

THE POWER OF WALI ON MUSLIM BRIDE: ISSUES
AND APPLICATION OF ISLAMIC LAW IN
THE MALAYSIAN PRACTICE

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THE POWER OF WALI ON MUSLIM BRIDE: ISSUES AND APPLICATION OF
ISLAMIC LAW IN THE MALAYSIAN PRACTICE

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بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

I hereby declare that the work in this academic project is my own except for quotations and summaries which have been duly acknowledged.

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بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

In the name of Allah, the Compassionate, the Merciful

Praise is to Allah Almighty, the Cherisher and Sustainer of the universe. May the peace and blessings of Allah Almighty be upon Muhammad, the seal of the prophets. In completing this academic project report I have contracted many debts. I am grateful to many people without whose sincere help and encouragement, I would not be able to complete this research.

Firstly, I wish to acknowledge the help I received from "Mdm. NorFadillah Binti Mohamad Ali" who supervised my academic project report and for whose unremitting efforts and encouragements no words of mine could adequately express my gratitude. I received useful suggestions for its improvement and her valuable comments.

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As a conclusion, I must say that all merit of conveying the message of Allah in this project is entirely due to the bounty of Allah and if, in it there are faults and mistakes they are entirely mine and I seek Allah's forgiveness for any such inadvertent error.

May Allah help us all to work together for His sake

ABSTRAK

Wali adalah salah satu rukun untuk melangsungkan perkahwinan dan pemilihan wali berdasarkan kepada kelayakkan atau syarat-syarat yang telah dipersetujui oleh para fuqaha. Kajian ini telah membincangkan kuasa wali ke atas perempuan Islam : issue serta aplikasi di dalam undang-undang islam di Malaysia. Penulis telah menggunakan tiga jenis kaedah di dalam kajian ini iaitu kaedah dokumentasi, perpustakaan, dan pelayaran internet. Turut dikaji adalah kuasa wali mengikut padanngan empat mazhab iaitu Mazhab Syafi'I, Mazhab Maliki, Mazhab Hanafi, dan Mazhab Hanbali dengan berlandaskan prinsip Islam serta mengkaji kes-kes dan enakment-enactment seperti yang diperuntukkan dalam Akta Undang-Undang Keluarga Islam setiap negeri. Hasil dari kajian ini akan meningkatkan lagi pengetahuan masyarakat akan sejauh mana kuasa wali itu untuk mewalikan sesuatu perkahwinan .

ABSTRACT

Guardianship is one of the principles to conduct a marriage and the selection of *wali* must be due to terms required by the *fuqaha*. This research has discussed the right of *wali* over Muslim women: the issue of *wali*, as well as, the application of Islamic law in Malaysia. The writer has used three approaches in this research, they are the documentation method, the library method, and by surfing the internet. The research also studies the power of *wali* according to the views of the four schools (Syafi'i school, Maliki school, Hanafi school, and Hanbali school) basing on the principles of Islam, as well as, reviewing the cases and enactments such as that is provided by the Islamic Family Law Act for every state. The findings from this research can elevate the knowledge of the society on the extent of the power of *wali* as a guardian to a marriage.

ملخص البحث

الولي هو أحد أركان لجواز النكاح واختيار الولي يعتمد على الكفاءة أو الشروط التي اتفق عليها الفقهاء . تحدث هذا البحث أن سلطة الولي على النساء في الإسلام : هذه القضية مع تطبيقها في القانون في ماليزيا. وتستخدم الباحثه ثلاثة مناهج في هذا البحث وهي المنهج الاستنادي والمنهج المكتبي والمنهج الموقعي (إترنيت) . ويبحث أيضا هذه القضية في آراء مذهب الأربعة هم شافعي, وحنافي, ومالكي وحنبالي في مبداء من جهة اسلامية يبحث عن الوالي كموجود في القانون الأسري الإسلامية في كل بلاد . والنتيجة من هذا البحث لستزيد المعلومات للمجتمع ما مدى سلطة الولي في النكاح.

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ABBREVIATIONS

s.a.w	:	salla Allah alayh wa sallam
s.w.t	:	subhanahu wa ta'ala
a.s	:	'alayh al-salam
p.	:	page
pp.	:	pages
vol.	:	volume
ra	:	radiya Allah anhu/ anha/ anhum
n.d	:	no date/ no year

INTRODUCTION

Background of Research

This researcher will discuss generally the power of *wali* on Muslim bride in Malaysia .This research will also discuss arrangement of *wali*, conditions of Muslim bride and others following the four schools. Beside that, other states of enactments which are related to consent of guardian for marriage. The *wali* is the representation or mediator or guardian for women seeking marriage. The Syariah Law determines that *wali* compulsory in marriage.

Aim of Research

The guardianship (*wali*) is compulsory, as we have explained earlier in which a person has sole power to draw up a marriage contract . The Shafie school considered that *wali* is compulsory only when the woman is a virgin. The problem is, who will give a women in marriage when she has no *wali*?. That is the problem which the writer will study in this research.

The researcher will also identify which a different four school in arrangement of *wali* and so on, the different Enactment Islamic Law according a certain country and the problem relating to *wali* in the Malaysia society.

Objective of Research

Among the objectives of the research are:

- To know the importance the power of *wali* on Muslim bride .
- To know the extent of jurisdiction of a *wali*.
- To identify which women can appoint a *wali* in marriage.
- To know the different from a four school related a *wali*.
- To know the different of *wali* in Enactment Islamic Family Law.

Scope of Research

In conducting this study, the research will focus on the grounds of the power of *wali* on Muslim bride and issue and application of Islamic law. The study will be based on the facts from the library research either the book of Enactments from any country, the book of four schools and others that related.

Library research is done to collect the facts and data relating *wali* in a Muslim marriage. For this purpose, the researcher is going to concentrate on the power of *wali* in muslim bride especially according to different opinion by four school and the different of arrangement by enactment from other country.

In this study, the researcher would like to focus on the issues and application of Islamic law in the Malaysian practice in Muslim bride and perhaps some suggestions to tighten the power of *wali*.

Research Methodology

Research Methodology is a method to find the data, information or knowledge. In this study has used 3 types of method; Documentation Method, Library Method, and Internet Exploring Method.

Documentation Method is a process to gather data through facts or sources in writing, relating to any sources which can give benefit information, such as articles in magazines, pamphlets any or enactment, reports, files of cases and others.

The Library Method research is a method where the researcher finds topics. Data and information from libraries, such as the KUIM, UIAM, UKM, and National Library.

In the Internet Exploring Method surfs by using search engines such as Google and Yahoo and will get the latest information by using this method.

Literature Review

In the book entitle " *Asas Kekeluargaan Islam Bahasan Empat Mazhab : Syafi'I , Hanafi , Maliki , dan Hanbali*" by Hassan Salleh published by Dewan Bahasa dan Pustaka (1989). It was written about the wali of marriage according by Shafi'I school from the aspect in Family law. In his writing, he found the arrangement of *wali* according to four schools.

In other book entitle "*Islamic Law and Sciety*" by Jamila Hussain published by The Federation press (1999). It written different with other book because it is discussing related the cases of *wali* not consent in Muslim bride and used a due Enactment.

Furthermore, my academic project paper in the title " *Undang-undang Keluarga Islam Dalam Empat Mazhab*" by Dr.Muhd Fauzi Muhammad by Synergymate Sdn Bhd, it written a detail about arrangement of *wali* following the four schools , the transfer of a *wali's* rights and especially opinion by Maliki School about Marriage by *wali hakim* (guardian appointed by Court).

In addition entitle" *Perkahwinan dan Penceraian Di bawah Undang-undang Islam* " by Nik NorainiNik Badli Shah by International law book services, it written just briefly about opinion four schools related a *wali* in Islamic marriage based on Al-Quran and Sunnah and a details about Act and cases that related.

On the other hand, entitle "*Tarjamah Sunan Ibnu Majah,Tarjamah Sunan Nasa'iy, Tarjamah Muaththa' Imam Malik and Sahih Muslim* also important books because there are discuss a details related a Consent of virgin in marriage, To marry of the daughter who under age, A marriage is void without a *wali*, A woman who have two guardian or *wali* for her marriage and so on based on Hadith.

The book of Enactments from any country also used in research to identify a different enactment for example related a condition of *wali* in country. It is have a different.

CHAPTER ONE

1.0 Definition of *Wali*

The fifth principle of marriage guardianship is the wali (guardian). The word "*wali*" originated from the Arabic word "*al-wilayah*" (الولاية) which means the willingness to take action, to manage and the power to administrate something, including the management of orphans by providing their needs and conducting the "*akad nikah* (marriage vow)" of a woman under his guardianship.¹ In other meaning of *wali* are the representation / mediation / guardian for women seeking marriage. From the book of Islamic Law and Society mean the bride's marriage guardian and will usually be her father or paternal grandfather.²

The *wali* or guardian in Malaysian Law Dictionary in relation to a child or young person, includes any person, includes any person who, in the opinion of The Court having cognizance of any case in relation to the child or young person or in which the child or young person is concerned , has for the time being the charge or control over the child or young person .³

The "*wali an-nikah*" is a certain male person who is the closest kin to a woman and he has the power to become the "*wali*" to marry off a woman.⁴

¹Hassan Salleh. 1989. *Asas Kekeluargaan Islam*. Dewan Bahasa Dan Pustaka. p. 42

²Jamila Hussain. 1999. *Islamic Law And Society*. The Federation Press. p. 64

³Hamid Ibrahim. 1985. *Malaysian Law Dictionary*. Malaysian Law Publisher. p.127

⁴Ibnu Qassim . 1993 . *Perkahwinan Dalam Islam(Berdasarkan Kepada Dalil,Hukum,Hikmat dan Panduan Kebahagiaan)*. Zafar Sdn,Bhd. p. 104

1.1 Authority of Al-Quran and Sunnah

The *wali* is a very important element (*rukn nikah*) in Muslim Bride. The marriage would not be valid without a *wali* . The relevant terms of *wali*.

1.1.0 Al-Quran

The verses in an obligation that have a *wali an-nikah*

According to *fuqaha* (majority of ulama), including al-imam Malik, Al-Imam As-Shafi'I, Al-Imam Ahmad and others with the same stream of thought, a woman should be married off by her *wali*. In the absence of the *wali*, *Al-hakim* or *Al-qadi*, and as such, can conduct the woman's marriage. The verse that used by all the Fuqaha' in Surah Al-Baqarah verse 232:

{ وَإِذَا طَلَّقْتُمُ النِّسَاءَ فَبَلَغْنَ أَجَلَهُنَّ فَلَا تَعْضُلُوهُنَّ أَنْ يَنْكِحْنَ أَزْوَاجَهُنَّ إِذَا تَرَاضَوْا بَيْنَهُمْ بِالْمَعْرُوفِ }
 ذَلِكَ يُوعِظُ بِهِ مَنْ كَانَ مِنْكُمْ يُؤْمِنُ بِاللَّهِ وَالْيَوْمِ الْآخِرِ ذَلِكَمْ أَزْكَى لَكُمْ وَأَطْهَرُ وَاللَّهُ يَعْلَمُ وَأَنْتُمْ لَا تَعْلَمُونَ }

It means :

" And when you have divorced women and they have fulfilled the term of their prescribed period , do to prevent them from marrying their (former) husbands, if they mutually agree on reasonable basis. This (instruction) is an admonition for him among you who believes in Allah and the Last Day. That is more virtuous and purer for you. Allah knows and you know not".⁵

⁵ Dr. Muhammad Taqi-ud-Din Al-Halili and Dr. Muhammad Muhsin Khan. n.d. *Translation of the meanings of The Noble Qur'an in The English Language*. King Fahd Complex For The Printing Of The Holy Qur'an Madinah, K.S.A. p 51

This above verse means that the woman must be marriage by her *wali* or guardian.

Al-Imam Shafie said:

"This verse is the clearest verse in the book of Allah which cites that an-nikah is not proper without the wali an-nikah, because the verse stated that Allah prohibits the wali from forbidding a woman's marriage. This prohibition is only effective to the person who has in his hands the power to forbid (a marriage)."

Allah said in Surah An-Nur verse 32 :

{ وَأَنْكِحُوا الْأَيَامَىٰ مِنْكُمْ..... }

It means:

" And marry those among you who are single (i.e. a man who has no wife and the woman who has no husband).... "

Allah also said in Surah Al-Baqarah verse 221 :

{ وَلَا تُنكِحُوا الْمُشْرِكِينَ حَتَّىٰ يُؤْمِنُوا..... }

It means:

" And give not (your daughters) in marriage to Al-Mushrikun till they believe (in Allah Alone) and verily....."

The verses above are instruction or command to a *wali An-Nikah* on Muslim bride .⁶

⁶Ibnu Qassim , 1993 , *Perkahwinan Dalam Islam(Berdasarkan Kepada Dalil,Hukum,Hikmat dan Panduan Kebahagiaan)*,Zafar Sdn,Bhd.,pp.101- 104.

1.1.1 To prove according As-Sunnah

Women, who have previously had marital relations with a man, can represent themselves and do not have to have a *wali* for seeking the husband.

Authorities from the Sunnah on the requirement of *wali* for the marriage of a virgin

1) Consent of a widow or a divorcee and an unmarried woman

In all cases, the woman must consent to the marriage or the marriage can be ruled invalid. Virgins need not speak up to declare that they want a marriage; simply not speaking out against the marriage (her silence) is sufficient consent for a virgin.

(حدثنا اسحاق بن منصور , اخبرنا محمد بن يوسف , اخبرنا الأوزعى عن يحيى بن ابن كثير، عن أبي سلمة ، أن أبي هريرة قال : قال رسول الله صلى الله عليه وسلم : "لا تنكح الثيب حتى تستأمر ولا تنكح البكر حتى تستأذن. وإذنها الصموت).

Means that :

"Ishaq bin Mansur told us, Muhammad bin Yusuf told us, Al-Auzal told us from Yahaya bin Abdul Kathir from Abu Salamah from Abu Hurairah said: Rasullullah cited," a widowed or divorced woman could not be married off unless it is with clear consent (yes or no). a virgin could not be married off, unless her consent is asked and her her acquiescence is her silence." (Sunan At-Tardmizi)⁷

(عن ابن عباس : ان النبي صلى الله عليه وسلم قال : الثيب احق بنفسها من وليها والبكر تستأمر وانها سكوتها)

⁷Drs.H.Moh.Zuhri.1992.Tarjamah Sunan At-Tirdmizi.Darul Fikir K.L. Vol.2.p 436

It means:

"Based on a source from Ibnu Abbas, truly the Prophet Mohammad said, "a widowed or divorced woman has more right to herself rather than her 'wali'. Whereas, the consent of an unmarried woman or a virgin must be asked first, and her silence is her consent". (Sahih Muslim)⁸

(حدثنا إسماعيل بن موسى السدوسي ثنا مالك بن أنس ، عن عبد الله ابن الفضل الهاشمي ، عن نافع بن جبير بن مطعم ، عن ابن عباس ، قال : قال رسول الله صلى الله عليه وسلم " الأيم أولى بنفسها من وليها . والبكر تستأمر في نفسها " قيل : يا رسول الله ! إن البكر تستحي أن تتكلم . قال " إذنها سكوتها).

It means :

"The news/message comes to us from Ismail bin Musa as-Sudiy, from Malik bin Anas, from Abdullah bin al-fadhl al-hasyimiy, from Nafi' bin Jubair bin Muthi'im, from Ibnu Abbas, he said : Rasullullah said,"..a woman who has no husband, that is a widow, has more right to herself than her wali. The consent of a virgin should be obtained from her." He was asked: " Dear Rasullullah, truly a virgin is shy to speak." He answered, "...her acquiescence is shown by her silence." (Sunan Ibnu Majah)⁹

(عن ذكوان أبي عمرو عن عائشة عن النبي (ص) قال استأمروا النساء في ابضاعهن قيل فإن البكر تستحي وتسكت قال هو إذنها)

⁸Imam Abi Hussin Muslim Bin Hujjaj Al-Khusyairi An-nasaburi.1997. *Sahih Muslim*. As-syafak Samarang. Vol.2 . p.776

⁹ Al-hafiz Abi 'Abdullah Muhammad Bin Yazid Al-Kazuwaini. 1992. *Sunan Ibnu Majjah*. Darul Fikr. Vol.1. p. 615

It means:

"From Dzakwan Abu Amr, from Aisyah ra ,from Rasullullah s.a.w. He cited ,” you should inform the girls about their marriages because girls are normally shy, therefore their silence shows their acquiescence.” (Sunan An-Nasa'iy)¹⁰

(عن مالك ، أنه بلغه عن سعيد بن المسيب أنه قال : قال عمر بن الخطاب : لا تنكح المرأة إلا بإذن وليها او ذى الرأى من اهلها او السلطان)

It means:

"A source from Malik, truly he heard from Said bin Al Musayyab who said: Umar bin Al Khatab once mentioned ,” a woman's marriage could not be conducted without the consent of her 'wali', or without getting the opinion of her family or the authority.” (Muwaththa' Al-Imam Malik)¹¹

2) Conducting the marriage of a very young girl

(حدثنا هشام بن عروة عن أبيه عن عائشة أن رسول الله (ص) تزوجها وهي بنت ست وبنى بها وهي بنت ست)

It means:

"From Hisyam Ibnu 'Urwah, from his father from Aisyah ra that Rasullullah (s.a.w) married her when she was six years old , and had intercourse with her when she was nine years old”. (Sunan An-Nasa'iy)¹²

¹⁰ Ustaz Ali Bey Ariffin.1993.Tarjamah Sunan An-Nasa'iy.Darul Fikir K.L. Vol. 3.p 481

¹¹ K.H Adib Bisri Musthofa.1992.Tarjamah Muwaththa' Al-Imam Malik R.A.Asy-Syifa' Darul Fikir. Vol. 2.p 4

¹²Ustaz Ali Bey Ariffin.1993.Tarjamah Sunan An-Nasa'iy.Darul Fikir K.L. Vol 3.p 476

(حدثنا أحمد بن سنان ، ثنا أبو أحمد ، ثنا إسرائيل ، عن أبي إسحاق ، عن أبي عبيدة ، عن عبد الله :
قال : تزوج النبي (ص) عائشة وهي بنت سبع . وبني بها وهي بنت تسع . وتوفى عنها وهي بنت
ثمان عشرة سنة)

It means:

"The news came to us from Ismail, from Abu Ishaq, from Abu "ubaidah, from Abdullah. He said," The Rasullullah (s.a.w) married Aishah when she was only seven years old, and he had intercourse with her when she was nine years old and he passed away when Aishah was eighteen years old". (Sunan Ibnu Majjah)¹³

(عن عائشة قالت : تزوجني النبي صلى الله عليه وسلم وأنا بنت ست سنين وبني بي وأنا بنت تسع
سنين)

It means:

"A source from Aishah who said, " Rasullullah (s.a.w) married me when I was six year old. He had intercourse with me when I was nine years old". (Sahih Muslim)¹⁴

3) A marriage without wali is not valid

(لا نكاح إلا بولي)

It means:

"No marriage without a wali".¹⁵

¹³ Al-hafiz Abi 'Abdullah Muhammad Bin Yazid Al-Kazuwaini. 1992. *Sunan Ibnu Majjah*. Darul Fikr. Vol.1. p. 622

¹⁴ Imam Abi Hussin Muslim Bin Hujjaj Al-Khusyairi An-nasaburi.1997. *Sahih Muslim*. As-syafak Samarang. Vol.2 . p. 777

(حدثنا ابن أبي عمر ، اخبرنا سفيان بن عيينة عن ابن جريج عن سليمان ، عن الزهري ، عن عروة ، عن عائشة أن رسول الله (ص) قال أيما امرأة نكحت بغير إذن وليها ، فنكاحها باطل ، فنكاحها باطل ، فنكاحها باطل. فإن دخل بها فلها المهر بما استحل من فرجها .فإن اشتجروا ، فالسلطان ولي من لا ولي له)

It means:

"Ibnu Abi Umar narrated to us, Sofyan bib Unainah Told us, from Juraij from Sulaiman from Az Zuhri from urwah from Aisyah, truly Rasullullah cited," ...every woman who married without the consent of her wali, the marriage is null, the marriage is null, the marriage is null. If the husband had intercourse with her then he had to find settlement, because the husband had....., should there be any disputes among the wali, therefore the hakim is the wali for a woman without wali". (Sunan At-Tirdmizi)¹⁶

4) A marriage which is conducted by two wali

(حدثنا قتيبة اخبرنا غندراخبرنا سعيد بن أبي عروبة عن قتادة عن الحسن عن سمرة بن جندب ، أن رسول الله صلى الله عليه وسلم قال : " ايما امرأة زوجها وليان فهي للأول منهما ، ومن باع بيعا من رجلين فهو للأول منهما).

It means:

"Quthaibah narrated to us, Ghundar told us, Said bin Arubah told us from Qatadah from Al-hassan from Samurah bin Jundab that Rasullullah cited," in the event a

¹⁵ Hassan Salleh . 1989. *Asas Kekeluargaan Islam Bahasan Empat Mazhab: Syafi'I, Hanafi, Maliki dan Hanbali*. Dewan Bahasa Dan Pustaka. pp. 44-45

¹⁶ Drs.H.Moh.Zuhri.1992.*Tarjamah Sunan At-Tirdmizi*.Darul Fikir K.L. Vol. 2. p. 424

woman is married off by two wali, therefore the valid marriage is the earliest of the two marriages and in the event a person sells a thing to two persons, therefore the valid is the first". (Sunan At-Tirmizi)

5) The marriage of a slave without the consent of the master

(حدثنا سعيد بن يحيى بن سعيد الأموي أخبرنا أبي أخبرنا ابن جريج عن عبدالله بن محمد بن عقيل عن جابر بن عبدالله عن النبي صلى الله عليه وسلم ، قال " إيا عبد تزوج بغير إذن سيده فهو عاهر) هذا حديث حسن صحيح .

It means:

"Said bin Yahaya bin Said bin Said Al-Umawi narrated to us, my father told me, Ibnu Juraij informed us by Abdullah bin Mohammad bin Aqil from Jabir bin Abdullah from the Prophet s.a.w. cited: " Any slave who married without the consent of her master, it is 'zina' (adultery)." (Hadith Hassan Sahih Sunan At-Tirmizi)¹⁷

6) A son can conduct the marriage of his mother

(حدثني ابن عمر بن أبي سلمة عن أبيه عن أم سلمة لما انتقضت عدتها بعث إليها أبو بكر يخطبها عليه فلم تزوجه فبعث إليها رسول الله صلى الله عليه وسلم عمر الخطاب يخطبها عليه فقالت أحر رسول الله صلى الله عليه وسلم اني امرأة غيرى وانى امرأة مصيبة وليس احد من أوليائي شاهد فأتى رسول صلى الله عليه وسلم فذكر ذلك له فقال ارجع إليها فقل لها اما قولك اني امرأة غيرى فسأدعوا الله لك فيذهب غيرتك وأما قولك اني امرأة مصيبة . فستكفين صبيانك وأما قولك أن ليس احد من

¹⁷ Ibid pp. 440-443

أوليائي شاهد فليس احد من اوليائك شاهد ولا غائب يكره ذلك فقالت لابنها يا عمر قم فزوج رسول الله صلى الله عليه وسلم فزوجه مختصر).

It means:

"Ibnu Umar Ibnu Salamah narrated to me from his father from Ummu Salamah r.a. said," after I completed my period of iddah, Abu Bakar sent a person to represent himself for my hand of marriage, but I declined the proposal. Later, Rasullulah s.a.w sent Umar Ibnu al-Khattab to represent himself for my hand of marriage, hence I answered, ' tell Rassullullah s.a.w. that I am a jealous woman and I have young children, besides I do not have any wali'. After Umar informed this matter to Rasullullah, he said, ' go to Ummu Salamah and tell her, 'if you are a jealous woman, Rasullah would pray to Allah to disappear your jealousy. If you said that you have young children, allah will fulfill their needs. But you did not mention your wali, whether they are here or not here, who are not happy over this matter.' Hence, Ummu Salamah said to his son, ' Dear Umar, stand and conduct my marriage to Rasullullah s.a.w.' thus, the son quickly conducted the marriage of Rasullullah to Ummu Salamah (his mother)". (Sunan An-Nasai'y)¹⁸

1.2 Importance of Wali

No *Nikah* (marriage) without *Wali's* consent, a statement attributed to the Prophet S.A.W and taken by the court to mean No *Nikah* is valid without the *Wali's* consent, is actually a statement of decree rather than of the Divine law. The meaning, therefore, would be somewhat as follows: No *Nikah* shall be allowed (or we shall not allow any *Nikah*) without the *Wali's* consent. The reason for the decree are Family values. Marriage of a man and a woman is a marriage between two families. The consent and the good wishes of the families involved are highly important. Disparaging this reality would amount to undermining the foundation on which the edifice of an Islamic society rests. For that reason, the court may declare a *Nikah*

¹⁸Ustaz Ali Bey Ariffin.1993.Tarjamah Sunan An-Nasa'iy.Darul Fikir K.L. Vol. 3.p 474-475

without the *Wali's* consent as void. But this consent is not a condition the absence of which makes the contract void *ab initio*. Moreover, socially, the consent of the bridegroom's *Wali* is as essential as is that of the bride's.

The verse of the Qur'an Surah An-Nisa' verse 25 used by the learned judge for his decision relates specifically to slave-women. It is obvious from the context of the verse that the verse allowed such Muslim men to marry slave-women as could not afford to marry 'free' Muslim ladies, provided they did that with the consent of the *ahl* (owners) of those slave-women. Therefore, there are no grounds in the Qur'an for the belief that a contract of marriage without *Wali's* consent makes the contract void *ab initio*.

Linguistically, the term *Nikah* has always been used in an Islamic society to mean an openly declared contract of marriage between a man and a woman made with their intention to live together as husband and wife for the rest of their lives.

There are certain conditions for this contract which, if not fulfilled, make the contract void *ab initio*. And there are some other conditions which, if unfulfilled, make the contract voidable. Of the conditions belonging to the first category, two important, Islamic conditions are:

- i) Open declaration of the *Nikah*. Marriage must be announced publicly (through any reasonable means) so that there is no room for any surreptitious sexual relationships.
- ii) Intention to live together permanently as husband and wife. Pre-planned divorce would make the contract prostitution rather than *Nikah*.

Of the conditions belonging to the second category, two important, Islamic conditions, among others, are:

- i) Dowry (to be paid by the man) in accordance with the conventions of the society and in due consideration of the woman's status and the ability of the man to pay. The amount is a token of the man's seriousness to take up the responsibility towards his wife-to-be.
- ii) Free consent of the man and the woman entering into the contract of marriage.

iii) *Wali's* consent.

Although arranged marriages have been common in Muslim societies, in theory at least, the free consent of both parties is required. There are several Al-Hadith in which the Prophet S.A.W is reported to have stated that the consent of a girl to her marriage must be sought, although if the girl is shy, her silence may be taken to be her consent.¹⁹

It seems that the underlying object of the honorable court's verdict (on 25 September 1996) was a check on extra-marital relationships, whereas the reasons for having *Wali's* consent in marriage are a stronger and healthier relationship between the families involved and greater security and privilege for the bride and the bridegroom. It is the condition of open declaration which serves as a check on clandestine relationships. However, even when this condition is not met, there is room especially when the parties involved are ignorant of the correct legal procedure and there is an absence of a general awareness of the correct law for sentences much lighter than automatic imposition of *hadd* (Qur'anic punishment) for fornication and, in some cases, there is room even for exoneration.

In case a man and a woman have reasonable bases for marriage against the wishes of their families, they can take the matter to the court, which has the right to decide in favour of either the *Wali/Awliya'* (plural of *Wali*) or the man and the woman. This principle is a corollary of the social directives of Islam and is corroborated by the following Hadith (a reported statement or act of the Prophet S.A.W).

A *Nikah* is not solemnise unless it takes place through the *Wali*, and, if someone does not have *Wali*, the ruler of the Muslims is the *Wali* (Tirmidhi, *Kitaab-al-Nikah*).

This Hadith is actually a corollary of the social directives of Islam pertaining to the institution of family and is based on great wisdom. Since the preservation and protection of the family set up is of paramount importance to Islam, it is but natural

¹⁹ Jamila Hussain.1999.*Islamic Law and Society* .The Federation Press.p.64

that each marriage takes place through the consent of the parents who are the foremost guardians. It is obvious that a marriage solemnised through the consent of the parent's shields and shelters the newly formed family. For reasons stated earlier, it is essential that the newly formed family be part of another larger family.

However, as is evident from the Hadith also, there can always be an exception to this general principle. If a man and a woman feel that the rejection on the part of the parents has no sound reasoning behind it or that the parents, owing to some reason, are not appreciating the grounds of this union, they have all the right to take this matter to the courts of justice. It is now up to the court to analyze and evaluate the whole affair. If it is satisfied with the stance of the man and woman, it can give a green signal to them. In this case, as is apparent from the Hadith, (from the words and if someone does not have a *wali*, the ruler of the Muslims is the *wali*) the state shall be considered the guardian of the couple. On the other hand, if the court is of the view that the stand of the parents is valid, it can stop the concerned parties from engaging in wedlock. Similarly, if a case is brought before the judicial forums in which the marriage has taken place without the consent of the parents, it is up to the court to decide the fate of such a union. If it is not satisfied with the grounds of this union, it can order for their separation and if it is satisfied, it can endorse the decision taken by the couple.

If the court finds that the consent of the man or the woman was obtained through undue influence or coercion, it may declare the *Nikah* as voidable at the option of the person whose consent was so obtained.

It is reported that a girl once came to 'A'ishah r.a and said 'My father has married me to his nephew to alleviate his poverty through me. I dislike him. 'A'ishah r.a replied 'Wait here until the Prophet S.A.W comes.' The Prophet S.A.W arrived shortly and she informed him of the matter. At this, the Prophet S.A.W sent for her father. When he arrived the Prophet S.A.W gave the girl the choice to do whatever she liked. She said: 'I accept my father's decision. I only wanted to know whether a girl has authority in this regard or not'. (Nisaie, Kitab-al-Nikah).

In differences of opinion it seems proper that the individual accommodate the opinion of the parents as far as possible, and only in extraordinary circumstances

should he persist in his decision. An individual no doubt has total freedom in decision making in this regard but he should give top priority to the protection of the institution of family. This freedom is so absolute that Islam disapproves of parents who forcibly marry their sons and daughters and makes it clear that it is the concerned man and woman who have the final say in this regard.

If in a society envisaged by Islam it is important that an individual give due regard to the opinion of the parents in marriage, it is even more important that the parents be extra cautious in this matter since they hold moral authority over their children. Misuse and abuse of such authority can produce grave consequences. Parents must give deep consideration to the inclinations and tendencies of their children in deciding their future in an affair as delicate as marriage. They should understand that once their children become mentally mature they must not impose their ideas on them.

CHAPTER TWO

2.0 Introduction

One of the problems related to the requirements of a marriage vow is the problem of *wali* or guardians of the unmarried woman (guardianship by virtue of nearest blood-relationship). The guardianship to a marriage vow (persons with the right or authority to a fulfillment of the marriage vow) is an empowerment of *syar'I*, bestowed to a group of persons, due to certain shortcomings of the person under his care, as a requirement for the marriage. This is a very complex problem and the discussion of this topic encompasses certain issues. However, I will present and clarify it from the four schools (Mazhab) points of view (Syafi'I, Hanafi, Hanbali and Maliki Schools).

2.1 Syafi'I School

2.1.1 The sequence of *wali*

The sequence of *wali* or guardians comprises of the persons rightful of inheriting the family property and heirloom (on the paternal side only). The sequences of *wali* are:

1. Father.
2. Grandfather.
3. Brothers of the same parents.
4. Brothers of the same father.

5. Nephew of the same parents.
6. Nephew of the same father.
7. Uncle of the same parents.
8. Uncle of the same father.
9. Cousins of the same parents.
10. Cousins from the same father (guardianship by virtue of nearest blood-relationship) and
11. Judge.

Shafi'I School states that the position of a father or grandfather as a *wali* to a marriage is more significant and weighty than that of a son or grandson because a father or a grandfather is more empathetic and sympathetic towards the daughters or grandchildren, and is more rightful to the management of the property.¹

2.1.2 Several matters in relation to guardianship according to Syafi'I School:

Firstly, a woman cannot conduct her own marriage herself, regardless with or without the permission of her *wali*. She cannot conduct another's wedding by accepting the representative from *wali* (guardian), cannot accept the wedlock on behalf of another, whether through the power granted by the guardians or representatives.

According to what is proper and recommended by tradition, the characteristic of a woman is naturally shy and therefore it is not acceptable to utter the marriage vow. Based on the firman (words of Allah) of Allah (s.w.t) in Surah Annisa', verse 34:

{ الرَّجَالُ قَوَّامُونَ عَلَى النِّسَاءِ..... }

"Men are the protectors and maintainers of women ..."

¹ Dr.Muhd.FauziMuhammad. 1996.*Undang-Undang Keluarga Islam Dalam Empat Mazhab*.Synergymate Sendirian Berhad. pp. 32-33

And Surah al-Baqarah, verse 232 :

{ فَلَا تَعْضُلُوهُنَّ أَنْ يَنْكِحْنَ أَزْوَاجَهُنَّ }

" ...do not prevent them from marrying their (former) husbands..."

These verses indicate that the marriage vow must be fulfilled by *wali*.
Rasullullah says:

(لا نكاح إلا بولي)

It means:

"The wedding is not valid unless is accompanied by *wali*". In a Hadith narrated by Ibn Majah:

(لا تزوج المرأة المرأة ولا المرأة نفسها)

It means :

"A woman cannot conduct the wedding of another woman or conduct her own wedding"

Secondly, the declaration of the mandatory *wali*, that is, *wali mujbir* (مجبر) , that he has conducted a woman's wedding (his daughter or granddaughter) can be accepted because he has the authority to conduct the wedding at the time of the declaration. If he is not the *wali paksa* (compulsory), his confession cannot be accepted because he does not have the authority to conduct the wedding without consent, unless with proof.

According to contemporary opinion (*Qaul Jadid*), the wedding declaration of a *baligh* and sane woman, whether she is a maiden or divorced can be accepted because a marriage is the right of women and men, therefore the marriage becomes valid with the woman's declaration. In the declaration, the woman must utter a matter related to her wedding, for example, "My *wali* has conducted our wedding witnessed by two impartial witnesses, with my consent".

According to previous opinion (*Qaul Qadim*), if both husband and wife are strangers, their declaration of marriage can be accepted. However, if they are local people, their declaration cannot be accepted without the accompaniment of proof.

The father as the mandatory *wali* has complete authority to conduct his daughter's marriage, regardless of her age, sane or insane, without the consent of his daughter. On the contrary, he has no authority to conduct the marriage of his daughter if she is a widow or if she has lost her virginity, except with the consent of his daughter. The *dalil* (commentaries) of al-Daruqutni:

(الثيب أحق بنفسها من وليها والبكر يزوجه أبوها)

It means :

"A widowed or divorced woman has more right towards herself than her wali and girls are married by the father".

The father has the right to conduct the marriage of his maiden daughter because the girl lacks knowledge regarding marital problems, and shy. However, if there is obvious enmity between a daughter and her father, the father cannot conduct the wedding of the daughter unless with the daughter's permission. The situation differs if the enmity is not obvious because in this case, the *wali* is concerned about his daughter and thus will avoid any problems later.

Although a father has the authority to conduct his maiden daughter's marriage without her consent, it must be with certain guarantee or conditions to prove that the action is justifiable and it is for the benefit of his daughter. Among the conditions are:

1. No obvious enmity between father and daughter.
2. The bridegroom must be equal in status.
3. The father must marry off the daughter with a reasonable dowry.
4. The father must marry off the daughter using the local (country's) currency
5. The bridegroom has no trouble paying the dowry.
6. The bridegroom will not pose any problems towards his daughter, for example, he is blind or too old or senile.
7. The bridegroom has no obstruction to allow his wife to perform the Hajj as individual responsibility.

Ibn al-Imad says: "are the above conditions are the conditions that make a marriage without consent valid or conditions that can justify the action (إقدام) to marry her off?" Actually the conditions mentioned above are among the conditions that legalize a marriage or legitimize a marriage without consent and justify the action to marry off the bride. Three matters that legitimize a marriage without consent are:

1. No obvious enmity between the father and daughter
2. The bridegroom must be of the same status
3. The bridegroom is able to pay the dowry immediately

It is commendable for the *wali* (guardian) to seek his matured daughter's consent to show his respect of her and from becoming autocratic. If the daughter is still young, the father does not have to seek consent but it is commendable to wait for the daughter to come to age (reaches puberty) or become adult because physical and mental maturity are important factors contributing to a happy future.²

² Hassan Salleh.1989. *Asas Kekeluargaan Islam* . Dewan Bahasa Dan Pustaka. p. 47

According to Syafi'i school, the father has the power to marry off her matured daughter without her consent even if she is already 60 years old. Based on Rasullullah's (s.a.w) Hadith: *Rasullullah says: "a widowed or divorced woman has more right to herself than his wali (guardian) and a maiden must be married off by her father."*³

A *wali* has no authority to marry off his widowed or divorced daughter unless with her permission. The Dalil:

(لا تنكحوا الأيامى حتى تستأمروهن)

It means :

" Don't you marry off a widower or divorcee unless you have already sought her consent".

A *wali* cannot marry off a young divorcee or widow who has not reached puberty or maturity because her consent is not accepted, but must wait for her to be matured and be of age.⁴

However, *syarak* (Muslim law) does not give full authority to the father and the father cannot execute his absolute power to marry off her daughter, if without justification. Even without her consent.⁵

The grandfather takes the role of the father when the father is not around or when the father has lost his guardianship because the grandfather has mandatory or obligatory guardianship, the same as the father.

³ Dr.Muhd.FauziMuhammad. 1996.*Undang-Undang Keluarga Islam Dalam Empat Mazhab*.Synergymate Sendirian Berhad. p. 41

⁴Hassan Salleh.1989. *Asas Kekeluargaan Islam* . Dewan Bahasa Dan Pustaka. p. 47

⁵ Dr.Muhd.FauziMuhammad. 1996.*Undang-Undang Keluarga Islam Dalam Empat Mazhab*.Synergymate Sendirian Berhad. pp. 41-42

A non-obligatory guardian is from the same family (blood relatives) but has no absolute authority. They are, for example, uncles of the same parents, uncles of the same father, or nephews, not commendable to marry off a girl without her consent, regardless if she is young, a maiden or a widow. They cannot perform the marriage in any condition because the consent of a very young girl cannot be accepted. As for a widow or divorcee who has already reached her puberty, the *wali* must seek a definite consent from her. It is not enough to accept her silence as consent. However, if both the bride and bridegroom are of the same status or suitable, her silence is acceptable. Dalil Khabar Muslim:

(الأيم أحق بنفسها من وليها والبكر تستأمر واذنهما سكوتهما)

It means :

*“A widow or divorcee has more authority to herself than her guardian, and the consent of a maiden must be asked and her silence can be accepted as consent .”*⁶

2.1.3 The transfer of a *wali*'s rights

The members of *ulama* generally agree that in certain situations, the power of *wali akrab* (guardian by virtue of nearest blood-relationship) is transferred to *wali ab'ad*. The situations are:

1. *Wali akrab* does not qualify as a marriage guardian (*wali*), such as, a child, slave, a person who is continually unconscious or insane, or too old or senile, or an idiot or an extravagant person, and a person not capable of managing property.
2. *Wali akrab* cannot perform his duty as *wali* because of *fasiq* (notorious evil doer from the religious point of view), always drinking alcohol and other

⁶ Hassan Salleh.1989. *Asas Kekeluargaan Islam* . Dewan Bahasa Dan Pustaka. pp. 44-48

drinks which can make a person drunk and as such. Based on Rasullullah (s.a.w) Hadith:

(قال رسول الله صلى الله عليه وسلم لا نكاح إلا بولي)

It means :

Rasulullah saw says, " There is no marriage unless it is performed by the wali".

Being in the state of *fasiq* can obstruct the influence as a *wali*, the same as a slave, but he is qualified to act as a *wali* the moment he repents

3. Has no *wali akrab* .
4. *Wali akrab* is not present or has disappeared: according to Syafi'I school if the *wali akrab* is missing more than two *marhalah* (the distance that allows a person to perform *qasar* prayer), the power or the close guardian can be transferred to *wali ab'ad*. Some opinions from the Syafi'I school state the power can be granted to *wali hakim* (guardian appointed by Court).
5. Refusal of *wali akrab*. The *ulamas* are of the opinion that the refusal of *wali akrab* to perform the marriage of a person under his care allows the power of *wali akrab* to be transferred to *wali hakim*. Based on Rasullullah (s.a.w) Hadith:

(فإن تشاجروا فالسلطان ولي من لا ولي له)

It means :

Rasullullah says, "If there is a dispute between the wali and the person under his care, the sultan becomes the wali to those without wali."

According to Syafi'I school and an official statement from Ahmad Hanbal, the refusal of the *wali akrab* results in the transfer of the power to *wali ab'ad*.

6. The difference of religion between *wali akrab* and the woman under his guardianship.
7. *Wali akrab* in the state of *ihram*. Some *ulamas* state that an intimate guardian in *ihram* can result in the transfer of the power of *wali akrab* to *wali ab'ad*. There is also an opinion from the *ulama* of Syafi'I school which states that if the *wali akrab* is *in ihram*, the power of *wali akrab* goes to *wali hakim* (guardian appointed by Court).

The objective of the transfer of power or rights from *wali akrab* to *wali ab'ad* in those situations is to protect the persons under their care who might lose their suitable future husbands because of the absence of *wali akrab*. Therefore, the Muslim law allows this transfer of right to *wali ab'ad* for the sake of the women.

2.1.4 Wali An-Nazir (equal guardianship)

Al-Imam Syafi'I states that if there are many equal guardians who can marry off a woman, such as, brothers from the same parents. However, the priority is the person who is more *faqih* and more *waru'*, as well as, older in age, with the agreement of other *wali*, and for the sake of the wedding. If the attributes differ among the *wali*, thus the priority is the one who is most *faqih*, next most *waru'*, and finally the oldest.

2.1.5 Right of veto

Members of the *ulama* agree that the right of veto occurs to children, boys or girls; to insane people, male or female, young or old. In the matter of children who are still young but already widowed or divorced, Syafi'I school does not give the *wali* the right to marry off young children who are widowed or divorced. It is compulsory for the *wali* to wait for the girl to reach puberty to get her consent and agreement

because the consent of a very young girl is not recognized, as well as, the *wali* will not have to use his right of veto repetitively, but the marriage fail. This is injustice to his daughter. Based on Rasullullah (s.a.w) Hadith: " *A widow or divorcee has better right to herself than her wali*".⁷

2.2 Maliki School

2.2.1 The sequence of *wali*

The sequence of *wali* comprises of persons who have the right to inherit the family property (paternal side only). The sequences of wali are:

1. Sons.
2. Father.
3. Brothers of the same parents.
4. Brothers of the same father.
5. Nephews of the same parents.
6. Nephews of the same father.
7. Grandfather.
8. Uncle of the same parents.
9. Uncle of the same father.
10. Cousins of the same parents.
11. Cousins of the same father.
12. *Qadi*.

Maliki school states that the priority of the sequence of *wali* goes to the son because the sons inherit the family property by *asabah* (balance of the property). Many *ulamas* are of the opinion that the grandfather is the second in sequence of the *wali* but Syafi'i school places the father as second in sequence and the grandfather the seventh in sequence. According to Maliki school and Abu Yusof al Hanafi state that

⁷Dr.Muhd.FauziMuhammad. 1996.*Undang-Undang Keluarga Islam Dalam Empat Mazhab*.Synergymate Sendirian Berhad. pp. 34-37

sons come before the other *wali* in the sequence of *wali*, such as father and grandfather, based on the Hadith:

(عن أم سلمة قالت لما انتقضت عدتها أرسل إليها رسول الله صلى الله عليه وسلم يخطبها فقالت يا رسول الله ليس أحد من أوليائي شاهد قال ليس من أوليائك شاهد ولا غائب يكره ذلك فقالت قم عمروا فزوج رسول الله صلى الله عليه وسلم)

It means:

“Ummu Salamah narrated in a Hadith : when she had completed her iddah, Rasullullah saw proposed to her, she answered, ‘ya Rasullullah, not even one of my wali is present’. He said, ‘none of your wali is here, and those who are not here do not agree to this marriage.’ Ummu Salamah said to his son, ‘Amru, marry Rasullullah to me.”

The *ulamas*’ opinions differ about who has the most right to become the *wali* when they are assembled, son and father, or grandchild and father, or son and grandfather, or grandchild and grandfather. According to Maliki school, a son has more right to become the *wali* of his mother’s marriage, even though the son is illegitimate. According to Al-Dasuki Al-Maliki, who gave comments on widows; If she is widowed through a legitimate marriage, and later she commits adultery and begets a son, then the son has the right to become the *wali* of his mother’s marriage. However, if she is widowed as a result of adultery and has a son, then the son has no right to become his mother’s *wali*.⁸

2.2.2 Women who have reached puberty and sane

Maliki school is of the opinion if the girl has reached puberty and sane and still a virgin, the *wali* has the authority to marry her off. However, if she is a widow, both have the rights to the marriage. The *wali* cannot marry off the widow without her

⁸ *Ibid* pp. 31-35