

## **Protecting Women's Interest (*Maslahah*) in Marriage Through Appointment of a Guardian (*Wali*) Under Islamic Law**

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### **ABSTRACT**

The term *Wali* (loosely translated as guardian in English) in general refers to a person who consents to or executes a marriage contract. Under the majority school of law (*jumhur*) including the Shafie, wali constitutes one of the pillars of marriage, the absence of whom will render the marriage void. However, under the Hanafi school of law, *wali* is not a pillar but merely one of the conditions for execution of a marriage contract and his absence does not appear to render the marriage invalid so long as the marriage fulfils some other conditions and the *wali* does not intervene in the marriage of his ward. Nevertheless, this condition does not deny the importance of *wali* in the marriage of his ward. This paper attempts to highlight and emphasise on the fact that the appointment of wali in marriage of a woman is significant in protecting the women's or the wards' welfare (*maslahah*). The paper also examines the importance and wisdom of having wali in marriage of a woman and explores why the consent of wali is considered crucial particularly under the majority school of law. Additionally, a comparative analysis on the requirement of *wali* under the law in Malaysia and several Muslim countries will be conducted. The paper is based primarily on library research though interviews with certain scholars and their opinions on the importance of having wali in marriage have been taken into consideration. It is believed this study will contribute significantly to knowledge on this subject especially

on the philosophy and wisdom of having a guardian (*wali*) under Islamic law. This is in the face of a rising trend among many Muslim women nowadays (with special reference to Malaysia) to disregard the need for a wali while contracting their marriage.

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## INTRODUCTION

The significance of the institution of marriage receives its greatest emphasis from the hadith: "Marriage is my *sunnah*. Whosoever keeps away from it is not from me". Abdur Rahman I. Doi rightly opines that in Islam, Allah the almighty has created man and woman to play distinct roles in human society and a woman's biology and physique best suit her, at base for the maternal role so necessary in the creation of healthy and happy families (I. Doi, A. R, 2006). In Islam marriage is considered a contract between two equal (compatible) partners. Women were created with a different nature compared with men. With that difference, they can complement one another. Due to the distinct nature of women, they need a protector. Not only when they are small but also before they are married. In Islam, choosing a good and suitable husband requires a second opinion from a man of experience. For this purpose, a guardian or *wali* is assigned to guard the woman who is his ward.

Nevertheless, there have been many occasions where a marriage disregards the role of a guardian. This can be seen from marriages that were contracted in the absence of a guardian or wali nasab, i.e. marriages solemnised without the consent and presence of wali; or marriages solemnised across the Malaysian border or those solemnised by Wali Raja due to Wali Nasab's refusal to be *wali* (see for example

Husin v Saayah [1980] 7 JH 35, Azizah v Mat (1976) 2 JH 251; Muhammad v Bahrunnasran dan Mazliani(1997) JH 99; Mohd Azam lwn Che Norina Nov (2004) JLD XVIII BHG I JH 123). Therefore, the premise of this research is that marriage without wali nasab will undermine the roles of a wali outlined under Islamic law for the benefit of his ward thus, compromising the interest of the latter.

## DEFINITION OF WALI

Under Islamic law, *wilayah* or guardianship connotes a position of authority or control over others. In other words, whoever can satisfy this criterion of having authority or control over others can be regarded as *walī*. (Al-Khin, Mustafa *et al.*, 2011). Therefore, *wali* can be defined as a person who has the authority to give away a woman in marriage (Nasution, S, 2009). *Al-wilayah* is defined literally as power and capability. According to Muslim jurists, *al-wilayah* means authority to decide without depending on approval from others. (al-Zuhaily, 2001) These definitions reflect that a guardian or a *walī* is a person who is responsible towards his children or towards the person who are under his protection and obligation.

Muslim jurists have divided guardianship of marriage into two namely general and specific guardianship. It follows that the guardian in marriage is of two kinds i.e. general guardian (*walī am*) who have a general authority of guardianship over women in a Muslim

territory such as a ruler or head of state; specific guardian (*walī khas*), is someone who has authority specifically on those daughters or relatives based on lineage or blood relationship. They include the father, grandfather, the germane or consanguine brother or brothers, paternal nephews, paternal uncles and so forth from residuary group (*asabah*) of inheritance. (al-Zuhaily, 2001).

### **WALI AS AN ESSENTIAL REQUIREMENT OF A VALID MARRIAGE**

All Muslim jurists seem to agree on the importance of *wali* in the marriage of his ward. Due to this reason, *wali* is recognised as one of the marriage requirements for a Muslim though some Muslim jurists seem to regard *wali* as a conditional requirement. Basically, there are four juristic views on this. The majority of Muslim jurists including Imam Malik, Imam Shafi'ie and Imam Ahmad view that *wali* as an important pillar of marriage and therefore, his consent is compulsory in a marriage contract. A woman regardless of whether she is a virgin or non virgin is to be given in marriage by her *wali*. On the other hand, Imam Abu Hanifah, Zufar (disciple of Imam Abu Hanifah), Sha'bi (Successor) and Zuhri (Successor) are of the view that *wali* is not a marriage pillar and his consent in marriage is merely recommended (*mandub*). Daud al-Zahiri regards *wali* as one of the essential elements in the marriage of a virgin but not non virgin (*thayyib*) while Ibn Sirin, al-Qasim bin

Muhammad, al-Hasan bin Saleh and Abu Yusuf are of the view that a woman, if she leads her own marriage without the *wali*'s consent, her marriage is considered pending until the *wali* consents. If the *wali* consents then the marriage is valid and if the *wali* does not consent then the marriage is not valid (Al-Sartawi, 2008; Al-Ashqar, 2012). Thus, *wali* as an essential requirement of a marriage is a majority view (including the Shafies). They highlight that a father (as a *mujbir wali*) may solemnise the marriage of his daughter without her consent, whatever her age may be, provided she is still a virgin even though the father is recommended to consult his daughter for her opinion on her future husband. In the case where the daughter has lost her virginity by a previous marriage, her formal consent to the marriage is necessary. Loss of virginity puts an end to the right of disposing of a daughter's hand without her consent (al-Nawawi; n.d.). The Shafies emphasise that if the Muslim women solemnise their marriages without *wali*, the marriages are considered invalid and both parties should be separated. If parties have already consummated the marriage, the women are entitled to a proper dower (*mahr mithli*) which is equal value with dower (*mahr*) given during the solemnisation of the marriage. (Al-Khin *et al.*, 2009). This view is supported by the *hadith* reported from Aishah. The Messenger of Allah said to the effect:

*“Whichever woman married without the permission of her walī her marriage is invalid, her marriage is invalid, her*

*marriage is invalid. If he entered into her, then the mahr is for her in lieu of what he enjoyed from her private part. If they disagree, then the Sultan is the wali for one who has no wali* “(Al-Shawkani, 1998).

On the other hand, the Hanafi jurists emphasised on the role of *wali* by making the latter one of the pre-conditions for an execution of a marriage contract. In other words, even though the consent of *wali* is recommended, the *wali* may always intervene in the marriage of his daughter especially in the case where his ward married a man who is not in equal status with her. (Muhammad Abu Zahrah, n.d.). This also indicates that despite the fact that the Hanafi jurists regard that *wali* is not a pillar of marriage but a mere condition to its execution, the importance of *wali* in marriage is still acknowledged and recognised.

The importance of *wali* as one of the pillars of marriage is seen in Malaysia, based on the Shafie school of law. The provision on requirement of *wali* in a marriage of a woman is incorporated in all state enactments including Federal Territories. As a pioneer Act that governs Muslims in Malaysia, Islamic Family Law (Federal Territories) Act 1984 (Act 303) (hereinafter referred to as IFLA) provides the mandatory consent of *wali* in the marriage of his ward (IFLA, s. 13(a)) as well as on of the presence of *wali* in the marriage of his ward:

*“A marriage in the Federal Territory shall be in accordance with the*

*provisions of this Act and shall be solemnized in accordance with hukum Syara’ by;*

- (a) *The Wali in the presence of the Registrar;*
- (b) *The representative of the Wali in the presence and with the permission of the Registrar; or*
- (c) *The Registrar as the representative of the Wali*

(2) Where a marriage involves a woman who has no Wali from nasab, in accordance with Hukum Syara’, the marriage shall be solemnized only by the wali Raja.” (IFLA, s. 7 (1&2)).

Similar provisions with similar wordings can also be found in other state enactments, for example in Selangor, Kelantan, Johor, Malacca, Negeri Sembilan, Kedah Darul Aman, Penang, Perlis and Pahang.

The importance of *wali* in the marriage of a woman is also highlighted in the law and practice in several Muslim countries. For example in Egypt, even though the Egyptian law is based on Hanafi school of legal thought and provides among others that a Muslim woman with full legal capacity has the right to give herself in marriage, in practice, the people do not deny the importance of *wali* in marriage. According to social practices in Egypt, this right is seldom utilised, unless the women have no remaining paternal relatives. There are also cases where some Muslim women rebelled against their guardians through court applications, in which they requested

that their marriages to be annulled on the grounds that the conditions of valid marriages have not been satisfied (Shaham, R, 1997).

The law relating to marriage and *wali* in Jordan is governed by Jordanian Law of Personal Status, 2010 (hereinafter referred to as "JPS"). Jordanians are active followers of the Hanafi school of legal thought. However, the law stipulates the presence or the consent of *wali* in the marriage of a woman who is a virgin. The law among others provides that the consent of *wali* who is in the list of priority is sufficient in the marriage of a woman provided that the man is *kufu* to her. (JPS, s. 16) Where the *wali nasab* refused to give consent for the marriage of his ward who have attained the age of 15, they may seek to apply for consent of *wali hakim* to solemnise the marriage provided that the *wali nasab* refuses to give consent without any valid reason (JPS, s.18).

In January 2004, the Moroccan government introduced family law reforms which entitle an adult woman (regardless of her marital status) to exercise self-guardianship in marriage. In addition, legal age of marriage for Moroccans has been increased from 15 to 18 years. The law also gives women and men the rights to compose their own marriage contracts. (Rashad H., 2005). The said law reflects that the scope of guardianship is extended to the parties of the marriage and such position is one of the major amendments to the law regarding marriage guardianship in Morocco. The law (the Moudawwana, 2004) states that marriages for those who are below the

age of majority depend on the agreement of their guardian (The Moudawwana, 2004, art. 9). The Moroccan law seems to suggest the *wali*'s role is crucial only when his ward is a minor. Nevertheless, there is no such contention so far that the *wali* is not important in the marriage of his ward even though the latter might exercise self guardianship in her marriage.

Based on interviews with some of the Muslim scholars in Jordan from the Hanafi school of legal thought, *wali* is regarded as a very important person in the marriage of his ward. According to Dr Ibrahim 'Uju, the Head of studies and research in Dar al-Ifta, a woman in Jordan is prohibited from solemnizing marriage on her own. If the *wali* declines to solemnise her marriage, she must file an application to solemnise the marriage through *wali 'Am*. (Ibrahim 'Uju, 2012). This is also the view of Dr Mansour Abdullah al-Tawalibeh, a judicial inspector at the Supreme Court Department of Jordan. He stated that even though generally Jordanians subscribe to the Hanafi school, *wali* has been made a marriage prerequisite especially in virgin woman's marriage (al-Tawalibeh, 2012). According to al-Sartawi a professor at Jordan University, in practice, the marriage in Jordan is solemnised by her *wali* upon the woman's consent. This is in line with the nature of a woman who is shy and soft-spoken. (al-Sartawi, 2012) This view was supported by Mufeed Sharhan, the Manager of al-'Affaf Society, a non governmental organisation in Jordan. He opined that the consent (*rida*) of the *wali*

in marriage will indicate the strength of the relationship. If the *wali* did not consent, the family ties will be very weak and fragile. (Mufeed Sharhan, 2012).

### **IMPORTANCE AND WISDOM OF HAVING WALI IN MARRIAGE OF WOMEN**

The classical and modern scholars and writers highlighted several reasons why *wali* is considered important in the marriage of a woman. The first reason which appears practical in nature is that the guardian can be an advisor for the Muslim women. In this circumstances, the *walī* is in the position to recommend or to give suggestion for women under his care concerning marriage with certain men (al-Latifi, A.K., 2000). Such a wisdom can be traced to the historical record of Prophet Syuaib AS when he suggested his daughter to Prophet Moses for marriage. It was apparent that Prophet Syuaib AS knew that Prophet Moses was a person who displayed honesty and piety. (Sayyed Qutb, n.d.). The Quran states to the effect:

*Said one of the (damsels): "O My (dear) father! Engage Him on wages: truly the best of men for Thee to employ is the (man) who is strong and trusty" ... "(The Quran, al-Qasas, 26). He said: "I intend to wed one of these My daughters to thee, on condition that Thou serve me for eight years; but if Thou complete ten years, it will be (grace) from thee. but I intend not to place Thee under a difficulty: Thou wilt find me, indeed, if Allah wills, one*

*of the righteous." ... ". (al-Qasas, 27). He said: "Be that (the agreement) between me and thee: whichever of the two terms I fulfil, let there be no ill-will to Me. Be Allah a witness to what we say".(al-Qasas: 28).*

The above verse reflects that *walī* is in the position to advise his ward to marry a person with such characteristic of piety, has a strong knowledge of Islam and committed to practising Islamic teachings. Syed Sabiq stated that generally, it should be understood that a woman is weak physically, socially and psychologically. Hence, the presence of *wali* is essential as an advisor and protector to the women (Syed Sabiq, 2004).

Furthermore, guardianship is a kind of protection to women. By having *walī* as guardian for women in general in matters concerning marriage, the *walī* will act as protector for the Muslim women so as to safeguard their interests. This duty falls on the close male relative or father of the women. There are instances where women are easily cheated and deceived but not the *walī*. In addition, matters relating to marriage require a lot of experiences and *walī* has a lot of these compared with his ward (Mohd, A. et al., 2014).

The importance of *wali* is also reflected by the fact that having a guardian is consistent with nature. Women are bestowed with feminine nature which embodies softness and shyness. In matters of marriages, such shyness prevents representation in negotiating the dower (*mahr*) and any other related matters. It

is feared that shyness in a woman will jeopardize her rights in negotiating her marriage contracts. (Mohd, A. *et al.*, 2014). As shyness is natural attribute of a woman and cannot be erased easily, the presence of *wali* is essential as protectors, mediators and negotiators for women and their rights.

Apart from the above, having a guardian may avoid flattery and deceit. According to the author of Hedaya, the existence of guardian or *wali* is important in order to avoid flattery and deceit which may happen. It is said this is, "because the end purpose in marriage is the acquisition of those benefit which it produces, such as procreation and so forth (al-Marghinani, n.d.). Moreover, the existence of *wali* is vital to guard his ward from being victimised by an unscrupulous person or from marrying a person who is morally and socially unfitted for her. It is also to protect progeny (*nasab*) from any problems or shame. Hence, the Shari'ah laws have imposed an obligation to the close relatives of women to be their *wali* because they are among those who love them the most and know the value of dower (*mahr*) for marriages. (Sayyid Qutb, n.d.).

In addition, guardianship may provide security for the sanctity of marriage contract. Due to lack of exposure or experience of the virgin daughters in connection to marriage contracts, the wali's intervention is necessary since it supplements the presumed incapacity of a woman to understand the nature of the contract, such as to settle the terms and other matters of similar importance. It should be emphasised that the Hanafi

jurists allow women to marry on their own based on their capacity to make decisions in daily matters and transactions. Thus, the same principle is also applied concerning marriage where the women who are of full age can make decision in marital affairs. (Al-Latifi A'K., 2000)

Finally, guardianship reflects close relationship in family ties. In other words, having an authority on the ward (the bride), may further strengthen the relationship between the wali and his ward. Besides, it is believed that blessings from family are important for a successful marriage. Hence, the consent from the *wali* can be considered a direct form of blessing from the family members. At the end of the day, the married couple will become part of the family. Thus, good and strong relationship will flourish easily if the marriage has already obtained the approval from the very beginning. (Al-Latifi A'K., 2000).

#### **WALI AS PROTECTOR FOR MUSLIM WOMEN'S INTEREST (*MASLAHAH*)**

The emphasis on the role of *wali* and the wisdom of having *wali* in marriage of a woman reflects the role of *wali* as a protector i.e. to protect and safeguard the best interest of his ward. Thus, the requirement of *wali* as a pillar of marriage can be considered as protecting the interest (*maslahah*) of women. Muslim jurists define *maslahah* as the seeking of benefits and the repelling of harms as directed by the Lawgiver (Nyazee, I.A.K, 200). Al-Ghazali defines *maslahah* as considerations that

secure benefits or prevent harm but which are simultaneously harmonious with the objectives of the *shariah*. The *maslahah* in general is divided into three based on its level of importance which are the essentials (*daruriyyāt*), the complementary (*hājiyyāt*) and the embellishments (*tahsīniyyāt*) (Kamali, M.H., 1998). The Muslim scholars have quoted a number of *hadiths* which authorise the actions based on *maslahah*. The main reference is provided by the *Hadith* which stipulates to the effect: ‘No harm shall be inflicted or reciprocated in Islam’. This hadith encompasses the essence of *maslahah* in all of its varieties (Kamali, M.H., 1998). By applying the principles of *maslahah*, the existence of *wali* is important to avoid negative consequences on the wards in future. This is because logically, if the *wali* gives consent to the marriage, it indicates his blessings to such a marriage. Therefore, the involvement of *wali* is vital in ensuring happiness in the marriage.

The requirement of *wali* is also necessary in order to avoid unlawful ends and in this context, the application of ‘blocking the means (*Sadd al-Dharīah*)’. The principle is not concerned with unlawful acts because those are prohibited anyway. It is concerned with lawful acts that may be prohibited as they lead to unlawful results (Nyazee, 2000). The authority of the application of the *Sadd al-Dharīah* can be found in the Quran, for instance, when the Qur’ānic text forbids the Muslims from insulting idol-worshippers,

notwithstanding the inherent enormity of idol-worshipping or the actual intention behind. “Revile not ye those whom They call upon besides Allah, Lest They out of spite Revile Allah In their ignorance. Thus have we made alluring to each people its own doing. In the end will They return to their Lord, and we shall then Tell them the truth of all that They did”(The Quran, al-An’am, 108).

Sayyid Qutb in his commentary of the Quran said that it is human nature for a person to assume his or her deeds are well intentioned and thus defends those actions (whether it was bad or good). Even in error, he or she still believes that act was good. “The unbelievers ascribed partners to God and appealed to them instead of appealing to Him; yet they accept that God is the One who creates and provides sustenance. If Muslims have reviled the unbelievers’ deities, the latter would have disregarded what they believe of God’s position and abuse God himself in order to defend their concepts and worship of other deities.” (Sayyid Qutb, n.d.).

Applying such opinion into current issues, it is believed that the requirement of *wali* is important to ensure that the ward will choose the right life partner who she will share her life with. This procedure will start even before the marriage takes place when the father or guardian interrogates the man to value his character and suitability. As the guardian undertakes the contracting of the marriage of the woman under his guardianship, this predisposes him to



protect her and makes his relatives, friends, associates, neighbours ready to assist him in achieving such protection. It is believed women will not lead their own marriage due to the fact that they are very shy by nature. Thus, herein lays the importance of wali to lead the marriage of his ward. Furthermore, the opinion of guardian (*wali*) is also necessary when daughters are to decide matters related to the feelings, emotions and love. It is agreeable facts that marriage is something serious and vital in the life of women. Therefore, the selected partner should be the right person. It is expected a father or guardian always want the best for his daughter and that she lives happily in her marriage. Accordingly, the requirement of guardian (*wali*) is important to safeguard the right and interest of the women. In addition, by applying the principle of *Sadd al-Dhari'ah* based on the Quran and the Sunnah of the Prophet (pbuh), having guardian (*wali*) in marriage of his ward can also be considered as one mechanism in preventing marital problems in future through selection of the right life partner. The cooperation, agreement and blessing from *wali* are also important to guarantee his participation and help in future. For a marriage to succeed, both husbands and wife need mutual understanding to guarantee its longevity. This further reflects the crucial role of a guardian (*wali*) in protecting the interest of his ward on the day of her wedding as well as her long term marital bliss.

## CONCLUSION

Islamic law emphasises the importance of guardian or wali in the marriage of a woman making it an important pre-wedding requirement. This was indicated by the verses of the Quran as well as the Sunnah of the Prophet (pbuh) which became the basis for a general consensus among Muslim scholars that wali is one of the important elements in the marriage of a woman. Islamic law as applied in Malaysia also adopts and is in agreement with the role of wali in the marriage of his ward. Several Muslim countries have adopted similar approaches namely requiring the presence and consent of wali in solemnising a marriage. The extensive discussion by classical and contemporary Muslim jurists on the issue of wali or guardian reflects the latter's importance in a Muslim marriage. The appointment of wali is to protect and safeguard the interest of his ward in marriages and ensuring a long lasting and happy marriage. The above discussion also reflects that, the appointment of wali as guardian in marriage of a woman in Islam is not to deny her right to marry on her free will (CEDAW 1979, Art. 16(b)) but to provide assistance for her in choosing the most suitable spouse and raising a family. It is also undeniable that wali, being a man, knows the characteristic of a man more than a woman and with this basic knowledge, he may provide sound opinion and advice to his ward. Most importantly, the wali's role is to make sure she has made a good choice and proper preparation for a good and successful life.

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