersebut bisa berangkat dari ide dasar dan nilai yang terkandung dari konsep wali nikah mazhab Maliki ini.

Kata Kunci: *Nikah, Wali, Perempuan, Mazhab Maliki & Ijbâr*

I. Introduction

It is not surprising to hear the claim that Islamic law disadvantages women. The attitude of many Muslim societies as well as the interpretation of many Muslim scholars seem even to support this popular allegation. One

* Dosen Fakultas Syariah UIN Sunan Kalijaga Yogyakarta.

of the most pinpointing arguments of this discriminative evidence is the legal requirement for a Muslim woman to have permission of her father or male relative (as a guardian) prior to marriage. This is, of course, in contrast to her male counterpart who may marry without his father's or any other relative's agreement. An effort therefore must be done to get a proper understanding of the position of women in Islamic law, especially in relation to the modern notion of personal autonomy and gender equality embraced in the current Muslim as well as non-Muslim societies in the world. This is due to the fact that the unequal legal requirements between the two sexes, believed to have been based on the sacred texts of Islam, must have been viewed as contradicting the more common teaching of the equality between man and woman in every sphere of life.

Our challenge now is how we can reconcile our modern view of gender equality with a body of Islamic legal doctrines so far dominating our religious worldview. In particular, the main question is how we can resolve the contradicting view of the need to have a *wali* (guardian)¹ for a female member in her marriage contract with the modern framework of personal autonomy and equality in which the meaning of distributive justice as equal treatment for both sexes is so dominant. This article is however not intended to answer the question since this preliminary work would absolutely be insufficient to cover a deep and wide-ranging study of Islamic teachings on women and the reinterpretation of its discourse in the modern era. This work will only try to decipher evidence from within Islamic legal teaching that the issue of *wali* in Islamic marriage is in fact interpretable. It is due to this very understanding that we might then say that the inequality between man and woman so far characterized in Islamic marriage law can be said as a non-rigid rule. Therefore, a reexamination on how we understand the religious teaching is not impossible as this will be done without neglecting the basic sources of Islamic law. Differently put, the Islamic teaching of guardian in marriage can be brought into a new interpretation in conjunction with the new understanding of gender equality and personal autonomy in

¹ *Wali* is an Arabic term, while *wali* is Indonesian, here I prefer to use the Arabic word, *wali* with Arabic transliteration.

modern society. In so doing, reconciliation between the alleged unabridged contradiction between Islamic teachings and Western values of marriage is then a possible endeavor.

This article will specifically discuss the theory of guardian in Islamic marriage as explained in Mâlikî school. The school is regarded as one of the four greatest schools in Islamic law, named after its founder Mâlik ibn Anas, the greatest legist of Medina who died in the second century of the Hijra. The teaching of the school is indeed not so well-known in Indonesia or Southeast Asian countries in general as it came to dominate mostly in the area of Northern, Western and Sub-Saharan Africa. The reason to discuss this school comes from the fact that the teaching of guardian of marriage in Mâlikî school is relatively different compared to the other schools of Islamic law. Indeed, all Muslim jurists agree that the presence of a guardian for a woman is basically an obligation in marriage. A close reading of the Mâlikî school, however, shows that in the view of the school there is no in fact any legal basis to uphold a belief that Islamic law subordinates female autonomy to the private interests of her male relative, the reason on which the rule of guardian in marriage is usually created. This is interesting since the school is so dominant in its dependency on the *'urf of ahl al-Mâdinah* in which the role of the custom of Medina people, believed to have been based on the tradition of the Prophet, is one of the most important basis in legal decision. Thus, Mâlikî's reason for obligating male guardian in a bride marriage with no motive of subordinating female party in the family may thus be more justifiable as it is believed to have been built on the basis of the Prophet's and his companion way of living.

The focus of the article will be given to comprehending how Mâlikî jurists understand the issue of guardian in marriage. First, who is the actor properly acting as a guardian in marriage and, second, what are the reasons used to maintain such guardianship tradition? The Mâlikî works show that although the presence of a guardian is needed in a marriage contract, it is not monopolized by the father. The marriage can still be done in the case where the guardian objects to the marriage as long as the bride can present the judge acting as her guardian. The view not to see father as the prime

guardian in marriage is a distinct position of the school to which this paper is interested to deal with. This is interesting since from our preliminary research the tradition of marital guardianship is developed in this school beyond the framework of gender gap between man and woman in the family. It is because of this Mâlikî's legal position that we see the reinterpretation of a guardian in Islamic marriage is in fact an open venture.

II. The General Theory of *Walî* in Islamic Marriage Law

The majority of Muslim jurists view that a *walî* (guardian) is needed for a valid Muslim marriage. Among the four major schools, Shafi'ite and Malikite are the two schools considering the approval of the guardian as a basis for validating Muslim marriage.² This is different to Hanafite and Hanbalite jurists who regard the consent of the guardian as merely the condition needed for marriage, since the two schools put an emphasis on the proposal (*ijâb*) and acceptance (*qabûl*) in the process of marriage itself.³ Interestingly, both groups have based their opinions on the primary sources of Islamic law seen as capable of supporting their views. The first group, Shâfi'î and Mâlikî schools, usually based their view on the Hadith from the Prophet who has been reported to regard the nullity of the marriage of Muslim woman done without the permission of her guardian.⁴ The efficacy of that Prophetic tradition is seen as sufficient to uphold the obligation of guardianship for female marriage although the Qur'an does not mention

² In this case, specifically on Mâlikî's position, see Muḥammad bin Aḥmad bin Rushd al-Qurṭubî al-Andalusî, *Bidâ'yah al-Mujtahid wa Nihâyah al-Muqtaṣid*, 2 vols. (Semarang: Usaha Keluarga, n.d.), vol. 2, 6-7. ("Fadzahaba Mâliku 'ilâ annahu lâ yakûnu nikâḥun illâ biwaliyyin, wa annahâ syartun fî al-siḥati fî riwâyatî asyhab 'anhu, wa bihi qâla al-Syâfi'î.").

³ Abdur Rahman I. Doi, *Shari'ah: The Islamic Law* (London: Ta Ha Publishers, 1984), 140. Also, Muḥammad bin Rushd, *Bidâ'yah al-Mujtahid*, vol. 2, 7. ("Wa qâla Abû Ḥanîfah wa Zafar, wa al-Sya'bî wa al-Zuhrî: idzâ 'aqadat al-mar'atu nikâḥahâ bighairi waliyyin wa kâna kuf'an jâza,...").

⁴ The Prophet was reported to say: "Any woman who got married without the permission of her guardian, her marriage would be considered null and void." "A woman cannot be considered married by a woman and a woman cannot be married by herself. The two Hadith are quoted from I. Doi, *Shari'ah*, 140-141.

explicitly a guardian or its derived words in the context of marriage. One verse often cited as the basis of guardianship in marriage is Qur'an 2:221 that says: "And do not give believing women in marriage to idolators until they believe."⁵ Although indirectly, this verse —as understood to be addressed to guardians for not giving consent to women willing to marry to idolators— points to the obligation for such a guardian in marriage.⁶ However, the obligation of guardian is not for a divorced woman willing to marry in the second time as the Qur'an explicitly recommends this: "But if they themselves go away, there is no blame on you for what they do of lawful deeds by themselves" (2:240). This is the verse of the Qur'an made as a basis for allowing widow to marry herself.

The second group, however, seems to base their view on the Hadith explaining the case when a woman came to the Prophet and offered herself for marriage, the woman then was married to a person who could not even give any dowry due to his poverty.⁷ Although the debate on the question weather there was a guardian presented to the marriage is absolutely possible, the fact that the woman came to the Prophet without any natural guardian (i.e., father or any other near relative) seems sufficient for this group to hold the view of marriage without guardian. Indeed, in that report the Prophet might have acted as a guardian for the woman, but he must have asked her before if the guardian was really necessary to validate the marriage. In other words, following the argument of Hanafite and Hanbalite, the presence of *ijâb* and *qabûl* process in the absence of the natural guardian for the woman appears to have been the basis for this group to view the position of guardian not as a necessary condition of the marriage. Interestingly, although Abû Hanîfah here agreed to give freedom to a virgin woman who has reached puberty to marry according to her choice, the consent of the guardian remains needed to fulfill the condition

⁵ All translations of the Qur'anic verses are taken from Abdullah Yusuf Ali, *The Holy Qur-an: Text, Translation & Commentary* (Lahore: Shaikh Muhammad Ashraf Kashmiri Bazar, n.d.).

⁶ Muḥammad bin Rushd, *Bidā'yah al-Mujtahid*, vol. 2, 8.

⁷ The report was quoted from I. Doi, *Sharī'ah*, 141.

of the valid marriage.⁸ This seems to bring into an understanding that for Abû Hanîfah, a girl wishing to marry cannot do so without the presence of her guardian expressing his consent to the marriage. At a glance, someone may thus be puzzled as to how the position of guardian in a marriage of a mature woman, since the obligation of presenting a guardian can be understood as an essential factor without which the marriage will be invalid. In this case, it is safe to assume that Abû Hanîfah viewed the position of guardian as the mere complementary function in marriage since he preferred to stress more the personal right of woman in marriage by giving an analogy with the permissibility of a mature woman to dispose of her property without reference to a guardian. The woman who has attained the age of puberty thus basically has the right to decide her own preference, *viz.*, her decision to whom she would marry. This is also principally the position of Hanbalî school concerning the guardian in marriage.

The above explanation appears to lead into basic position regarding guardianship in marriage, namely, that the presence of a father or other near male relative is needed to validate the marriage of a female Muslim. This is the condition that should be accomplished for a minor or virgin woman willing to marry in the first time; while the widow is thus free from that condition as she can basically do the marriage based on her own personal consent. Although Muslim jurists may not come to the same opinion whether the approval of the guardian is a condition needed for validating the marriage, they all basically are in the same position that the interference of a guardian is not needed in a marriage of a widow and divorced woman. This is supported by the Prophetic tradition reportedly as explaining that the widow and the divorced woman should not be married without her order, while the marriage of a virgin should not be done until her permission is obtained.⁹ Another report also explicated that

⁸I. Doi, *Sharī'ah*, 141

⁹The Prophet is reported to have made the following statements: "A previously married woman shall not be married till she gives her consent, nor should a virgin be married till her consent is sought." "A previously married woman is more a guardian for herself than her guardian, and a virgin should be asked permission about herself, and her

when a father gives his daughter in marriage and she finds herself disliking it, the marriage should be repudiated.¹⁰ These and many of other Prophetic traditions seem to have the same tone of stressing the need of the bride's consent in the process of making a marriage contract. Here, the presence of the guardian may be seen as not surpassing the basic right of a woman—either virgin or widow—to decide the contract by herself.

The need of a guardian for a minor or a virgin bride leads however into another question on the extent of the guardian's right in such a marriage. The question is specifically raised in concern of the guardian's role in the marriage of minor children: Can in fact a guardian compel the marriage of a child before attaining the age of puberty? Unsurprisingly, this is the question that raises a heated debate among jurists as it cannot be answered without involving their understanding of gender relations in the family. All schools of Islamic law, however, come into the same opinion of the person basically has the valid right to act as a guardian of a minor marriage. They agree that father is basically the main person to act as a guardian in the marriage of his minor children, although they are different in the case when the father is absent. *Hanafi* school believes that the marriage of a minor boy or girl (either a virgin or not) is acceptable as long as the guardian comes from the father's side (*'aṣābah*). In the view of *Mālikī* the marriage is valid only when the guardian is a father, while *Shafiite* recognizes the marriage if the guardian is the father or the grandfather. *Hanbalī* school, who seems not to differ from *Shafiite*, views that in the case of the minor marriage done without the father or the grandfather, the minor on obtaining

permission is her silence." The reports were quoted from Haifaa A. Jawad, *The Rights of Women in Islam: An Authentic Approach* (London: Macmillan Press Ltd., 1998), 34. See also the Hadith as found in Muslim: "Lā tankiḥu al-ayyamu ḥattā tusta'maru wa lā tankiḥu al-bikru ḥattā tusta'dzanu, qālū yā rasūl allāhi kayfa idznuhā? Qāla an taskuta." Also, "Al-ayyamu aḥaqqu binafsihā min waliyyihā wal-n'bikru tusta'dzanu fī nafsihā wa idznuhā samātuhā." "Al-thayyibu aḥaqqu binafsihā min waliyyihā wal-bikru tusta'maru waidznuhā sukūtuhā." Al-Imām Abī al-Ḥusayni Muslim ibn al-Ḥajjāj al-Qushairī al-Nisābūrī, *Ṣaḥīḥ Muslim*, (N.p.: Sharakah Nūr Asia, n.d.), 594.

¹⁰ As quoted from I. Doi, *Shari'ah*, 142.

majority has an option of repudiating the marriage.¹¹ In other words, those four schools of Islamic law were basically of the same opinion that, essentially, a father is the one having the right to compel the marriage of his minor children.¹² This is what is called as the right of *ijbar* in many *fiqh* books, while the guardian acting in such a marriage is called as *walī mujbir*.¹³

The question arises however as to how those schools built their legal reasoning so as to arrive at their opinion. Beyond differences, the majority schools seem to depart from the same understanding that the marriage of minor children should be done with the involvement of the male guardian so that the marriage contract can be seen as a valid undertaking. Our question is what the reasoning used as a basis for certain legal position? Is that due to the culture of gender differences between male and female in most Arabian societies in which the schools of Islamic law were commonly established? Or other reasoning beyond the gender culture has in fact been involved in the case? This is interesting since from such questions we can depart ourselves from the mere understanding of what schools obligating the female guardian but more on what reasons in fact used by those schools to support their views. Here, Mâlikî school is seen as one of the most interesting phenomenon since according to this school the obligation of guardianship in marriage seems not to be constructed on the basis of the belief of gender gap but more on the need to protect the ward from unscrupulous marriage. This is interesting as with such an opinion that we may be able to reconstruct our views regarding guardian in marriage, especially in regard to the right to compel the minor marriage.

¹¹ Muḥammad bin Rushd, *Bidā'yah al-Mujtahid*, vol. 2, 5-6.

¹² I. Doi, *Shari'ah*, 142.

¹³ The power bestowed upon *walī* to compel the marriage of female minor is indeed a distinguishing feature of Islamic law. This power seems to be given to certain male guardian based on the jurists' assumption that guardians who are fond of their relatives/offspring would not have sinister motives in arranging their marriages. See John L. Esposito, *Women in Muslim Family Law* (New York: Syracuse University Press, 1982), 17-18.

III. Mâlikî School on the Issue of *Ijbâr* in Marriage

As seen in many *fiqh* works written by many jurists from other schools, Mâlikî works do not explain in such a great detail the question of the reason why a father has an important position in the process of marriage of his children. Indeed, the works only treat the issue as a taken for granted tradition. In relation to this Mâlikî's position, Ibn Rushd in his *Bidâ'yah al-Mujtahid wa Nihayah al-Muqtaṣid*, for example, explained that a father is included as the person who has the right to compel the first marriage of his daughter, the specific right to which the other male relatives do not have.¹⁴ Interestingly, the book does not mention why such a right is only for the father and not for the male relatives. Such a privileged right seems consistent with the issue of majority as the condition of personal autonomy characterized in this school. The role of guardian exclusively relates to the function of the majority of the ward and not the gender of the ward. The right of the father to guard his children's marriage is therefore not confined only to the daughters but to the sons as well, as long as they are still in a minor age. In other words, as the guardian of a minor, the father has basically an absolute right to compel the marriage of both his minor sons and daughters, the power of which is not existent anymore when the children get their maturity. It seems based on this consideration that Mâlikî school gives a biological father the powers to compel the marriage of his minor daughter, born resulted from his previous marriage, who became a widow prior to puberty.¹⁵ It is also due to this reasoning that the father is allowed to compel the marriage of his children having permanent mental disability. Here we see that the consideration is in fact not the gender of the children to whom the guardian has the right to interfere their personal autonomy but more based on the state of majority that each child has attained regardless of their sex.

The fact that Mâlikî school is more concerned with the issue of majority of the children than that of their gender differences can be a

¹⁴ Muḥammad bin Rushd, *Bidâ'yah al-Mujtahid*, vol. 2, 4-5. ("Wa qâla Mâlik lil-'abbi faqat an yujbiruhâ 'alâ al-nikâḥ." And also, "lâ yuzawwijuhâ illâ al-abb faqat.").

¹⁵ Muḥammad bin Rushd, *Bidâ'yah al-Mujtahid*, vol. 2, 5.

blatant evidence that in the debate concerning the position of a *walī* in marriage, the school more oriented itself on the issue of security of the children, especially in relation to their lives in the post-marriage.¹⁶ The analysis on the visibility of the children to get married is thus here the main concern of marital guardianship although the influence of patriarchal system in the Arabian society in general must have also influenced the perspective of the rule itself. Yet, what seems important to note here is that in the absence of the father, the minor's designated guardian cannot automatically have the power to compel the marriage of the female minor orphan without the expressed designated power to do so from the father.¹⁷ This rule, compared to the automatic power of the designated guardian to compel an orphan boy's marriage, just expresses an interesting phenomenon whereby the right of *ijbār* in Maliki school might not be established due to the demeaning view toward the position of female children in the family, as many may have supposed, but more on the view of the need to protect the children from irresponsible party of marriage.

It is thus more appropriate to assume that the guardian's role in marriage cannot simply be understood as a means of the patriarchal family to subdue its female members. This is true so far as we see the fact that, *first*, the right to compel the marriage of the minor children, both male and female, is basically assigned to the father only and cannot be inherited to the other relatives although it may be conveyed by designation (*waṣīyyah*).¹⁸ Thus, when the father is absent without leaving any designated successors, the power to compel the marriage basically disappears. *Second*, in concern of the strong influence of the patriarchal system, Mālikī school seems to see this pattern not as a taken for granted ideology but more as a leeway to

¹⁶ Detail discussion on how Mālikī teachings on guardianship were practiced in the court, see Amira El Azhary Sonbol, "Adults and Minors in Ottoman *Shari'a* Courts and Modern Law," in Amira El Azhary Sonbol, ed., *Women, the Family and Divorce Laws in Islamic History* (New York: Syracuse University Press, 1996), 236-256.

¹⁷ Mohammad Fadel, "Reinterpreting the Guardian's Role in the Islamic Contract of Marriage: The Case of the Mālikī School," *Journal of Islamic Law* 3 (1998): 6-8.

¹⁸ Muḥammad bin Rushd, *Bidā'yah al-Mujtahid*, vol. 2, 5.

assure the success of female members in building marital relationship. Therefore, we see that although male children can get their own freedom in marriage due to their puberty, female children cannot get the freedom simply from the puberty. Here, the school ruled that besides reaching puberty a female will get her freedom after two conditions are fulfilled, i.e., entry into her marital home and the capacity to manage her property verified by reliable witnesses.¹⁹ Needless to say that she can also get her freedom after the father or the designated guardian declares her maturity in front of the court. The two points above lead to our analysis before that the reason of differentiating female from male children in terms of their freedom of marriage is essentially to assure the marriage itself. This, although questionable nowadays, reflects aptly the framework of gender relationship at the time, i.e., that a female minor should attain some other conditions despite her puberty to assure her capability of accessing independent rights of marriage.

The fact that the right to compel the minor marriage is not confined only to female children but the male as well seems reasonable for us to challenge the common belief of gender differences as the main reasoning to institutionalize marital guardianship. The critic may be posed towards Mâlikî jurists as they appear to maintain the second class of female children so that puberty is not the only condition to get freedom in marriage. Yet, one should not disregard the socio-political environment in which the school established and developed in Medina society about thirteen centuries ago. The hegemony of patriarchal ideology in the society must have influenced the school according to which legal decisions were built in conjunction with such psychosocial feeling of justice living at the time. Thus, the decision not to liberate female minor from the guardian's right to compel her marriage cannot be understood beyond the main mission to protect her from unsuccessful marriage in which the male party commonly dominate the relationship.

¹⁹Fadel, "Reinterpreting," 9.

It is from this framework that we can understand the two steps of female legal capacity theorized by Mâlikî jurists: First, the girl has to get physical maturity and, second, upon her majority, it has to be assured that she has capability to manage her property.²⁰ Although Mâlikî jurists here seemed to rule that the right to compel the female marriage is valid upon the female incapacitated due to her minority but not that arising from her inability of managing property (*safah*), the two conditions without which the girl may be married without her approval only strengthen our analysis that the right of *ijbâr* comes essentially from the responsibility of the guardian towards his ward, especially in assuring the success of marriage.

Furthermore, the argument of guardian as an agent to promote the effective objective of marriage can also be related to the diluted role of guardianship in the marriage of an adult or widowed woman. Here, Mâlikî school seems to have a distinct opinion that even support our view on the role of *walî* above. In this respect, the Malikites, candidly, did not assign the father as a priority to act as guardian of the marriage. The woman's son is rather the first choice to act as a guardian, while her grandson as the second choice and the father the third. The decision to give the son of the woman, and not the father, as the main person taking a role in the guardianship is here very significant insofar as it can signify the argument against the belief of the male's right in the family to control its female members. There are at least two arguments that can be set forth here: First, the position of the father as the third choice after the son and the grandson for possible acting as a guardian of an adult marriage is evidence that the issue of guardianship in marriage is not about the male's control over the female. We may argue that if the woman has a son, she will not properly choose her son as the agent of controlling her willingness to marry; rather the father would be the appropriate choice here. In other words, the choice of a son as a guardian in his mother's marriage is just a sign of his insignificant position in deciding the validity of the marriage because the woman has basically a freedom to decide her marriage. Thus, although according to

²⁰Fadel, "Reinterpreting," 10.

the law a specific male relative may act as her guardian, she is in fact free to have her own choice since she has every right to give her consent related to the marriage. In case the guardian presents and opposes the marriage, it would be valid so long as she consents. This implies that an adult woman has her own right to decide to whom she would marry, and the duty of her guardian is not but to marry her to any male she wishes to. Differently put, she does not need to obtain her actual guardian's permission to marry as she is basically the one to decide; and if she cannot find any cooperative male relative, she may use judge to support the marriage.²¹ In this respect, Mâlikî school created two mechanism: (1) the permission for the woman to use her male relatives or the judge as her guardian, and (2) the possibility of the woman to sue her own guardian as a remedy of specific performance of the guardian's duties.²² The woman can thus basically circumvent the opposition of the guardian in case he might have different opinion regarding the marriage.

Second, the fact that the guardian in the marriage of an adult woman is not in a position to decide the validity of the marriage suggests that the guardian does not function to subject the woman to the guardian's physical control. This leads to questioning the position of the guardian itself: If the guardian has no legal power to decline the marriage, what then the function does he play in the marriage of an adult woman? Mâlikî jurists seem to have realized this and therefore relate this issue to the theory of *kafa'ah*. One Malikite jurist, Ibn Lubb, was reported to say that the requirement of a guardian in an adult marriage is only to assure that the requirement of *kafa'ah* is met.²³ The presence of a guardian is thus more related to the technical matters of the marriage but not to act as a decision maker in validating the marriage contract itself. This is supported by the fact that the condition of *kafa'ah* has basically no relation with the legal matters of the contract. It is essentially a condition of the bride and groom

²¹Fadel, "Reinterpreting," 12-13.

²²Fadel, "Reinterpreting," 14.

²³As quoted from Fadel, "Reinterpreting," 14, note 36. ("ṭalab al-walī innamā huwa li taḥsul al-kafā'ah bi nazar al-walī,").

so as to assure that the spouse has equal social and religious status. This, although understood as an important factor to succeed the marriage, is not the condition to accept the validity of the marriage. The woman can thus marry to a man of her choice even though he might not fulfill the condition of *kafa'ah*, while the contract of marriage is considered valid.

We see therefore that factually *kafa'ah* is not the obligation of the marriage; it is only optional since both the woman and the guardian have a freedom to accept the groom seen as not fulfilling its condition so long as the woman gives her consent. Seeing *kafa'ah* not as an obligation but the mere option shows very clearly that the main concern of Mālikî jurists towards the issue of guardianship in marriage is to assure that the women can realize their objective of marriage. In the view of this school, the principal role of guardianship in the marriage of an adult woman is thus not to determine the groom to whom the woman will marry but rather the terms on which she will marry.²⁴ Hence, practically, the guardian is more to act as an agent (*wâkil*) than as a *walî* of the woman, the duty of which is not to interfere the woman's plan of marriage but to assist her in insuring the success of marriage since she is basically free to contract for herself without the intermediation of the agent.

The argument that the function of a male guardian is more as an agent (*wâkil*) of woman in marriage is just in conjunction with our thesis explained before that the mission of guardianship is not to uphold the male hegemony towards the female family members or more widely due to the gender gap between male and female in the society but rather the need of the family to assure that all family members can achieve the main objective of marriage, i.e., the continuation of the family well-being in society. The interpretation as such, however, entails another question of the possibility to reinterpret the theory of guardianship in marriage so as to put it in par with the teaching of gender equality commonly embraced in modern society.

²⁴Fadel, "Reinterpreting," 15.

IV. Conclusion: The Need of Reinterpretation

Reading paragraphs above, one may come to a question that if the role of the male guardianship is no more than an agent (*wâkil*) of a woman in marriage, having no legal right to interfere the consent of the woman, why do then all schools of Islamic law basically require the presence of a male guardian in the marriage of a female member? This question arises since an inescapable ambiguity in seeing the nature of marriage contract itself. On the one hand, it is viewed as a publicly regulated relationship, but, on the other, it can also be viewed as a purely private bond. This is in fact due to such an ambiguity that we see the position of marriage in a different way: is marriage a legal act necessarily placed in a public domain or is it purely a private relation in which no one has right to interfere? As a consequence, our view on the legal position of marital guardianship is also different: we may see it as a private business so that both bride and groom basically have their own right to decide without the interference of the guardian, or it is a public legal domain since the contract of marriage cannot basically be undertaken without the presence of other member of the family as a guardian. In this sense, the theory of marital guardianship followed in Mâlikî school might however be created to resolve such ambiguity, i.e., by giving a middle way position of the guardianship itself: that the presence of a guardian in marriage is basically needed in order to help the woman assuring her attainment of effective objectives of the marriage. Thus, his presence is not intended to lessen the personal right of the woman to decide the marriage, inasmuch as that the woman is also free to refer to the judge in case she cannot find any male relative willing to support the marriage.

Seeing the argument above, one may come to a conclusion that the rule of guardianship in marriage is basically created to support the female family members in deciding their plan of marriage. It is clearly not established to support the control of the male towards the female members or maintain the status quo of gender gap in the family. The interpretation as such is of course built on the basis of understanding the background of gender relation existing at the time when the logic of Mâlikî school was

developed in the society. Therefore, we can say that although the Mâlikî's rule of marital guardianship was created in order to positively help the bride and groom to achieve a successful marriage, the logic of this rule was still much influenced by the pattern of gender relation living in the society where the gravity rested on the male leadership. That is why female party remained essentially to be the "object" of guardianship, particularly that of adult women in which the presence of the male relatives were still needed to be the agent (*wâkil*) of the bride. It is thus safe to assume that what Mâlikî jurists had done in relation to the theory of guardianship was essentially an effort to make a balanced power between man and woman in marital relationship, although in so doing the success was much dependent on the creation of substantive law that could as much as possible offer a change in the society. Differently put, what Mâlikî had offered was essentially an idea to give women more chance to decide their own choice and personal freedom but this might unfortunately not be reflected effectively in the law since the framework of gender relation in the society was not ready yet for such revolutionary changes. We can say therefore that although guardianship was created as a leeway to assist female party accessing an effective marriage, maintaining the institution of marital guardianship was in itself an evidence of the influence of patriarchal system entrenched in society.

Reinterpreting the guardianship theory inasmuch as bringing it to come in line with the need of gender equality and personal autonomy of both male and female is therefore a possible venture. This is based on at least two considerations: *first*, different gender logic between the one embraced in the society when the Mâlikî school was developed in the early and middle ages of Islamic history and that accepted in the modern era has certainly influenced the changing logic of personal law followed in Muslim society. Hence, applying the frame of gender relationship living in the Mâlikî's time for this current period must certainly create a big problem for the development of Islamic law. In other words, following rigidly the rule of guardianship which can be seen as contradicting the view of modern values may only result in a rebuff of Muslim society to the

institution of law itself. This is because the feeling of justice and equality has changed in conjunction with the changing time. Here, adopting Eugen Ehrlich's theory, if the gravity of legal development basically lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself, the changing pattern on the thinking of marital guardianship will certainly happen in follows of the changing Muslim worldview of gender relationship. Thus, in the post discussion of Mâlikî's theory of guardianship above one may pose such questions as: should we continue the tradition of marital guardianship if it is not seen anymore as protecting the personal autonomy of female members in the family? Can we now still use the argument of efficient marriage to preserve the rule of male guardianship in marriage if it is not seen as convincing the more current belief of gender equality embraced in society?

Second, the emergence of a nuclear family model in most modern society has also given a negative factor to the law of guardianship in marriage. At least from the perspective of its implementation, the rule of guardianship contradicts the philosophical values basing the practice of the nuclear family. Personal autonomy of each party in marriage basically is the foundation of building a nuclear family in which father and mother have equal rights toward their children without the involvement of other cognate relatives. This runs in contradiction to the practice of marital guardianship in which father and male relatives usually become the actors of such guardianship. Therefore, involving only the father or the male relatives as a guardian in marriage without the involvement of the mother or other female relatives in one family unit is certainly a mockery to the principle of nuclear model already built in the family. The old practice of marital guardianship is thus problematic not only due to its ignorance of personal autonomy of each family member but also for the fact that its practice disregards the equality position of female and male party in the family.

Understanding the two factors above, it is safe to conclude that reinterpreting the law of marital guardianship is just the only way to revitalize Islamic marriage law in the lives of modern society. This is based

on the belief that since the society where we live now has distinct gender values, implementing the old rule of marital guardianship will certainly give a bad impact to the development of law itself in the society. In this sense, Mālikî's rule of marital guardianship can be used as a starting point of such reinterpretation due to the fact that although the rule might not be built on the basis of common demeaning view of female party in the family—as it is based more on the need to help the children accessing an effective marriage—the rule itself was created not beyond the framework of the old gender relationship where personal equality and autonomy still rested on the frame of male leadership. This means also that reinterpreting the Islamic law of marital guardianship is essentially the mere continuation of the previous efforts done by many jurists such as those of Mālikî school to bring the religious law coming into the same line with the feeling of justice of society.

In so doing, we may thus change this tradition of marital guardianship so much as that its practice does not contradict the modern values of gender equality and personal autonomy existing currently in our society. Some reforms may be applied here in the practice of marital guardianship: *first*, the guardianship is not practiced to place female party in marriage as an object of the male relatives. *Second*, it is not meant as a leeway to legalizing minor marriage. In any condition, if the minor marriage should happen, the guardian should work not only for girls but also for boys with the objective to protect the bride and groom from unscrupulous marriage. *Third*, the father or male relatives are not the only party to act as a guardian without involving also the mother and female relatives in a nuclear family. Thus, any members in a nuclear family can basically act as a guardian in the marriage, i.e, father, mother, brothers and sisters. *Fourth*, mature women and widowed are basically free to do their marriage without the involvement of the guardian. *Five*, in the case of the mature women willing to involve her guardian, the function of the guardian is only to act as an agent (*wākil*) of the woman, especially to help her getting the success of marriage based on her personal choice as she is the one having a freedom to decide the marriage.

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