

From Exclusivism to Openness: Deconstructing the Role of Deaf Individuals as Marriage Witnesses in the Compilation of Islamic Law

Ahmad Izzuddin

Universitas Islam Negeri Maulana Malik Ibrahim Malang, Indonesia

Email: azharzudin@syariah.uin-malang.ac.id

Mohammad Fauzan Ni'ami

Universitas Islam Negeri Maulana Malik Ibrahim Malang, Indonesia

Email: Niamifauzan01@gmail.com

Abd. Rouf

Universitas Islam Negeri Maulana Malik Ibrahim Malang, Indonesia

Email: Abd.rouf1208@uin-malang.ac.id

Moh. Irfan

Universitas Islam Negeri Sunan Ampel Surabaya, Indonesia

Email: Moh.irfan@uinsby.ac.id

ABSTRACT

The role of marriage witnesses for deaf individuals has been a subject of debate among various Islamic schools of thought. The *Compilation of Islamic Law* (*Kompilasi Hukum Islam* or KHI), as Indonesia's codified Islamic jurisprudence, adopts the view of scholars who prohibit deaf individuals from serving as marriage witnesses. This article critically examines the KHI's stance, arguing that it marginalizes deaf individuals in the marriage process. This study employs a normative approach, utilizing Auda's *maqāṣid al-sharī'ah* concept. The findings reveal that the exclusion of deaf individuals as marriage witnesses stems from the KHI's restrictive interpretation, which is rooted in classical *fiqh*. As a legal product influenced by Shafi'i jurisprudence, the KHI maintains the requirement that marriage witnesses must have both auditory and visual capabilities. However, through the principles of openness and purposefulness in Auda's *maqāṣid al-sharī'ah*, this study argues that hearing-impaired individuals possess the necessary qualifications to serve as marriage witnesses. In contemporary society, deaf individuals effectively communicate through various means, including sign language and assistive technologies. Therefore, a legal reinterpretation based on universal Islamic values—particularly those emphasizing equality and justice—is both necessary and justified.

[Peran saksi pernikahan bagi individu tunarungu telah menjadi perdebatan di antara berbagai mazhab fikih. Kompilasi Hukum Islam (KHI) mengadopsi pandangan ulama yang melarang individu tunarungu menjadi saksi pernikahan. Artikel ini secara kritis meninjau pandangan KHI, dengan berargumen bahwa

ketentuan tersebut (sengaja) meminggirkan individu tunarungu dalam proses pernikahan. Penelitian ini menggunakan pendekatan normatif dengan memanfaatkan kerangka *maqāṣid al-sharī'ah* ala Auda. Temuan penelitian ini menunjukkan bahwa eksklusif terhadap individu tunarungu sebagai saksi pernikahan berasal dari interpretasi KHI yang terbatas, yang berakar pada doktrin fikih klasik. Sebagai produk hukum yang banyak dipengaruhi oleh mazhab Syafi'i, KHI menetapkan bahwa saksi pernikahan harus memiliki kemampuan mendengar dan melihat. Namun, melalui prinsip keterbukaan dan 'kebertujuan' dalam *maqāṣid al-sharī'ah* Auda, penelitian ini berpendapat bahwa individu dengan gangguan pendengaran tetap memenuhi kualifikasi untuk menjadi saksi pernikahan. Dalam masyarakat kontemporer, individu tunarungu dapat berkomunikasi secara efektif melalui berbagai sarana, termasuk bahasa isyarat dan teknologi pembantu. Oleh karena itu, reinterpretasi hukum berdasarkan nilai-nilai universal Islam—khususnya yang menekankan kesetaraan dan keadilan—dapat dibenarkan.]

KEYWORDS

Shafi'i jurisprudence, marriage witness, deaf people, Compilation of Islamic Law, openness

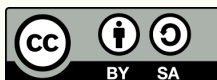
ARTICLE HISTORY

Received: 2 October 2024

Approved for Publication: 30 December 2024

TO CITE THIS ARTICLE

Ahmad Izzuddin, Mohammad Fauzan Ni'ami, Abd. Rouf, Moh. Irfan, "From Exclusivism to Openness: Deconstructing the Role of Deaf Individuals as Marriage Witnesses in the Compilation of Islamic Law" *Al-Ahwal: Jurnal Hukum Keluarga Islam* 17, no. 2 (2024): 287-306, <https://doi.org/10.14421/ahwal.2024.17208>.



Copyright © 2024 by Author(s)

This work is licensed under a Creative Commons Attribution-ShareAlike 4.0 International License.

Introduction

Since it was ratified on June 10, 1991, the Compilation of Islamic Law (KHI) has not been updated. In fact, since the early 2000s, criticism of the contents of the KHI material has emerged, pioneered by the liberal progressive group.¹ The group proposed the Counter Legal Drafting of the Compilation of Islamic Law (CLD-KHI) because the KHI contains patriarchal values that give rise to discrimination against

¹ Following Imam Mawardi's opinion, the liberal-progressives in question are those who promote Islamic values and modernism, advocate human rights, human and gender equality, and offer an alternative Islam. See Ahmad Imam Mawardi and Achmad Kemal Riza, "Why Did Kompilasi Hukum Islam Succeed While Its Counter Legal Draft Failed? A Political Context and Legal Arguments of the Codification of Islamic Law for Religious Courts in Indonesia," *Journal of Indonesian Islam* 13, no. 2 (2019): 421–53.

women. Another reason is as an agenda to promote the value of gender equality in written norms.²

One of the factors causing the emergence of CLD-KHI is due to social conditions that segregate groups of women, such as increasing cases of domestic violence and abandonment of wives due to polygamy.³ However, the CLD-KHI became controversial because there was opposition from groups who did not agree, so the draft was suspended and cancelled, and the initiative to be discussed in the legislature was stopped.⁴

Nevertheless, criticism of KHI continues to emerge as time progresses. Several studies show that KHI will always be criticized to be able to respond to the times, both in terms of methodological criticism as expressed by Nuroniyah,⁵ then criticized the patriarchal issue in the material carried out by Fakhyadi,⁶ and Sodik's critique of conservatism in KHI.⁷ The point is that KHI's criticism tends to marginalize women based on material content.⁸

Apart from patriarchal issues, which are the starting point for criticism of KHI, issues regarding people with disabilities are also issues that need to be considered in criticizing KHI. The KHI material that needs to be criticized is about marriage witnesses with sensory disabilities.⁹ Article 25 explains that one of the requirements to be a marriage witness is not having a hearing disability or intellectual disability. The article is a sign that the KHI has not recognized the rights of witnesses to marriage for people with hearing disabilities. KHI article 25 gives the impression that people with hearing disabilities do not have legal capacity, thus negating the rights of witnesses to marriage. Deaf people are perfect legal subjects and receive equal recognition before the law.¹⁰

² Siti Musdah Mulia, "MUSLIM FAMILY LAW REFORM IN INDONESIA: A Progressive Interpretation of The Qur'an," *Al-Mawarid* 15, no. 2 (2015): 1-18.

³ Alfitri, "Whose Authority? Contesting and Negotiating the Idea of a Legitimate Interpretation of Islamic Law in Indonesia," *Asian Journal of Comparative Law* 10, no. 2 (2015): 191-212.

⁴ Mawardi and Riza, "Why Did Kompilasi Hukum Islam Succeed While Its Counter Legal Draft Failed? A Political Context and Legal Arguments of the Codification of Islamic Law for Religious Courts in Indonesia."

⁵ Wardah Nuroniyah, "Kritik Metodologis Terhadap Pembaruan Hukum Perkawinan Dalam Kompilasi Hukum Islam," *Mahkamah: Jurnal Kajian Hukum Islam* 1, no. 1 (2016): 33-47.

⁶ Defel Fakhyadi, "Patriarkisme Hukum Kewarisan Islam: Kritik Hukum Waris Islam Dan Kompilasi Hukum Islam," *Jurnal Hukum Islam* 3, no. 1 (2021): 1-16.

⁷ Mochamad Sodik, "Pembacaan Progresif Terhadap Fikih Keluarga (Kritik Terhadap KHI Dan Ruu HTPA)," *Asy-Syir'ah: Jurnal Ilmu Syari'ah Dan Hukum* 46, no. 1 (2012): 109-38.

⁸ Euis Nurlaelawati, *Modernization, Tradition, and Identity: The Kompilasi Hukum Islam and Legal Practice in Indonesian Religious Courts*, 1st ed. (Amsterdam: Amsterdam University Press, 2010), 106.

⁹ People with sensory disabilities are those whose function is disrupted by one of the five senses, including blindness, deafness and speech impairments. See Explanation of Article 4 Paragraph (1) letter d of Law No. 8 of 2016 concerning Persons with Disabilities (*Undang-undang Nomor 8 Tahun 2016 Tentang Penyandang Disabilitas*).

¹⁰ Amran Suadi, "Kesamaan Di Hadapan Hukum (Equality Before the Law) Bagi Penyandang Disabilitas Di Peradilan Agama," in *Hukum Disabilitas Di Indonesia*, ed. Muhammad Sadi Is, Fadilah Mursid, and Ari Azhari (Depok: Rajawali Pers, 2021), 43.

KHI's view regarding the loss of the position of marriage witness for deaf people has to be criticized because the discussion of the position and requirements of witnesses in marriage is still a matter of debate among madhhab scholars.¹¹ Concerning marriage witnesses, the Malikiyah, Syafi'iyah, and Hanabilah scholars define witnesses as the pillars of marriage. Meanwhile, the Hanafiyyah and Zhahiriyyah ulama place witnesses as a requirement (*syarat*) for marriage.¹² It's just that there are differences of opinion among Muslim scholars regarding the requirements for being a witness in a marriage, such as being sane, mature, free, and able to hear and see.¹³ Then speak, and know the words of the person who is agreeing (*aqd*).¹⁴

Seeing the differences between Muslim scholars shows that there is a gap to criticize the KHI, which is based on *fiqh*. Researchers consider that the position of deaf, disabled marriage witnesses in the KHI marginalizes the sensory disabled community. In the KHI, deaf disabled marriage witnesses have not become perfect legal subjects. This means that deaf people are not included as people who can testify (*ahliyyah asy-syahādah*).¹⁵ This is contrary to the paradigm of legal inclusivity in Indonesia as stated in Law No. 8 of 2016 concerning Persons with Disabilities and the universal values of Islam, which uphold justice and equality.¹⁶

Criticism of the construction of deaf marriage witnesses is necessary to protect the rights of people with disabilities. In a legal context, criticism is made so that legal protection for people with disabilities is not ambiguous. This is as stated by Sodiqin that the regulations on disability rights are experiencing disharmony.¹⁷ Not only that, sociologically, the number of people with disabilities in Indonesia reaches 8.5% of the total population in Indonesia.¹⁸

Previous research has examined the issue of marriage witnesses, such as Hadi, who revealed that there was anxiety among marriage registrars in advocating for marriage witnesses with sensory disabilities.¹⁹ Hadi also researched

¹¹ Wahbah Az-Zuhaili, *Fiqh Al-Islām Wa Adillatuh Juz 7* (Beirut: Dar al-fikr, 1985), 82.

¹² Az-Zuhaili, 70-71.

¹³ Syaikh Abdurrahman Al-Juzairi, *Terjemah Fikih Empat Mazhab Jilid 5* (Jakarta: Pustaka Al-Kautsar, 2015).

¹⁴ Ibrahim bin Muhammad bin Ahmad Al-Bajuri, *Hasyiyyah Al-Bajuri 'ala Syarh Ibnu Qosim Jilid 3* (Jeddah: Darul Minhaj, 2016), 350.

¹⁵ Ahmad bin Umar Asy-Syatiri, *Syarh Al-Yaqut an-Nafis Fi Madzhab Ibni Idris* (Beirut: Darul Minhaj, 2007), 588.

¹⁶ Qodariah Barkah, "Perlindungan Hukum Bagi Penyandang Disabilitas Dalam Perspektif Islam," in *Hukum Disabilitas Di Indonesia*, ed. Muhammad Sadi Is, Fadilah Mursid, and Ari Azhari (Depok: Rajawali Press, 2021), 71.

¹⁷ Ali Sodiqin, "Ambiguitas Perlindungan Hukum Penyandang Disabilitas Dalam Perundang-Undangan Di Indonesia," *Jurnal LEGISLASI INDONESIA* 18, no. 1 (2021): 41.

¹⁸ Kemenko PMK, "Pemerintah Penuhi Hak Penyandang Disabilitas di Indonesia", *Kemenko PMK*, 15 Juni 2023, diakses 7 Mei 2024, <https://www.kemenkopmk.go.id/pemerintah-penuhi-hak-penyandang-disabilitas-di-indonesia>.

¹⁹ Mukhammad Nur Hadi, Fahrudin Ali Sabri, and Ahmad Masum, "Betwen Conservatism and Progresivism: The Young Penghulu in East Java's Legal Paradigm Addresses Disability Issues in Marriage," *Al-Qadha: Jurnal Hukum Islam Dan Perundang-Undangan* 10, no. 2 (2023): 198.

the views of marriage registrars on the status of deaf marriage witnesses.²⁰ Yulianti studied the transformation of witnesses contained in *fiqh* into KHI. The research also found that the Hanafi, Syafi'i, and Hambali schools require that marriage witnesses not be deaf people.²¹ Syafe'i tried to deconstruct the witness requirements contained in Article 25 of the KHI. This is because several requirements do not provide space for human rights freedom and equality such as women and deaf people.²² Abdillah conducted research by discussing that a witness is someone who can observe and explain something that is witnessed.²³

This paper aims to discuss marriage witnesses with sensory disabilities, especially hearing disabilities. By using the juridical-normative type, the focus of this study is to critique KHI article 25 concerning the requirements for marriage witnesses. In this article, the author attempts to deconstruct the marriage of deaf people to obtain justice, equality, and certainty as legal subjects. Therefore, the theory that will be used to carry out the deconstruction is the *maqāṣid al-syarī'ah* of Auda. Meanwhile, the system approach, namely openness and purposefulness, is used for the reconstruction of marriage witnesses that reach the values of justice and equality by examining the purpose of marriage witnesses.

Construction of Deaf Marriage Witnesses: Opinions of Muslim Scholars on the Position of Marriage Witnesses

KHI is a guideline for Indonesian Muslim society in acting in the civil sector.²⁴ The position of the KHI is as a source of Islamic law in Indonesia, which accommodates the opinions of madhhab scholars, especially the Shafi'i.²⁵ This can be seen from the many KHI materials that adopt the views of Syafi'iyah scholars. For example, witnesses to marriage as a pillar of marriage in article 14 and hearing as a requirement for witnesses to marriage in article 25.²⁶ Marriage witnesses as a

²⁰ Mukhammad Nur Hadi, "Nalar Fikih Penghulu Di Kota Malang Dalam Saksi Nikah Tuli," *Inklusi* 8, no. 2 (2022): 169–84.

²¹ Irma Yulianti, "Transformasi Fiqh Empat Madzhab Ke Dalam Kompilasi Hukum Islam Tentang Saksi Nikah," *ADLIYA: Jurnal Hukum Dan Kemanusiaan* 12, no. 1 (2019): 61–84.

²² Abdul Malik Syafe'i, "Dekontruksi Pasal 25 Kompilasi Hukum Islam Tentang Kesaksian Perempuan Dalam Perkawinan," *Medina-Te Jurnal Studi Islam* 14, no. 1 (2016): 195–210.

²³ Syaik Abdillah et al., "Revisiting the Role of Women as Witnesses in Fiqh Justice," *Ahkam: Jurnal Ilmu Syariah* 19, no. 1 (2019): 61–80.

²⁴ Naskur Bilalu et al., "Compilation of Islamic Law as Judge's Consideration at a Religious Court in North Sulawesi, Indonesia," *Samarah* 6, no. 2 (2022): 514–36.

²⁵ Ahmad Rajafi, "Sejarah Pembentukan Dan Pembaruan Hukum Keluarga Islam Di Nusantara," *Aqlam: Journal of Islam and Plurality* 2, no. 1 (2018): 1–20.

²⁶ Marriage witnesses as a pillar of marriage are not only explained in the KHI, but there are laws and regulations in Indonesia that regulate marriage witnesses. In Law Number 1 of 1974 concerning Marriage, article 26 states that a marriage that is not attended by two witnesses can be requested to be annulled. The validity of marriage witnesses is then emphasized in PP Number 9 of 1975 concerning the Implementation of Law Number 1 of 1974, article 10, which states that marriage procedures must be carried out in the presence of two witnesses. Meanwhile, in the Regulation of the Minister of Religion of the Republic of Indonesia Number 30 of 2024 concerning Marriage Registration, article 10 also explains that the pillars of

pillar of marriage are accommodated in article 14, which explains that carrying out a marriage must be attended by the prospective husband and wife, a marriage guardian, two witnesses, and an *ijab kabul*. The article states:

“To carry out a marriage there must be: a). Prospective husband, b). Prospective wife, c). Marriage guardian, d). Two witnesses, e). *Ijab and kabul*.”

Article 14 is the result of the majority opinion of scholars. This can be seen from several views of scholars regarding the position of marriage witnesses. To clarify the differences in opinion of madhhab scholars, see the table below:

Table 1. Comparison of the position of marriage witnesses from the madhhab scholars' perspective

Madhhab Scholars	Witness as Pillar	Witness as a Requirement	Witnesses are not pillars and Requirement
Shafi'i scholars	✓	X	X
Hanabilah scholars	✓	X	X
Hanafiyyah scholars	X	✓	X
Malikiyyah scholars	X	✓	X
Syi'ah scholars	X	X	✓
Ja'fariyyah scholars	X	X	✓

Information: ✓ = Accept, X = Reject

The table above provides an overview of the Shafi'iyyah and Hanabilah Ulama making witnesses as the pillars of marriage. Meanwhile, the Hanafiyyah and Malikiyyah scholars make witnessing a legal condition for marriage.²⁷ The basis of this group's thinking is based on two hadiths, namely: 1) *Hadith* narrated by Ibn Abbas from the Prophet Muhammad Saw. said “*al-baghāyā al-lātī yunkiḥna anfusahunna bi ghairi bayyinatīn* (prostitutes are people who marry themselves without any witnesses)”. 2). *Hadith* narrated by Aisyah r.a. from the Prophet Muhammad Saw. said “*lā nikāḥa illā bi waliyyin wa syahidai ‘adlin* (there is no marriage except with a guardian and two just witnesses)”.²⁸

The reason for the difference in the position of the marriage witness is because of the difference in understanding the pillars and valid requirements in marriage between schools of thought. According to the majority of scholars, a marriage witnessed as a pillar is a matter that supports the occurrence of an event because it is an internal part of the event. Witnesses are a pillar of marriage because they are part of the marriage. Meanwhile, according to Hanafi scholars, pillars are matters that determine the existence of something and become part of

marriage include the prospective husband, prospective wife, marriage guardian, two witnesses, and *ijab kabul*.

²⁷ According to some jurists from Malikiyyah schools, witness is not the pillar of marriage, however the marriage should be announced. For further, see Az-Zuhaili, *Fiqh Al-Islām Wa Adillatuh* Juz 7., 70.

²⁸ Amir Syarifuddin, *Hukum Perkawinan Islam Di Indonesia: Antara Fiqh Munakahat Dan Undang-Undang Perkawinan* (Jakarta: Prenada Media Group, 2009), 82.

its essence. Therefore, the pillars of marriage according to the views of Hanafi scholars are only *ijab* and *kabul* because the essence of marriage lies only in the marriage contract.²⁹ Meanwhile, according to the majority of scholars, the conditions for marriage are matters that determine the existence of something and are not part of something. In this case, the requirement is an external factor of an act. Therefore, the majority of scholars think that marriage witnesses are not a requirement of marriage because marriage witnesses are an internal part of marriage. Meanwhile, Hanafi scholars understand that conditions are something that determines the existence of an act. Hanafi scholars have the view that marriage witnesses are a condition because the essence of marriage is not in the marriage witnesses.³⁰

There are also some less well-known views about legal marriage without witnesses. This opinion was expressed by the Shiite school of thought, as well as by Abdurrahman bin Mahdi, Yazid bin Harun, Imam az-Zuhri, and the Ja'fariyyah scholars. The basis of this opinion is because the practice of marriage without witnesses was once carried out by Ibn Umar, Hasan bin Ali, Salim and Hamzah who were both sons of Abdullah bin Umar. Several narrations also confirm that marriage without witnesses was once carried out by Ibn Zubair.³¹

The basic legal basis used for the opinion that a marriage without witnesses is valid is the statement of Ibn Munzir, namely that no hadith stipulates the requirement for the presence of two witnesses in a marriage "*lā yatsbutu fī syāhidaini fī ḥikahī khobarun* (there is no hadith that stipulates the requirement for the presence of two witnesses in a marriage)". The next basis for thinking is the statement of Yazid bin Harun, who stated that Allah Swt. only ordered the presence of witnesses in the practice of buying and selling and did not order their presence during marriage: "*amara Allahu bil isyḥādi fī al-bai'i dūna an-nikāhi*".³² However, Maliki scholars have different opinions regarding the time of witnessing in marriage. The majority of Maliki scholars are of the opinion that the presence of witnesses during the marriage contract is recommended. Meanwhile, the presence of a marriage witness when husband and wife want to have intercourse is mandatory. This group views the presence of witnesses as announcing the marriage, and this announcement can be realized during the marriage contract or when having sexual intercourse with his wife.³³

Based on the explanation, it is understood that, according to the majority of scholars, marriage witnesses affect the validity of the marriage. In the discussion of marriage, the position of witnesses is very urgent. Seeing this, KHI tends to choose the opinion of the majority of scholars adopted by the Syafi'iyah and Hanabilah, namely the position of marriage witnesses as a pillar, not following the opinions of

²⁹ Az-Zuhaili, *Fiqh Al-Islām Wa Adillatuh* Juz 7., 36.

³⁰ Az-Zuhaili., 36.

³¹ Abdul Karim Zaidan, *Al-Mufassshal Fi Ahkam Al-Mar'ah Wa Bait Al-Muslim Fi Syari'ah Al-Islamiyyah* Juz 6 (Beirut: Muassasu ar-Risalah, 1993)., 109.

³² Sayyid Sabiq, *Fiqh As-Sunnah* (Beirut: Dar al-Fatah al-l'lam ak-'Arabiy, 2012).

³³ Zaidan, *Al-Mufassshal Fi Ahkam Al-Mar'ah Wa Bait Al-Muslim Fi Syari'ah Al-Islamiyyah* Juz 6., 110.

the Hanafiyyah and Malikiyah, who position marriage witnesses as a valid requirement for marriage.

Construction of Deaf Marriage Witnesses: Affiliation of Madhab in the Compilation of Islamic Law

In addition to marriage witnesses as a pillar, KHI also formulates the requirements for marriage witnesses. This is accommodated in article 25, which includes that marriage witnesses must be Muslim men, fair, sane, mature, have no memory impairment, and must not be people with sensory disabilities, especially deaf people.³⁴ The article states:

“Those who can be appointed as witnesses in a marriage contract are Muslim men, just, mature, have no memory impairment and are not deaf people.”

Of course, this is a problem because the KHI does not recognize the existence of deaf witnesses. This means that deaf people cannot be witnesses. This position is certainly far from the inclusive concept that prioritizes equality. Basically, the majority of scholars agree that marriage witnesses must have the ability to testify (*ahliyyah asy-syahādah*). Among these abilities include Islam, rational, and being just. (*al-‘adālah*), man (*adh-dhukūra*), able to hear (*as-samā’*), able to speak (*an-nuṭqu*), intelligent (*ḍabt*), able to see (*al-baṣar*), and know the spoken word or language of the person doing the contract (*ma’rifatu lisan au lughot al-‘aqīdaini*).³⁵ However, there is debate among madhab of thought regarding the requirements for witnesses to a marriage, especially regarding the ability to see (*al-baṣar*), speak (*an-nuṭqu*), and hear (*as-samā’*). The ability to testify is certainly an issue because there are differences of opinion among scholars. In the context of this research, witnesses to marriage with sensory disabilities, including blind people, mute people, and deaf people, are the topics that will be described. The summary and description are explained below:

Table 2. Comparison of marriage witnesses for people with sensory disabilities from the *madhab* scholars' perspective

Disabilities	Hanafiyyah Scholars	Malikiyyah Scholars	Syafi’iyyah Scholars	Hambaliyyah Scholars
Blind	✓	✓	X	✓
Speech	✓	✓	X	X
Deaf	-	X	X	X

Information: ✓ = Accept, X = Reject, - = difference

³⁴ The requirement that marriage witnesses must not be deaf is only found in the KHI. General laws and regulations (*lex generalis*) such as Law Number 1 of 1974 concerning Marriage and PP Number 9 of 1975 do not contain requirements for deaf marriage witnesses. Likewise, there is no prohibition on deaf marriage witnesses. In article 14, it only states that the requirements for witnesses are male, Muslim, mature, sane, and fair.

³⁵ Khulud Badru Zamanan, “شروط عقد النكاح في الفقه الإسلامي واختيارات قانون الأحوال الشخصية الكويتي”, مجلة كلية 32, no. 4 (2017): 1440–1517.

First, the position of a blind person as a witness to a marriage. In this position, the Syafi'iyah scholars do not allow blind people to be witnesses to a marriage. The Syafi'i school requires that a witness to a marriage be someone who can see. This view is based on the reason that in the *ijab kabul*, what is witnessed is the words of the person who is making the marriage contract. These words cannot be proven except by seeing and hearing.³⁶ However, there is another opinion from the Syafi'iyah which allows a blind witness to be a marriage witness if they have the knowledge and belief that the voice of the *ijab kabul* comes from the two people in the marriage contract.³⁷ Meanwhile, Hanafi scholars allow blind witnesses to be witnesses to a marriage. Hanafi scholars position blind people like healthy people. Through Imam al-Kasani, Hanafi scholars argue that seeing a witness to a marriage contract is not a requirement for a valid marriage. Therefore, a marriage is considered valid with a blind witness to the marriage.³⁸

The opinion of Hanafi scholars regarding the validity of blind witnesses is followed by Maliki scholars, namely that seeing is not included in the requirements for witnesses to a marriage.³⁹ Likewise, according to the Hanabilah scholars, a marriage is valid with a blind marriage witness, therefore, a marriage witness who can see is not a requirement for a marriage witness. However, the Hanabilah scholars note that a blind witness must know and believe that the voice of *ijab* and *kabul* comes from two people who are entering into a marriage contract even though they cannot see.⁴⁰

Second, the position of a mute person as a marriage witness also has different opinions. In this case, Hanafiyyah and Malikiyyah scholars have the same tendency of opinion, namely, allowing a mute person to be a marriage witness. Not only that, but someone who is not able to speak is considered valid for both. Hanafiyyah scholars reason that the ability of a witness lies in the ability to receive information about the marriage contract.⁴¹ Maliki scholars think that the testimony of a mute person is permissible as long as they understand the *ijab kabul* of the person who is doing the marriage contract. The basis of this group's argument is that as long as there are instructions that provide an understanding of the marriage contract process, the witness is considered valid, so that a mute person can understand the *ijab kabul* but cannot express it. Therefore, this is not a problem. Another basis is that there is no correlation between the speech of a person doing the marriage

³⁶ Zaidan, *Al-Mufassshal Fi Ahkam Al-Mar'ah Wa Bait Al-Muslim Fi Syari'ah Al-Islamiyyah* Juz 6., 122.

³⁷ Asy-Syatiri, *Syarh Al-Yaqut an-Nafis Fi Madzhab Ibni Idris*, 588

³⁸ Zaidan, *Al-Mufassshal Fi Ahkam Al-Mar'ah Wa Bait Al-Muslim Fi Syari'ah Al-Islamiyyah* Juz 6., 122.

³⁹ Wazarootul auqof wastikwanul islamiyyah, *Al-Mausu'ah Al-Fiqhiyah Al-Kuwaitiyah* Juz 41 (Kuwait: Wazarootul auqof wastikwanul islamiyyah, 2002)., 299.

⁴⁰ Zaidan, *Al-Mufassshal Fi Ahkam Al-Mar'ah Wa Bait Al-Muslim Fi Syari'ah Al-Islamiyyah* Juz 6., 122.

⁴¹ Zaidan., 123.

contract and the muteness of a witness because the witness can still hear the *ijab kabul*.⁴²

Different from the majority of Syafi'iyyah and Hanabilah scholars. This group considers that the person who becomes a witness to the marriage must be able to speak, so a marriage with a mute witness is not allowed. Different from the majority of Syafi'iyyah and Hanabilah scholars. This group considers that the person who becomes a witness to the marriage must be able to speak, so a marriage with a mute witness is not allowed.⁴³ Third, the position of deaf marriage witnesses. Based on observations and searches in several books of scholars of the school of thought, researchers found three opinions on this issue, namely the opposing, pro, and neutral opinions.

The first opinion is the opposing opinion. The majority of scholars require that the marriage witness must be able to hear the *ijab kabul*. This opinion is the best (*ashāh*) among Shafi'i scholars and the preferred opinion (*mukhtār*) among Hanabilah scholars.⁴⁴ The logical argument of this group is that the *ijab kabul* speech is something that must be understood and comprehended by the witnesses, whereas deaf people are unable to hear and will certainly not be able to understand what is being said by the person who is performing the marriage contract.⁴⁵ Likewise, Maliki scholars consider a marriage to be invalid if the witness to the marriage is deaf; this is because he is unable to hear the words of the person who is carrying out the marriage contract.⁴⁶

The second opinion is the pro opinion. Based on the researcher's search, this opinion is weak (*dhaif*). There are only a few scholars who allow it, one of them being the Hanafiyyah scholars. Through Imam As-Sughdi, there is an opinion that allows witnesses to a marriage from the deaf community; the law implies that the marriage is considered permissible.⁴⁷ The argument that this group built was that the requirement for marriage was the presence of witnesses to the marriage, not hearing the witnesses.⁴⁸ However, this group did not fully accept it because of internal debates such as Qadhi Khan's opinion which tended to choose the opinion that marriages should not be conducted with deaf witnesses. Then some az-Zaila'i thinks that a deaf disabled marriage witness is the opinion chosen (*mukhtār*) by his followers Imam Sughdi but is still considered weak (*dhaif*). As a result, this

⁴² Zamanan, "شروط عقد النكاح في الفقه الإسلامي واختيارات قانون الأحوال الشخصية الكويتي", 1470.

⁴³ Wazarootul auqof wastikwanul islamiyyah, *Al-Mausu'ah Al-Fiqhiyah Al-Kuwaitiyah* Juz 41., 299

⁴⁴ Abu Bakar Utsman Muhammad Syatha Ad-Dimyati, *I'anatu Ath-Thalibin* Juz 3 (Beirut: Darul Fikr, 1997), 343.

⁴⁵ Syamsuddin Muhammad bin Ahmad al-Khotibi Asy-Syirbini, *Mughi Al-Muhtaj Ila Ma'rifati Ma'ani Alfadz Al-Minhaj* Juz 4 (Beirut: Darul Kutub Ilmiyah, 1994), 235.

⁴⁶ Muhammad bin Ahmad bin Arafah ad-Dasuqi Al-Maliki, *Hasiyyah Ad-Dasuqi 'ala Syarh Al-Kabir* Juz 4 (Beirut: Darul Fikr, n.d.), 168.

⁴⁷ Burhanuddin Abi Al-Ma'ali, *Adz-Dzakhirotu Al-Burhaniyyah Al-Musamma Dzakhirotu Al-Fatawa Fi Al-Fiqh 'ala Mazhab Al-Hanafi* (Beirut: Darul Kutub al-Ilmiyyah, n.d.), 278.

⁴⁸ Fakhruddin al-Hasan bin Mansur, *Fatawa Qadihan* (Beirut: Darul Kutub Ilmiyyah, 2009), 294.

difference of opinion is considered very weak and is not taken up by the majority of scholars.⁴⁹

The third opinion, a neutral opinion. Interestingly, this discussion has a neutral group. This group does not want to debate the validity of marriage in front of deaf witnesses. This group chose a more moderate path, namely by arguing that a marriage is valid in the presence of a deaf witness if the groom is deaf, so that the contract is conveyed using signs that the witness understands.⁵⁰

Seeing the debate on witnesses to marriages with sensory disabilities, especially deaf people, KHI as Indonesian *fiqh* adopts the views of the majority of scholars. The main reference that is the basis for the preparation of KHI article 25 is the view that does not allow deaf marriage witnesses who are affiliated with the opinions of scholars of the Syafi'iyah school. This shows that the preparation of KHI article 25 is very textual and does not consider the opinions of pro and neutral.

Criticism of the Compilation of Islamic Law: Exclusivism of Deaf Marriage Witnesses

Looking at the previous discussion, the author is of the opinion that the drafting of KHI article 25 regarding the requirements for marriage witnesses is very textual and tends to take the opinion of the Syafi'iyah scholars. This is the basis for the author's criticism that KHI is very exclusive. The author divides the meaning of exclusive here into two understandings, namely in terms of methodology and the basis of the KHI paradigm, both of which are interrelated.

First, KHI is very exclusive in methodology. The reason is that KHI tends to deepen the project by studying *fiqh* books from various madhab of thought, but the majority of those studied are books from the Shafi'iyah madhab, which are already well-known among Indonesian Muslim scholars. At least approximately 38 books were studied and divided into 7 State Islamic Religious Colleges (PTKIN) that were appointed.⁵¹ According to Muchtar Zarkasih, the efforts made to deepen

⁴⁹ Zainuddin bin Ibrahim bin Muhammad Al-Mishri, *Bahru Al-Raqiq Syarh Kanzu Ad-Daqaq Juz 3* (Beirut: Darul Kutub al-Islami, n.d.), 94.

⁵⁰ Muhammad bin Amin bin Umar bin 'Abdi Aziz 'Abidin Al-Hanafi, *Darul Mukhtar 'ala Ad-Dari Al-Mukhtar Juz 3* (Beirut: Darul fikr, 1992), 22-23.

⁵¹ The 7 IAINs include: 1). IAIN Ar-Raniri Aceh who studied Al-Bajūri, Fathul Mu'in, Asy-Syarkawi 'ala at-Tahrir, Al-Mughni al-Muhtaj, Nihayatul muhtaj, and Asy-Syarqawi, 2). IAIN Syarif Hidayatullah studied the books 'Ilanatu at-Talibin, At-Tuhfah, Targhib al-Musytāq, Bulghat al-Salik, Asy-Syamsuri fi al-Faraid, al-Mudawana, 3). IAIN Antasari Banjarmasin studied Al-Qalyubi/al-Mahalli, Fathu al-Wahhab wa Syarhuh, Bidayatu al-Mujtahid, al-Umm, Bughyah al-Mustarsyidin, 'Aqidah wa al-Syar'ah, 4). IAIN Sunan Kalijaga Yogyakarta studied al-Muhalla, al-Wajiz, Fathu al-Qadir, Al-Fiqh 'ala al-Madzahib al-Arba'ah, Fiqh as-Sunnah, 5). IAIN Sunan Ampel studies the Kasyf al-Qina, Majmu' al-Fatawi Ibn Taymiyyah, Qawani asy-Syar'iyah by Sayyid Usman bin Yahya, al-Mughni, al-Hidayah Syarh Bidaya at-Taimiyyah Muhtadi, 6). IAIN Alauddin studies the Al-Qawānīn asy-Syar'iyah of Sudaqah Dakhlan, Nawab al-Jalil, Syarh Ibn Abidini, al-Muwattā, Hasyiah Syamsuddin Muh Irfat Dasuki, 7). IAIN Imam Bonjol Padang studies Badai al-Sannai, Tabyin al-Haqaiq, al-Fatawi al-Hindiyyah, Fathu al-Qadir, Nihayah. See Mahkamah Agung RI, *Himpunan Peraturan Perundang-Undangan Yang Berkaitan Dengan Kompilasi Hukum Islam Dengan Pengertian Dalam Pembahasannya* (Jakarta: Mahkamah Agung RI, 2011), 25-26.

the KHI project not only involved studying *fiqh* books but also interviews with scholars, jurisprudence of Religious Courts, comparative studies of the laws of several countries, and workshops or seminars on legal materials.⁵²

Likewise, in the preparation, Article 25 explains that one of the requirements to be a witness to a marriage is not to be deaf and disabled. KHI takes the opinion of the majority of scholars without considering the pro and neutral opinions. This indicates that the epistemology of KHI is *fiqh*, which is the axis of exclusivism. Wahid stated that KHI adopts *fiqh* that has been codified into a book by scholars of the school of thought.⁵³ Why is that? Because *fiqh* is still seen as sacred and hence immutable, namely, *fiqh* is sacred, perfect, cannot change, and can apply anytime and anywhere.⁵⁴

Based on the renewal method, KHI article 25 uses the intra-doctrinal reform method, namely referring to the conventional *fiqh* concept.⁵⁵ The method of compiling KHI article 25 is by using the *takhyir* method, namely choosing the view of one of the Islamic jurisprudence scholars. Some researchers say that *takhyir* is the same as *tarjih* because it chooses a different view based on a stronger view or a view that is more in accordance with needs.⁵⁶ The method of *takhyir* that was carried out in drafting KHI article 25 was to look for views that developed among Sunni madhab.⁵⁷ Based on the previous discussion, the main reference that is the basis for compiling the KHI is the view of scholars of the Shafi'iyah school of thought who prohibit deaf marriage witnesses.

Based on this method, KHI article 25 tends to be more exclusive and does not open up space to use more responsive concepts and methods. The drafting of article 25 does not use a reinterpretation method and seeks a method based on goodness (*maslahat*). This is different when compiling articles on marriage registration, which are stated in articles 5, 6, and 7, as well as reconciliation registration in article 10. In compiling article 25, the KHI also did not use the *ihtisn* method. Different from the drafting of KHI article 99 regarding legitimate children, namely children born as a result of a legitimate marriage and the result of a legitimate husband and wife's actions outside the womb and born by the wife.

⁵² Mahkamah Agung RI., 23.

⁵³ Marzuki Wahid, "THE DISCOURSE OF INDONESIAN FIQH; Methodological Bid of Family Law Reform," *Al-Mawarid* 15, no. 2 (2015): 143–60.

⁵⁴ Marzuki Wahid and Nurrohman, "Syari'at Islam Versus Negara -Bangsa: Problem Paradigma Pemikiran Keislaman," in *Pemikiran Islam Kontemporer Di Indonesia* (Yogyakarta: Pustaka Pelajar, 2012), 159.

⁵⁵ Khoiruddin Nasution, *Pengantar Dan Pemikiran Hukum Keluarga (Perdata) Islam Indonesia* (Yogyakarta: Academia+Tazzafa, 2010), 44.

⁵⁶ Khoiruddin Nasution, "Metode Pembaruan Hukum Keluarga Islam Kontemporer," *Unisia* 30, no. 66 (2007).

⁵⁷ The use of *takhyir* in the Sunni madhab can be done with several alternatives, namely: 1). Abandoning the existing rules and seeking alternative opinions that exist in the same madhab, 2). Seeking views that are developing and popular in the Sunni madhab, 3). If there are none, then seeking from the madhab that are not popular, 4). Seeking the opinions of *khalaf* fiqh experts, 5). If the previous method cannot be done, then adopting the legal rules that have developed in the Syi'ah tradition. See Ahmad Bunyan Wahib, "Reformasi Hukum Keluarga Di Dunia Muslim," *Ijtihad : Jurnal Wacana Hukum Islam Dan Kemanusiaan* 14, no. 1 (2014): 13.

This article excludes the general provisions regarding the concept of legitimate children and shifts to something based on goodness (*maslahat*).⁵⁸

The textuality of the KHI in compiling article 25 makes the KHI trapped in conservative orthodoxy, unproductive, and only produces regressive readings. The KHI simply takes for granted the views of the ulama of the madhhab who reject deaf marriage witnesses without considering a more comprehensive and inclusive methodology. The result is that the KHI does not consider the issue of disability because it is hampered by the conservatism of classical *fiqh*.

Second, the exclusive basis of the KHI paradigm. The author understands that the factor causing the invalidity of deaf marriage witnesses in the KHI is that it does not use an inclusive paradigm. This paradigm emphasizes that disability is part of human rights, namely that humans have an equal position regardless of gender or disability. In the issue of KHI article 25, it is clear that the legal material contained in KHI is still far from inclusive of disabilities. This indicates that deaf people become objects rather than legal subjects. In the human rights paradigm, deaf people are perfect legal subjects, therefore, the legal material contained in KHI must provide access to the potential for deaf people to become witnesses to marriage.

Based on human rights and recognition, deaf people as legal subjects, their position cannot be abandoned. The stigma that has so far considered deaf people as legally incompetent in the context of family law is no longer relevant to the principles of legal protection that currently exist. As expressed by Suadi in his writing, the rights of the disabled are to get access to legal justice.⁵⁹ Therefore, it is very important to consider the deconstruction of deaf marriage witnesses.

The exclusivism of the KHI paradigm is a representation of the nature of Islamic law in Indonesia, which pays little attention to human rights. The KHI's a priori view of the issue of disability can undermine the universal elegance of Islamic law, which should tend towards humanism. Article 25 of the KHI can eliminate the principle of equality and justice in Islamic law, which prioritizes a responsive-humanistic spirit. Articles like this should be reconsidered, considering that deaf people have the same rights before the law. The author agrees with Sodik that the shortcomings of deaf people can be improved with more respectful methods, such as utilizing science and technology that can help them receive information.⁶⁰

Deconstruction of Deaf Marriage Witnesses: Justice and Equality Based on the *Maqāṣid Al-Syarī'ah* System Approach

Looking at the previous discussion, it is necessary to make efforts to restore the humanistic spirit in the KHI, especially Article 25 concerning the requirements for

⁵⁸ Nuroniyah, "Kritik Metodologis Terhadap Pembaruan Hukum Perkawinan Dalam Kompilasi Hukum Islam.", 45.

⁵⁹ Suadi, "Kesamaan Di Hadapan Hukum (Equality Before the Law) Bagi Penyandang Disabilitas Di Peradilan Agama.", 41

⁶⁰ Sodik, "Pembacaan Progresif Terhadap Fikih Keluarga (Kritik Terhadap KHI Dan Ruu HTPA)."

witnesses to marriage. As time goes by, efforts are needed to make the KHI relevant to the issue of disability. This aims to ensure that the KHI material does not contain elements of discrimination against vulnerable groups. Therefore, deconstruction based on *maqāṣid al-syarī'ah* is an alternative way to restore the humanistic spirit of the character of Indonesian *fiqh*.

In developing the *maqāṣid al-syarī'ah* so that it is able to reach human rights, Auda offers several features to explore Islamic law, including the openness of the Islamic legal system (openness) and the purpose of the Islamic legal system (purposefulness).⁶¹

We describe a scheme that helps to facilitate the reader. The aim is to clarify the analysis of the deconstruction of hearing-impaired marriage witnesses with the features of the openness of the Islamic legal system (openness) and the purpose of the Islamic legal system (possession) in the approach of the *maqāṣid al-syarī'ah* system. The deconstruction of hearing-impaired marriage witnesses in KHI article 25 based on *maqāṣid al-syarī'ah* is below.

First is openness towards deaf marriage witnesses. The openness in question is that Islamic law is able to interact with the environment, therefore it must be open and not closed.⁶² By using a legal system like this, Islamic law will become static and flexible so that it is able to respond to a new problem. This attitude is carried out in a way that a scholar must be able to see the world broadly. A scholar in analyzing a problem must use a perspective that is relevant to the conditions and situations.

In the matter of article 25, the openness system will view deaf marriage witnesses from a world perspective, namely human rights and regulations for people with disabilities in Indonesia. In human rights instruments, equality and justice are the values that are prioritized, therefore all forms of discrimination against individuals or certain groups, especially those with disabilities, must be eliminated. In Law No. 19 of 2011 concerning the Ratification of the Convention on the Rights of Persons with Disabilities, the main point that is outlined is that the state recognizes the dignity, value, and equal rights for people with disabilities. Not only that, in the human rights instruments contained in the regulations, it ensures that the state can realize the rights of every person through adjusting regulations,

⁶¹ Jasser Auda, *Maqasid Al-Shariah as Philosophy of Islamic Law: A System Approach, The International Institute of Islamic Thought* (USA: The International Institute of Islamic Thought, 2007), 30. See also Mohammad Fauzan Ni'ami and Bustamin, "Maqāṣid Al-Syarī'ah Dalam Tinjauan Pemikiran Ibnu Asyur Dan Jasser Auda," *JURIS: Jurnal Ilmiah Syari'ah* 20, no. 1 (2021): 91–102. Ainol Yaqin, "Rekonstruksi Maqāṣhid Al-Syarī'ah Dalam Pengembangan Metodologi Hukum Islam (Kajian Eksploratif Pemikiran Jasser Auda)," *Madania: Jurnal Kajian Keislaman* 22, no. 1 (2018): 63–81. Akhmad Supriadi, "Sistem Sebagai Filsafat (Tawaran Baru Jasser Auda Bagi Pengembangan Hukum Islam Kontemporer)," *Jurnal Studi Agama Dan Masyarakat* 13, no. 2 (2017): 219–42. Muhammad Salahuddin, "Menuju Hukum Islam Yang Inklusif-Humanistik: Analisis Pemikiran Jasser Auda Tentang Maqāṣid Al-Syarī'ah," *Ulumuna: Jurnal Studi Keislaman* 16, no. 1 (2012): 103–24.

⁶² Jasser Auda, *Membumikan Hukum Islam Melalui Maqashid Syariah: Pendekatan Sistem*, ed. Rosidin and 'Ali 'Abd El-Mun'im (Jakarta: PT Mizan Pustaka, 2008), 88.

changing regulations, and guaranteeing the participation of people with disabilities in all aspects of life.

However, in practice, various forms of human rights violations against people with disabilities are still found. Likewise, in terms of material, some of the materials contained in regulations in Indonesia contain acts of discrimination and stigmatization of people with disabilities, including the contents of the material in KHI article 25. Therefore, on the basis of equality, the state is obliged to protect all forms of discrimination against people with disabilities, one way is to deconstruct deaf marriage witnesses by revising KHI article 25. Not only does it conflict with human rights instruments, article 25 which prohibits deaf marriage witnesses is at odds with the philosophy of disability regulations in Indonesia, namely Law No. 8 of 2016 concerning Persons with Disabilities. The author views two philosophies, namely equal opportunity and respect. In terms of equal opportunity, the KHI should provide opportunities or provide access for deaf people to become marriage witnesses. Meanwhile, respect means that the KHI should respect and accept the existence of disabilities with all inherent rights without any shortcomings in family law matters.

Second, the purpose (purposefulness) of deaf marriage witnesses. According to Auda, the purpose (purposefulness) feature is the core of the entire approach. Based on the system approach, the realization of the purpose (purposefulness) needs to maintain openness, renewal, flexibility, and realism. The purpose of establishing Islamic law should be returned to the welfare of society with an orientation to protecting human dignity and maintaining human rights. For Islam, maintaining human rights based on the principles of justice and equality is an obligation, because the main purpose of religion is to reflect respect for human rights that must be maintained.⁶³

In relation to KHI article 25, the prohibition on hearing-impaired marriage witnesses is a form of legal marginalization. The validity of marriage witnesses only applies to hearing witnesses, this kind of thing must be reviewed and consider the elements of justice and equality before the law. The goal is for the law to represent justice, equality, and legal certainty. The purpose of a marriage witness is to represent the *i'lan* (notification) of marriage to the community. At least a witness has two meanings; First, a witness is a person who is asked to be present at an event to witness and know so that when needed the person is able to provide information and justification for the event. Second, a witness is a person who provides information to provide proof or information about something that is known.⁶⁴

Rajafi said that marriage witnesses are a way to strengthen the values of *mithāqan ghalīzan* in marriage.⁶⁵ As expressed by Malikiyyah, basically marriage

⁶³ Zaprul Khan, *Rekonstruksi Paradigma Maqashid Asy-Syari'ah: Kajian Kritis Dan Komprehensif* (Yogyakarta: IRCiSoD, 2020). 294.

⁶⁴ Ahmad Rajafi, "Urgensi Keberadaan Saksi Perkawinan Di Era Revolusi Industri 4.0," in *Progres Hukum Keluarga Islam Di Indonesia Pasca Reformasi; Dimensi Hukum Nasional, Fiqh Islam, Kearifan Lokal*, ed. Ahmad Rajafi (Yogyakarta: CV. Istana Agency, 2020), 162.

⁶⁵ Rajafi., 162.

witnesses are related to proof of marriage, so that marriage must be announced to the public. Therefore, marriage witnesses function as *i'lan* in marriage.⁶⁶ The wisdom of marriage witnesses was also revealed by Zuhaili, namely that with the presence of marriage witnesses, the marriage has authentic evidence.⁶⁷

Seeing this goal, the deconstruction of deaf marriage witnesses which were originally not allowed should shift position to be allowed with the note that the purpose and function of the marriage witness can be fulfilled, namely; 1). Deaf marriage witnesses can understand the implementation of the marriage contract, 2). Deaf marriage witnesses are able to record or remember the marriage contract event, 3). Deaf marriage witnesses are able to inform the public that the two have been legally married, 4). Deaf marriage witnesses are able to assess and analyze the marriage contract event.

Based on the results of the deconstruction of the marriage witness from the perspective of the system features above, the requirements to become a marriage witness in KHI article 25 which negates the deaf can be reformulated or deconstructed to obtain a new perspective. Therefore, the formulation of the requirements for a marriage witness in article 25 should be red:

“Those who can be appointed as witnesses in a marriage contract are a Muslim man, just, mature, and a deaf, mute, or visually impaired person who has the ability to understand the events of the marriage contract.”

Deconstruction of deaf marriage witnesses is carried out in order to achieve *maqāsid al-syari'ah* by expanding the scope of *maqāsid* from protection to development and rights. This kind of criticism needs to be carried out on the KHI material so that it is inclusive of disability issues.

Conclusion

This paper concludes that there is marginalization of deaf people as marriage witnesses caused by the exclusivity of KHI article 25 which includes; First, methodological exclusivity is caused by the preparation of KHI, especially article 25, using the *takhyir* method which is affiliated with the Syafi'iyah school of thought. Article 25 also chooses the view of the majority of scholars which requires that marriage witnesses must be able to hear the *ijab kabul*. The reason is that the *ijab kabul* speech is something that must be understood and comprehended by the witness, while deaf people are unable to hear and certainly will not be able to understand what is conveyed by the person who is making the marriage contract. Second, the exclusive basis of the KHI paradigm which is not inclusive is the reason why deaf people do not get access to become marriage witnesses. This exclusive attitude makes KHI rigid towards the issue of disability.

⁶⁶ Zaidan, *Al-Mufassshal Fi Ahkam Al-Mar'ah Wa Bait Al-Muslim Fi Syari'ah Al-Islamiyyah* Juz 6., 109

⁶⁷ Az-Zuhaili, *Fiqh Al-Islām Wa Adillatuh* Juz 7., 72

By using the openness and porposefulness maqāṣid al-syarī'ah features, Jaseer Auda concluded that deaf people have room to become marriage witnesses. The construction of deaf marriage witnesses is based on the universality of Islam which contains the values of equality, justice, and legal certainty. Through the openness feature, namely viewing deaf marriage witnesses from a world perspective, namely human rights and disability regulations in Indonesia. Then the purpose feature (Porposefulness) namely justice, equality, and legal certainty, so that the deconstruction of deaf marriage witnesses has the potential to be permitted on condition that the intent and function of the marriage witness can be fulfilled. The implication of this study is the inclusiveness of family law issues in Indonesia. By using a systems approach, the author offers a concept of deconstructing marriage witnesses that is more inclusive of hearing disabilities, so that KHI article 25 can be reformulated by prioritizing human rights values, namely justice and equality, and reducing discrimination against people with disabilities.

References

- Abdillah, Syaik, Sasa Sunarsa, Muhamad Dani Somantri, Enceng Iip Syaripudin, and Hapsah Fauziah. "Revisiting the Role of Women as Witnesses in Fiqh Justice." *Ahkam: Jurnal Ilmu Syariah* 19, no. 1 (2019): 61–80. <https://doi.org/10.15408/ajis.v19i1.11768>.
- Ad-Dimyati, Abu Bakar Utsman Muhammad Syatha. *I'anatu Ath-Thalibin Juz 3*. Beirut: Darul Fikr, 1997.
- Al-Bajuri, Ibrahim bin Muhammad bin Ahmad. *Hasyiyyah Al-Bajuri 'ala Syarh Ibnu Qosim Jilid 3*. Jeddah: Darul Minhaj, 2016.
- Al-Hanafi, Muhammad bin Amin bin Umar bin 'Abdi Aziz 'Abidin. *Darul Mukhtar 'ala Ad-Dari Al-Mukhtar Juz 3*. Beirut: Darul fikr, 1992.
- Al-Juzairi, Syaikh Abdurrahman. *Terjemah Fikih Empat Mazhab Jilid 5*. Jakarta: Pustaka Al-Kautsar, 2015.
- Al-Ma'ali, Burhanuddin Abi. *Adz-Dzakhirotu Al-Burhaniyyah Al-Musamma Dzakhirotu Al-Fatawa Fi Al-Fiqh 'ala Mazhab Al-Hanafi*. Beirut: Darul Kutub al-Ilmiyyah, n.d.
- Al-Maliki, Muhammad bin Ahmad bin Arafah ad-Dasuqi. *Hasyiyyah Ad-Dasuqi 'ala Syarh Al-Kabir Juz 4*. Beirut: Darul Fikr, n.d.
- Al-Mishri, Zainuddin bin Ibrahim bin Muhammad. *Bahru Al-Raqiq Syarh Kanzu Ad-Daqaiq Juz 3*. Beirut: Darul Kutub al-Islami, n.d.
- Alfitri. "Whose Authority? Contesting and Negotiating the Idea of a Legitimate Interpretation of Islamic Law in Indonesia." *Asian Journal of Comparative Law* 10, no. 2 (2015): 191–212. <https://doi.org/10.1017/asjcl.2016.1>.
- Asy-Syatiri, Ahmad bin Umar. *Syarh Al-Yaqut an-Nafis Fi Madzhab Ibni Idris*. Beirut: Darul Minhaj, 2007.
- Asy-Syirbini, Syamsuddin Muhammad bin Ahmad al-Khotibi. *Mughi Al-Muhtaj Ila Ma'rifati Ma'ani Alfadz Al-Minhaj Juz 4*. Beirut: Darul Kutub Ilmiyah, 1994.
- Auda, Jasser. *Maqasid Al-Shariah as Philosophy of Islamic Law: A System Approach*.

- The International Institute of Islamic Thought*. USA: The International Institute of Islamic Thought, 2007.
- . *Membumikan Hukum Islam Melalui Maqashid Syariah: Pendekatan Sistem*. Edited by Rosidin and 'Ali 'Abd El-Mun'im. Jakarta: PT Mizan Pustaka, 2008.
- Az-Zuhaili, Wahbah. *Fiqh Al-Islām Wa Adillatuh* Juz 7. Beirut: Dar al-fikr, 1985.
- Barkah, Qodariah. "Perlindungan Hukum Bagi Penyandang Disabilitas Dalam Perspektif Islam." In *Hukum Disabilitas Di Indonesia*, edited by Muhammad Sadi Is, Fadilah Mursid, and Ari Azhari, 71. Depok: Rajawali Press, 2021.
- Bilalu, Naskur, Ridwan Jamal, Nurlaila Harun, and Syahrul Mubarak Subeitan. "Compilation of Islamic Law as Judge's Consideration at a Religious Court in North Sulawesi, Indonesia." *Samarah* 6, no. 2 (2022): 514–36. <https://doi.org/10.22373/sjhc.v6i2.12441>.
- Fakhyadi, Defel. "Patriarkisme Hukum Kewarisan Islam: Kritik Hukum Waris Islam Dan Kompilasi Hukum Islam." *Jurnal Hukum Islam* 3, no. 1 (2021): 1–16. <https://doi.org/10.24014/jhi.v2i1.10447>.
- Hadi, Mukhammad Nur. "Nalar Fikih Penghulu Di Kota Malang Dalam Saksi Nikah Tuli." *Inklusi* 8, no. 2 (2022): 169–84. <https://doi.org/10.14421/ijds.080206>.
- Hadi, Mukhammad Nur, Fahrudin Ali Sabri, and Ahmad Masum. "Betwen Conservatism and Progresivism: The Young Penghulu in East Java's Legal Paradigm Addresses Disability Issues in Marriage." *Al-Qadha: Jurnal Hukum Islam Dan Perundang-Undangan* 10, no. 2 (2023): 198. <https://doi.org/10.32505/qadha.v10i2.7352>.
- Hayat, Muhammad Jihadul. "Historisitas Dan Tujuan Usia Minimal Perkawinan Dalam Perundang-Undangan Keluarga Muslim Indonesia Dan Negara Muslim." *Journal Equitable* 3, no. 1 (2018): 49–63.
- Mahkamah Agung RI. *Himpunan Peraturan Perundang-Undangan Yang Berkaitan Dengan Kompilasi Hukum Islam Dengan Pengertian Dalam Pembahasannya*. Jakarta: Mahkamah Agung RI, 2011.
- Mansur, Fakhrudin al-Hasan bin. *Fatawa Qadihan*. Beirut: Darul Kutub Ilmiyyah, 2009.
- Mawardi, Ahmad Imam, and Achmad Kemal Riza. "Why Did Kompilasi Hukum Islam Succeed While Its Counter Legal Draft Failed? A Political Context and Legal Arguments of the Codification of Islamic Law for Religious Courts in Indonesia." *Journal of Indonesian Islam* 13, no. 2 (2019): 421–53. <https://doi.org/10.15642/JIIS.2019.13.2.421-453>.
- Mulia, Siti Musdah. "MUSLIM FAMILY LAW REFORM IN INDONESIA: A Progressive Interpretation of The Qur'an." *Al-Mawarid* 15, no. 2 (2015): 1–18. <https://doi.org/10.20885/almawarid.vol15.iss2.art1>.
- Nasution, Khoiruddin. "Metode Pembaruan Hukum Keluarga Islam Kontemporer." *Unisia* 30, no. 66 (2007).
- . *Pengantar Dan Pemikiran Hukum Keluarga (Perdata) Islam Indonesia*. Yogyakarta: Academia+Tazzafa, 2010.
- Ni'ami, Mohammad Fauzan, and Bustamin. "Maqāṣid Al-Syarī'ah Dalam Tinjauan Pemikiran Ibnu Asyur Dan Jasser Auda." *JURIS: Jurnal Ilmiah Syari'ah* 20, no. 1 (2021): 91–102.
- Nurlaelawati, Euis. *Modernization, Tradition, and Identity: The Kompilasi Hukum*

- Islam and Legal Practice in Indonesian Religious Courts*. 1st ed. Amsterdam: Amsterdam University Press, 2010.
- Nuroniayah, Wardah. "Kritik Metodologis Terhadap Pembaruan Hukum Perkawinan Dalam Kompilasi Hukum Islam." *Mahkamah: Jurnal Kajian Hukum Islam* 1, no. 1 (2016): 33–47. <https://doi.org/10.24235/mahkamah.v1i1.624>.
- Rajafi, Ahmad. "Sejarah Pembentukan Dan Pembaruan Hukum Keluarga Islam Di Nusantara." *Aqlam: Journal of Islam and Plurality* 2, no. 1 (2018): 1–20. <https://doi.org/10.30984/ajip.v2i1.507>.
- . "Urgensi Keberadaan Saksi Perkawinan Di Era Revolusi Industri 4.0." In *Progres Hukum Keluarga Islam Di Indonesia Pasca Reformasi; Dimensi Hukum Nasional, Fiqh Islam, Kearifan Lokal*, edited by Ahmad Rajafi, 162. Yogyakarta: CV. Istana Agency, 2020.
- Sabiq, Sayyid. *Fiqh As-Sunnah*. Beirut: Dar al-Fatah al-I'lam ak-'Arabiyy, 2012.
- Salahuddin, Muhammad. "Menuju Hukum Islam Yang Inklusif-Humanistik: Analisis Pemikiran Jasser Auda Tentang Maqāsid Al-Syarī'ah." *Ulumuna: Jurnal Studi Keislaman* 16, no. 1 (2012): 103–24. <https://doi.org/10.20414/ujs.v16i1.191>.
- Sodik, Mochamad. "Pembacaan Progresif Terhadap Fikih Keluarga (Kritik Terhadap KHI Dan R UU HTPA)." *Asy-Syir'ah: Jurnal Ilmu Syari'ah Dan Hukum* 46, no. 1 (2012): 109–38.
- Sodiqin, Ali. "Ambiguitas Perlindungan Hukum Penyandang Disabilitas Dalam Perundang-Undangan Di Indonesia." *Jurnal LEGISLASI INDONESIA* 18, no. 1 (2021): 41. <https://doi.org/10.54629/jli.v18i1.707>.
- Suadi, Amran. "Kesamaan Di Hadapan Hukum (Equality Before the Law) Bagi Penyandang Disabilitas Di Peradilan Agama." In *Hukum Disabilitas Di Indonesia*, edited by Muhammad Sadi Is, Fadilah Mursid, and Ari Azhari, 44. Depok: Rajawali Pers, 2021.
- Supriadi, Akhmad. "Sistem Sebagai Filsafat (Tawaran Baru Jasser Auda Bagi Pengembangan Hukum Islam Kontemporer)." *Jurnal Studi Agama Dan Masyarakat* 13, no. 2 (2017): 219–42. <https://doi.org/10.23971/jsam.v13i2.667>.
- Syafe'i, Abdul Malik. "Dekontruksi Pasal 25 Kompilasi Hukum Islam Tentang Kesaksian Perempuan Dalam Perkawinan." *Medina-Te Jurnal Studi Islam* 14, no. 1 (2016): 195–210. <https://doi.org/10.19109/medinate.v12i2.1182>.
- Syarifuddin, Amir. *Hukum Perkawinan Islam Di Indonesia: Antara Fiqh Munakahat Dan Undang-Undang Perkawinan*. Jakarta: Prenada Media Group, 2009.
- Wahib, Ahmad Bunyan. "Reformasi Hukum Keluarga Di Dunia Muslim." *Ijtihad: Jurnal Wacana Hukum Islam Dan Kemanusiaan* 14, no. 1 (2014): 13. <https://doi.org/10.18326/ijtihad.v14i1.1-19>.
- Wahid, Marzuki. "THE DISCOURSE OF INDONESIAN FIQH; Methodological Bid of Family Law Reform." *Al-Mawarid* 15, no. 2 (2015): 143–60. <https://doi.org/10.20885/almawarid.vol15.iss2.art7>.
- Wahid, Marzuki, and Nurrohman. "Syari'at Islam Versus Negara -Bangsa: Problem Paradigma Pemikiran Keislaman." In *Pemikiran Islam Kontemporer Di Indonesia*, 159. Yogyakarta: Pustaka Pelajar, 2012.
- Wazarootul auqof wastikwanul islamiyyah. *Al-Mausu'ah Al-Fiqhiyah Al-Kuwaitiyah Juz 41*. Kuwait: Wazarootul auqof wastikwanul islamiyyah, 2002.

- Yaqin, Ainol. "Rekonstruksi Maqâshid Al-Syarî'ah Dalam Pengembangan Metodologi Hukum Islam (Kajian Eksploratif Pemikiran Jasser Auda)." *Madania: Jurnal Kajian Keislaman* 22, no. 1 (2018): 63–81. <https://doi.org/10.29300/madania.v22i1.803>.
- Yulianti, Irma. "Transformasi Fiqh Empat Madzhab Ke Dalam Kompilasi Hukum Islam Tentang Saksi Nikah." *ADLIYA: Jurnal Hukum Dan Kemanusiaan* 12, no. 1 (2019): 61–84. <https://doi.org/10.15575/adliya.v12i1.4490>.
- Zaidan, Abdul Karim. *Al-Mufassshal Fi Ahkam Al-Mar'ah Wa Bait Al-Muslim Fi Syari'ah Al-Islamiyyah* Juz 6. Beirut: Muassasu ar-Risalah, 1993.
- Zamanan, Khulud Badru. "شروط عقد النكاح في الفقه الإسلامي واختيارات قانون الأحوال الشخصية" 32 □□□□□ □□□□□□ □ □□□□□□ □□□□ □□□□. *الكويتي*, no. 4 (2017): 1440–1517. <https://doi.org/10.21608/mksq.2017.7758>.
- Zaprulkhan. *Rekonstruksi Paradigma Maqashid Asy-Syari'ah: Kajian Kritis Dan Komprehensif*. Yogyakarta: IRCiSoD, 2020.