

## **Legal Formulation for Forced Marriage Prevention through the Decision of *Wali Mujbir* in Religious Courts and its Relevance with *Maqāṣid Syari'ah* and Human Rights**

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### **Abstract**

Based on the Annual Report of the Indonesian Religious Court and Religious Court Decisions throughout Indonesia year 2020-2021, there were 5,080 divorces caused by forced marriages and 3446 divorces caused by arranged marriages without the basis of love. The number of cases shows that the practice of forced marriages and arranged marriages without love is still rife, which is the cause of divorce in society. Based on this background, this research probes efforts to prevent forced marriages through religious courts by proposing the *wali mujbir* prevention norm in the marriage law. Through this norm, children or parties under guardianship can file a case to the Religious Court to prevent forced marriages they are experiencing. This study shows that creating the *wali mujbir* prevention norm in the marriage law aims to accommodate the role of children actively, directly, and independently to prevent forced marriages against themselves by marriage guardians. If the marriage guardian is proven to have taken forced actions to marry off a child or person under his guardianship, then the marriage guardian is declared a *wali mujbir*, as stated in the ruling of the religious court. This proposal is one of the efforts to reduce the high number of divorces in society.

**Keywords:** Legal Formulation, Forced Marriage, *Wali Mujbir*, Religious Court

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## Introduction

The significance of transformative legal thinking stimulates the emergence of new discourses for legal development. This includes Islamic law. The position of Islamic law is one of the sources of national law in Indonesia, along with Western law and customary law.<sup>1</sup> This legal pluralism refers to the basic provisions of the Indonesian state as a legal state (*rechtsstaat*) following Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia Amendment III. Furthermore, as one of Indonesia's judicial institutions, the religious court has the authority to examine, decide, and settle Islamic civil cases, one of which is in the field of marriage.<sup>2</sup>

Marriage in Islamic law is a firm contract (*miṣāqān galizān*). The purpose of marriage is to obey Allah's commands as a form of *gairu maḥḍah* worship (all actions that bring goodness to oneself and others and are carried out with sincere intentions because of Allah Swt). Some wisdom of marriage includes fulfilling human biological needs, realizing peace of mind and inner stability, protecting oneself from sin and immorality, avoiding moral decadence, realizing the nature of women as mothers and men as fathers, and maintaining the continuity of humanity.<sup>3</sup>

One of the legal dynamics discussed in marriage law relates to the issue of guardians.<sup>4</sup> In this case, the context

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<sup>1</sup> Matta Baharuddin, "Analisis Kedudukan Hukum Islam Dalam Sistem Hukum Di Indonesia," *DIKTUM: Jurnal Syariah Dan Hukum* 10, no. 2 (2012): 169, <https://doi.org/10.35905/diktum.v10i2.268>.

<sup>2</sup> Article 49 of Law Number 3 of 2006 on changes to Law Number 7 of 1989 on Religious Court.

<sup>3</sup> Abdul Aziz Muhammad Azzam, *Fiqh Munakahat* (Jakarta: Amzah, 2009), 39.

<sup>4</sup> Marriage law as part of *al-Aḥwāl Al-Syakhsyyah* (family law) is an integral spectrum of Islamic law which is inseparable from the dimensions of aqidah and Islamic morality. *Al-Aḥwāl Al-*

of a guardian, when connected with marriage law, is someone who acts on behalf of the bride in carrying out the marriage contract. The marriage contract is carried out by the two brides, the male party, which is carried out by the groom himself and the woman whose her marriage guardian represents.<sup>5</sup>

At present, there is still the practice of forced marriages and marriages through arranged marriages without the basis of love, which are the cause of domestic social problems in the community. As a result, these marriage practices cause disharmony in the household until it ends in divorce.<sup>6</sup> There are several factors behind parents to force their children to marry. The first is economic factor. Due to the economic needs of the lower middle class, encouraging guardians carry out marriages by finding husbands for their daughters with men whose economic level is higher/capable of their lives. As is the case with the Lamurukung Community, Bone Regency.<sup>7</sup>

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*Syakhsiyah* (family law) is a law that has been implemented in the Islamic world, and has even become their customary law. Awareness to implement family law in the Islamic world is very high. Not only in Islamic countries or countries where the majority of the population is Muslim. Also, in secular countries where Muslims are a minority population, Islamic family law is still applied and obeyed by Muslim families. A. Djazuli, *Ilmu Fiqih: Penggalan, Perkembangan, Dan Penerapan Hukum Islam* (Jakarta: Kencana, 2006), 169.

- <sup>5</sup> Dede Nurdin, "Konsep Hak Ijbar Wali Nikah Menurut Fiqih Islam Dan Kompilasi Hukum Islam," *At-Tadbir* 32, no. 2 (2022): 94.
- <sup>6</sup> See the 2020 and 2021 Annual Report of the Indonesian Religious Court and Electronic Documents of Religious Court Decisions throughout Indonesia via the Indonesian Supreme Court Decision Directory Application at the link <https://putusan3.mahkamahagung.go.id>.
- <sup>7</sup> Samsidar Fahri, "Dampak Kawin Paksa Terhadap Kehidupan Rumah Tangga Pada Masyarakat Lamurukung Kabupaten Bone," *SUPREMASI: Jurnal Pemikiran, Penelitian Ilmu-Ilmu Sosial, Hukum Dan Pengajarannya* 14, no. 1 (2020): 28, <https://doi.org/10.26858/supremasi.v14i1.13303>.

Parents who forcibly marry off their daughters wish to see an adequate life for their children. For this reason, they find husbands for their daughters with men whose economic level is higher than theirs. Even though the daughter disagrees with the future husband her father is looking for, the father does not care. The important thing is that the groom agrees to marry his daughter.<sup>8</sup>

Second is the hereditary factor where the guardians look for potential husbands for their daughters based on their ancestry. In the context of heredity, a guardian looks for a potential husband for his daughter in the form of a boy from the same ancestry as his daughter's family. This is the case in the Mlarak District, Ponorogo Regency.<sup>9</sup> This hereditary factor is one factor that influences the implementation of marriages based on coercion because the guardians find a mate for their children, as seen from their religious obedience, sufficient economy, and good offspring. In this case, the guardian usually looks for potential husbands for their children with people they know well because if the guardian knows them well, they can find out the man's ancestry.<sup>10</sup>

Third is educational factor. People with low levels of education make these people less aware of marriage law. This dramatically affects the level of understanding, especially marriage law. The lack of understanding of national and Islamic marriage law is due to the low level of public education. This is the case with the example of

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<sup>8</sup> Fahri, 28.

<sup>9</sup> Ahmad Budi Zulqurnaini, "Pandangan Hukum Islam Terhadap Nikah Paksa Karena Titumbukne (Studi Kasus Di Kecamatan Mlarak)" (STAIN Ponorogo, 2016), 62.

<sup>10</sup> Zulqurnaini, 62.

Karang Wedoro Village, Turi District, and Lamongan Regency.<sup>11</sup>

Lastly is the customary or Habits Factor. Customs or habits in an area significantly affect the way of life of a group of people. These customs or habits play a significant role in regulating the life of a society. In addition, people generally follow the customs that apply in their respective regions. As with the example in the case of Watang Sawitto, Kabupaten Pinrang.<sup>12</sup>

Customs and culture of marriage through arranged marriages still occur frequently in society. Parents match their young children with relatives, close family, and children of friends so that kinship is still maintained. Because of that, it has become a culture in the family to marry at a young age and arrange marriages by their parents because of the culture still attached to the family.<sup>13</sup>

Several legal consequences in marriage based on coercion generally cause disharmony between husband and wife besides divorce. If the marriage is carried out based on coercion, a problem will likely arise in domestic life. For example, there are quarrels, disputes, and misunderstandings between husband and wife, like the case example in Panaan Village, Palengaan District, Pamekasan Regency.<sup>14</sup> This is because they do not want to

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<sup>11</sup> Hisdiyatul Izzah, Mir'atul Firdausi, and Tiyan Iswahyuni, "Faktor Dan Dampak Nikah Paksa Terhadap Putusnya Pernikahan Menurut Kompilasi Hukum Islam," *The Indonesian Journal of Islamic Law and Civil Law* 2, no. 1 (2021): 71, <https://doi.org/10.51675/jaksya.v2i1.174>.

<sup>12</sup> Nelda K., "Nelda K., "Tinjauan Sosiologi Hukum Terhadap Nikah Paksa (Studi Kasus Di Watang Sawitto Kabupaten Pinrang)" (IAIN Pare-Pare, 2018), 49.

<sup>13</sup> K, 49.

<sup>14</sup> Imam Hafas, "Dampak Kawin Paksa Terhadap Keharmonisan Rumah Tangga Dalam Perspektif Hukum Islam," *Mitsaqan Ghalizan* 1, no. 1 (2021): 36.

understand each other, give in to each other, and lack communication because they do not know each other's character very well. Moreover, there is a lack of love for each party. Due to forced marriages, these things are caused by the lack of harmony between husband and wife.<sup>15</sup> The role of asking for the approval of the prospective bride and groom in marriage is critical. This is because estrangement and bickering are possible between husband and wife in every marriage and household life. Especially if, in a marriage, there is an element of compulsion. Marriages performed based on coercion have the potential to end in divorce. As is the case with the Lamurukung Community, Bone Regency.<sup>16</sup>

Currently there is no research that discusses the establishment of *wali mujbir* norms in marriage law or the Religious Courts Law to prevent the possibility of forced marriage. Then there is also a legal vacuum in marriage law or the Religious Courts Law regarding mechanisms for preventing forced marriage.

Through this research, a legal formulation of the authority of the religious court in the field of marriage was initiated, particularly regarding the authority of the religious court in handling cases of marriage prevention. Thus, the authority of the religious court does not only handle cases of preventing marriages committed by external parties against parties who are about to marry or preventing marriages against the marriage plans of prospective husbands or prospective wives. Thus, new legal provisions regarding the role of children can be accommodated in an active, direct, and independent way

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<sup>15</sup> Hafas, 37.

<sup>16</sup> Fahri, "Dampak Kawin Paksa Terhadap Kehidupan Rumah Tangga Pada Masyarakat Lamurukung Kabupaten Bone," 28.

to prevent forced marriages against them by marriage guardians through religious court.<sup>17</sup>

After the introduction, this article will discuss the concept of *wali mujbir* in *fiqh* and forced marriage. Then, discusses about formulating forced marriage prevention through the religious court decisions on *wali mujbir*. Furthermore, discusses *maqāsid syari'ah* and human rights analysis toward the prevention of forced marriage through religious court. The discussion ends with a concluding section.

### ***Wali Mujbir* and Forced Marriage**

*Wali mujbir* is a designation in *fiqh* that comes from the concept of *ijbār*. Etymologically, the word *ijbār* comes from the basic word *jabara* formed in pattern *af'ala* becomes *ajbara-yujbiru-ijbārūn*, which means to force and oblige to do something.<sup>18</sup> In terminology, *ijbār* is the permissibility for a father or grandfather to marry off a young girl without his permission. Further, a guardian, when connected with marriage law, acts on behalf of the bride in carrying out the marriage contract. Thus, a guardian who uses *ijbār* rights is called a *wali mujbir*.<sup>19</sup>

It can be understood that a *wali mujbir* is a guardian who has the right to force his will to marry his child or someone under his guardianship to marry without the

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<sup>17</sup> Jalaluddin Jalaluddin Halim, Ahmad Rasyidi, M. Fahmi Al Amruzi, "Rechtsvacuum Dalam Pencegahan Perkawinan Paksa Di Peradilan Agama (Telaah Yuridis Sosiologis Kebebasan Anak Untuk Memilih Pasangan Dalam Perkawinan)," in *Proceeding International Seminar of Islamic Studies*, 2023, 322.

<sup>18</sup> A.W. Munawir, *Kamus Al-Munawir* (Surabaya: Pustaka Progresif, 1997), 78.

<sup>19</sup> Muhammad Ngizzul Muttaqin and Nur Fadhilah, "Hak Ijbar Wali Tinjauan Maqashid Syari'ah Dan Antropologi Hukum Islam," *De Jure: Jurnal Hukum Dan Syar'iah* 12, no. 1 (2020): 105, <https://doi.org/10.18860/j-fsh.v12i1.7923>.

need to ask for an opinion or without the need to obtain permission or approval from the child or person to be married.<sup>20</sup> Furthermore, the *wali mujbir* is also a *wali nasab* who, in this context, carries out coercion by using his *ijbār* rights in the framework of the marriage of his child or someone under his guardianship.<sup>21</sup>

Forced marriage means a marriage that is carried out not of their own volition or because of pressure, either from parents or other parties who have the right to force them to marry.<sup>22</sup> The term forced marriage is textually not mentioned in the *fiqh* literature. However, in *fiqh munakahat* (fiqh about marriage), it is discussed about the *ijbār* rights and *wali mujbir*.<sup>23</sup>

Understanding of the term *wali mujbir* gave rise to the term forced marriage, where the right of *ijbār* is understood as the right to force a marriage by another person, which in this case is carried out by the father. In simple terms, forced marriage can be interpreted as a marriage bond without the consent of one of the parties.<sup>24</sup> The legal basis for the concept of *ijbār* is related to the

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<sup>20</sup> Sayuti Thalib, *Hukum Kekeluargaan Indonesia* (Jakarta: UI Press, 2007), 65.

<sup>21</sup> Muhammad Taufiq Habibi Talli and Abdul Halim, "Pandangan Mazhab Al-Syafi'i Dan Hanafi Tentang Wali Mujbir Dalam Pernikahan Anak Di Bawah Umur," *Shautuna: Jurnal Ilmiah Mahasiswa Perbandingan Mazhab* Volume 3, no. Issue 1 (2022): 371, <https://doi.org/10.24252/shautuna.vi.25850>.

<sup>22</sup> Masthuriyah Sa'dan, "Menakar Tradisi Kawin Paksa Di Madura Dengan Barometer Ham," *Musawa Jurnal Studi Gender Dan Islam* 14, no. 2 (2015): 148, <https://doi.org/10.14421/musawa.2015.142.143-156>.

<sup>23</sup> Arif Kurniawan, "Kawin Paksa Dalam Pandangan Kiai Krpyak," *Al-Ahwal: Jurnal Hukum Keluarga Islam* 9, no. 1 (2017): 102, <https://doi.org/10.14421/ahwal.2016.09107>.

<sup>24</sup> Abu Bakar, "KAWIN PAKSA (Problem Kewenangan Wali Dan Hak Perempuan Dalam Penentuan Jodoh)," *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 5, no. 1 (2013): 84, <https://doi.org/10.19105/al-lhkam.v5i1.283>.



hadith of the Prophet Muhammad as narrated by Imam Bukhāri (Hadith number 5158).<sup>25</sup>

Through the contents of the hadith narrated by Imam Bukhari, most fiqh scholars make this hadith the basis for the validity of the *wali mujbir*. This refers to the incident of Abu Bakr's, who married his daughter, Aisyah, to the Prophet Muhammad when Aisyah was 6 (six) years old and got along with the Prophet Muhammad when Aisyah was 9 (nine) years old. Through this hadith, some jurists understand that various matters concerning young children are the father's responsibility. Therefore, this hadith determines the father's *ijbār* rights for his child.<sup>26</sup>

The legal basis for *ijbār* rights is also based on the hadith of the Prophet Muhammad about the classification and differences between girls and widows. The father's power as the group's guardian is not the same as in the editorial of the hadith, which reads: *al'ayim ahaqqu bi nafsihā min waliha* which means the widow has more rights over herself than her guardian (the hadith of the Prophet Muhammad as narrated by Imam Bukhāri, hadith number 5136).<sup>27</sup> Based on this hadith, the widow has more rights over herself than her guardian. So, his *mafhum mukhalafah* (the opposite understanding) is that fathers have more rights over their daughters.<sup>28</sup>

Discussion of *wali mujbir* with *ijbār* rights attached to the guardian is also based on religious concern for women under guardianship. In the realm of *fiqh*, there are dynamic differences regarding the issue of wali mujbir.

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<sup>25</sup> Muḥammad bin Ismail Al-Bukhārī, *Ṣaḥīḥ Al-Bukhārī* (Beirut: Dār al-Fikr, 2002), 268.

<sup>26</sup> Ilham Akbar Perdana Putra, Jumni Nelli, and Zulfahmi Zulfahmi, "Hadits Wali Nikah Dan Implikasi Terhadap Wali Mujbir," *Jurnal Pendidikan Tambusai* 6, no. 2 (2022): 128.

<sup>27</sup> Al-Bukhārī, *Ṣaḥīḥ Al-Bukhārī*, 265.

<sup>28</sup> Kurniawan, "Kawin Paksa Dalam Pandangan Kiai Krpyak," 104.

Islamic Jurists have different opinions regarding the issue of the wali mujbir. Abu Hanifah<sup>29</sup> against coercion in marriage. According to him, the implementation of marriage must get the child's consent. A must if the child refuses a forced marriage. The legal basis used by Abu Hanifah is the hadith, which states that a guardian may marry a girl on condition that the daughter agrees and that the daughter's consent is sufficient to remain silent.<sup>30</sup>

Meanwhile, Imam Malik<sup>31</sup> considers the issue of wali mujbir is a situation where a father, in terms of his power, has the right to force his daughter to marry and the right of *ijbār* (force). This is only limited to one father.<sup>32</sup> Marriage guardians outside the father (for example, grandfather, biological or paternal brother, biological or paternal brother's children, biological or paternal uncle, biological or paternal uncle's children, and others) may not use coercion. Even so, guardians other than the father's side can become marriage guardians if there is consent from the daughter concerned.<sup>33</sup>

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<sup>29</sup> Imam Abu Hanifah is the founder of the Hanafi school of thought who still has family ties with Ali bin Abi Talib. During his life he was known as a person who was very knowledgeable, expert in asceticism, very humble, and very firm in holding on to religious teachings. Muhammad Jawad Mughniyah, *Al-Fiqh 'ala Al-Madzahib Al-Khamsah* (Beirut: Dar al-Tayyar al-Jadidah wa Dar al-Jawad, 2000), 25.

<sup>30</sup> Khoiruddin Nasution, *Hukum Perkawinan* (Yogyakarta: Academia dan Tazzafa, 2005), 86.

<sup>31</sup> Imam Malik is the second of the four famous Fiqh Imams. The Imam Malik School (Maliki School) is a pioneer in the field of fiqh. Many of his students spread his schools of thought and followed his method of determining the law. M. Hasan Al-Jamal, *Biografi 10 Imam Besar, Alih Bahasa M. Khaled Muslih Dari Kitab Asli Hayat Al-Imam* (Jakarta: Pustaka Al-Kautsar, 2007), 31.

<sup>32</sup> Nopia Nurhasanah, "Hak Ijbār Wali Dalam Hukum Perkawinan" (IAIN Purwokerto, 2019), 20.

<sup>33</sup> Moch. Aufal Hadliq Khayyul Millati and Ridwan Yunus Waddin, "Relevansi Hak Ijbar Wali Nikah ( Study Pemikiran Wahbah Az-Zuhaili Dalam Fiqih Islam Wa Adillatuhu) Dan Kompilasi Hukum

Imam Syafi'i<sup>34</sup> classifies the guardians who have the right to force girls under his guardianship to marry are divided into three groups, namely:<sup>35</sup>

1. The group of immature women who have not reached 15 years of age or have not reached puberty (menstruation). In this case, a father has the right to marry off his daughter even without the child's consent, with the condition that it brings benefits and rejects *mafsadat*;
2. The group of adult women, Imam Syafi'i, sees a balanced relationship between fathers as guardians and daughters. However, the meaning of the emphasis is that the father has more rights in terms of the provisions of his daughter's marriage;
3. The group of widowed women, Imam Syafi'i follows the absolute provisions described in the hadith that a widow has more rights over herself than her guardian. In contrast, permission is an absolute that must be fulfilled by the guardian when he is going to marry off a child under his guardianship.

Ibnu Qudamah, as one of the well-known scholars from the Hanbali school of thought, agrees on the context of wali mujbir and the use of the right of *ijbār* in marrying immature women, whether the woman likes it or not, but

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Islam (KHI)," *Mabahits : Jurnal Hukum Keluarga Islam* 3, no. 02 (2022): 113.

<sup>34</sup> Imam Shafi'i who is known as the founder of the Shafi'i school is Muhammad bin Idris Asy'Syafi'i Al-Quraish. Even though he grew up without a father and lived in an inadequate family situation, this did not make him feel inferior, inferior, let alone lazy. On the contrary, he was very active in studying hadith from hadith scholars who were widely spread throughout Arabia such as Mecca. Al-Jamal, *Biografi 10 Imam Besar, Alih Bahasa M. Khaled Muslih Dari Kitab Asli Hayat Al-Imam*, 29.

<sup>35</sup> Nasution, *Hukum Perkawinan*, 87.

the conditions that must be fulfilled are *sekufu*. Ibnu Qudamah also believes that a father (*wali*) has the right to force his daughter whether she is an adult or a minor. According to Ibnu Qudamah, the legal basis is the actions of the Prophet Muhammad, who married 'Aisyah when he was about seven years old and got together after 'Aisyah was nine years old.<sup>36</sup>

In the context of Indonesia's national law, the provisions of Article 6 paragraph (1) of Law Number 1 of 1974 stipulate that one of the conditions for marriage is the consent of the prospective bride and groom.<sup>37</sup> Likewise, Article 72 of the Compilation of Islamic Law stipulates that void marriages are marriages without guardians or carried out by guardians who are not entitled and marriages carried out by force.<sup>38</sup> This shows that the *ijbār* right of the guardian, according to the provisions of Article 72 of the Compilation of Islamic Law, is not allowed because the *ijbār* right contains an element of coercion.

### **Formulating Forced Marriage Prevention through the Religious Court Decisions on *Wali Mujbir***

One of the legal dynamics discussed in marriage law relates to the issue of guardians.<sup>39</sup> In this case, the context

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<sup>36</sup> Nasution, 88.

<sup>37</sup> Article 6 paragraph (1) Law Number 1 of 1974 on Marriage.

<sup>38</sup> Article 72 Presidential Instruction Number 1 of 1991 on Dissemination of the Compilation of Islamic Law.

<sup>39</sup> Marriage law as part of *al-Aḥwāl Al-Syakhṣiyyah* (family law) is an integral spectrum of Islamic law which is inseparable from the dimensions of *aqidah* and Islamic morality. *al-Aḥwāl Al-Syakhṣiyyah* (family law) is a law that has been implemented in the Islamic world, and has even become their customary law. Awareness to implement family law in the Islamic world is very high. Not only in Islamic countries or countries where the majority of the population is Muslim. Also, in secular countries where Muslims are a minority population, Islamic family law is still applied and obeyed by Muslim

of a guardian, when connected with marriage law, is someone who acts on behalf of the bride in carrying out the marriage contract. The marriage contract is carried out by the bride and groom, namely the male party, which is carried out by the groom himself, and the female party, which is carried out or represented by his guardian.<sup>40</sup>

Philosophically, the urgency of the position of a guardian becomes significant because it relates to the conditions, pillars, and validity of a marriage.<sup>41</sup> Of course, the marriage must be based on love between the two parties. This aims to fulfill natural and religious provisions to create a *sakinah*, *mawaddah*, and *rahmah* family which means a family with tranquility, love and mercy.<sup>42</sup>

Juridically, guardianship provisions in marriage are regulated in Islamic law and national law. Several verses of the Qur'an concern the position of guardian in Islamic marriage law. This follows Allah's word in the chapter an-

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families. Djazuli, *Ilmu Fiqih: Penggalan, Perkembangan, Dan Penerapan Hukum Islam*, 169.

<sup>40</sup> Nurdin, "Konsep Hak Ijbar Wali Nikah Menurut Fiqih Islam Dan Kompilasi Hukum Islam," 94.

<sup>41</sup> The conditions for marriage in Islamic law include: There is consent from both parties of the bride and groom, both the man and the woman without any coercion; Adult; Similarity of Religion (Islam); There is no lineage relationship, *raḍa'ah* (breastfeeding) relationship and *mu ṣ aharah* (semenda) relationship. The pillars of marriage, among other things, must exist: Prospective husband; Candidate wife; Marriage Guardian; Two witnesses; Ijab and granted. R. Abdul Djamali, *Hukum Islam (Asas-Asas, Hukum Islam I, Hukum Islam II)* (Bandung: CV. Mandar Maju, 1992), 79–81.

<sup>42</sup> There are three ideal aspects that are building life in the household as the goal of marriage in Islam. First, *litaskunu ilaiha* which means *sakinah* in the form of a calm, peaceful, harmonious and peaceful atmosphere in a household. Second, *mawaddah* or mutual love. In this case, love is subjective, namely for the benefit of those who love. Third, *rahmah* namely affection that is objective, namely affection which is the basis for love. Agus Riyadi, *Bimbingan Konseling Perkawinan (Dakwah Dalam Membentuk Keluarga Sakinah)* (Yogyakarta: Ombak, 2013), 104.

Nur verse 32. Guardian provisions are<sup>43</sup> also contained in several hadiths of the prophet Muhammad, like the hadith narrated by Imam Abu Dawud (hadith number 2085) regarding the prohibition of marriage without guardian.<sup>44</sup>

In the context of national law, the position of marriage guardian is regulated explicitly in the Presidential Instruction of the Republic of Indonesia Number 1 of 1991 concerning the Dissemination of the Compilation of Islamic Law. Child guardianship is regulated in Law Number 23 of 2002 concerning Child Protection, amended by Law Number 35 of 2014, and the second amendment through Law Number 17 of 2016.

There is a dynamic debate about the position of the guardian in the marriage procession. Regarding this matter, the debate about the role of the marriage guardian is not only related to the issue of the validity of one's marriage. However, it also relates to the right to marry people under his guardianship. It is also related to the issue of licensing for people who are going to marry. If a guardian forces his child or someone under his guardianship to marry another person without the child's desire or consent, both girls and boys, that guardian is called a *wali mujbir*. Regarding the provisions of *wali mujbir* in marriage, the majority of fiqh scholars, such as the Malikiyah, Syafi'iyah, Hanabilah and Zahiriyah (except Hanafiyah) allow guardians to use *ijbār* rights with various classifications and specific conditions.<sup>45</sup>

The problem that arises later is when in practice, the coercive act of a guardian who takes refuge behind the right of *ijbār* is only used as a means to force his child to marry

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<sup>43</sup> Depag RI, *Al-Qur'an Terjemahan* (Semarang: CV. Toha Putra, 1989), 541.

<sup>44</sup> Abū Sulaiman ibn al-Asy'as Al-Sijistaī, *Sunan Abū Dawud Juz III* (Beirut: Dār al-Fikr, 1968), 193.

<sup>45</sup> Mughniyah, *Al-Fiqh 'ala Al-Madzahib Al-Khamsah*, 235.

the choice of the guardian without the consent and approval of the child or the person under his guardianship. Parents or guardians should also pay attention and consider the views and wishes of children. This is because children have the right to continue their lives in the future. Even so, it does not mean that children are immediately justified in ignoring parental advice in their marriage.

Sociologically, there is still the practice of forced marriages and marriages through arranged marriages without a basis of love among the people. Not a few of these marriage practices ended in divorce. There are several examples of legal cases in the religious court related to divorce caused by forced marriages and divorce caused by arranged marriages without love. The various cases studied consist of divorce cases that were decided and signed in 2020 and 2021. In this case, 2 (two) cases were studied. The following will describe the position of the legal case:<sup>46</sup>

1. Decision Number 5001/Pdt.G/2020/PA.Im is a divorce lawsuit filed by the Plaintiff as the wife against the Defendant as the husband (Divorce Case) at the Indramayu Religious Court, Indramayu Regency, in 2020. In this case, the Plaintiff argued that he only lived in the household for 3 (three) days. This was because the marriage between the Plaintiff and the Defendant was based on coercion from the Plaintiff's parents. As a result, the Plaintiff was unable to continue his household. Therefore, the Plaintiff filed for divorce at the Indramayu Religious Court. This case has been proven in court so that the Panel of Judges has granted the divorce suit from the Plaintiff;

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<sup>46</sup> The Indonesian Supreme Court Decision Directory Application at the link <https://putusan3.mahkamahagung.go.id>.

2. Decision Number 533/Pdt.G/2021/PA.Bjm is a divorce lawsuit filed by the Plaintiff as the wife against the Defendant as the husband (Divorce Case) at the Banjarmasin Religious Court, Banjarmasin City, in 2021. In this case, Plaintiff argued that since the beginning of their marriage, Plaintiff and Defendant's household was not harmonious. Plaintiff and Defendant got married because Plaintiff's parents arranged an arranged marriage. The marriage of the Plaintiff and the Defendant only lasted 1 (one) week. After that, the Plaintiff and the Defendant separated their residence for more than 1 (one) year. Therefore, the Plaintiff filed for divorce at the Banjarmasin Religious Court. This case has been proven in court so that the Panel of Judges has granted the divorce suit from the Plaintiff.

Based on data obtained from the 2020 and 2021 Annual Reports of the Religious Court of the Republic of Indonesia as well as Electronic Documents of Decisions of Religious Courts throughout Indonesia on the website of the Directory of Decisions of the Supreme Court of the Republic of Indonesia, it shows that in 2020 and 2021 there have been many divorce lawsuits, especially divorce lawsuits caused by forced marriages and marriage through arranged marriages without the basis of love as per Table 1.<sup>47</sup>

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<sup>47</sup> See the 2020 and 2021 Annual Report of the Indonesian Religious Court and Electronic Documents of Religious Court Decisions throughout Indonesia via the Indonesian Supreme Court Decision Directory Application at the link <https://putusan3.mahkamahagung.go.id>.



Table 1. Divorce Due to Forced Marriage and Arranged Marriage Cases in Religious Court throughout Indonesia in 2020 and 2021

No	Some Causes of Divorce	Case		Number of Cases
		Year 2020	Year 2021	
1	Divorce caused by forced marriage	2669	2411	5080
2	Divorce is caused by marriage through an arranged marriage without a basis of love	1996	1450	3446
Number of Total Cases				8526

As illustrated by the data in the table above, it shows that there is still the practice of forced marriages and arranged marriages without love as the cause of domestic social problems in the community. As a result, these marriage practices cause disharmony in the household until it ends in divorce.

Regarding the legal problems related to the practice of forced marriages and marriages through arranged marriages without the basis of love, this is related to the mechanism of legal prevention. In this case, there is no legal provision that regulates the prevention of forced marriages by marriage guardians against children, which children can independently pursue to prevent forced marriages against themselves. In a sense, there is no legal regulation to accommodate children's efforts internally to prevent forced marriages against them by marriage guardians.

The provisions of Article 6 paragraph (1) of Law Number 1 of 1974 concerning Marriage stipulates that marriage must be based on the consent of the two prospective bride and groom.<sup>48</sup> Apart from that, Article 16 paragraph (1) of the Compilation of Islamic Law also stipulates that marriage is based on the consent of the prospective bride and groom.<sup>49</sup>

The provisions of Article 14 paragraph (1) of Law Number 1 of 1974 concerning Marriage only stipulate that those who can prevent marriage are families in the straight line up and down, siblings, marriage guardians, and guardian guardians of one of the prospective bride and groom.<sup>50</sup> Likewise, the provisions of Article 62 paragraph (1) of Presidential Instruction Number 1 of 1991 concerning the Dissemination of the Compilation of Islamic Law stipulates that those who can prevent marriage are families in the lineage straight up and straight down, siblings, marriage guardians, guardian guardians from one of the bride and groom.<sup>51</sup>

Subsequent legal provisions in Article 49 of Law Number 3 of 2006 concerning Amendments to Law Number 7 of 1989 concerning Religious Court, the latest being amended by Law Number 50 of 2009 stipulates that the religious court has the duty and authority to examine, decide and resolve cases at the first level between people who are Muslim in the areas of: marriage; heir; will; grant; waqf; zakat; infaq; alms; and shariah economy.<sup>52</sup>

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<sup>48</sup> Article 6 paragraph (1) Law Number 1 of 1974 on Marriage.

<sup>49</sup> Article 16 paragraph (1) Presidential Instruction Number 1 of 1991 on Dissemination of the Compilation of Islamic Law.

<sup>50</sup> Article 14 paragraph (1) Law Number 1 of 1974 on Marriage

<sup>51</sup> Article 62 paragraph (1) Presidential Instruction Number 1 of 1991 on Dissemination of the Compilation of Islamic Law.

<sup>52</sup> Article 49 of Law Number 3 of 2006 on changes to Law Number 7 of 1989 on Religious Court.

The elucidation of Article 49 letter a number 4 of Law Number 3 of 2006 concerning Amendment to Law Number 7 of 1989 concerning Religious Court which was last amended by Law Number 50 of 2009 contains provisions that what is meant by marriage is matters which are regulated in or based on laws regarding valid marriages conducted according to shariah, including number (4) about prevention of marriage.<sup>53</sup>

It can be understood that various existing legal provisions only accommodate the prevention of marriage for those who are about to get married. In a sense, marriage prevention can be carried out by external parties against the marriage plans of the prospective husband or prospective wife. Thus, there is no legal provision that regulates the prevention of forced marriages by marriage guardians to children through the active, direct, and independent role of children to prevent forced marriages against themselves.

Based on the various descriptions above, two problems were found as the primary basis for conducting this research. In this case, it includes sociological problems and juridical problems. First, the sociological problems in this study are related to the practice of forced marriages and arranged marriages without love in society. As a result, these marriage practices cause disharmony in the household until it ends in divorce. This is contrary to the legal principle of marriage that marriage is a solid bond (*mišāqān galizān*) established based on mutual consent and consent between the two husbands and wives.

Likewise, in other cases of forced marriages to children or parties under guardianship that were previously carried out by the child's family, such as uncles,

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<sup>53</sup> Article 49 of Law Number 3 of 2006 on changes to Law Number 7 of 1989 on Religious Court.

and not carried out by the biological father because the child is an orphan, in this case, the child is in an inferior position compared to the marriage guardian. Several examples of these cases occurred because legal provisions had not been accommodated regarding the role of children in an active, direct, and independent way to prevent forced marriages against them by marriage guardians.

Second, the juridical problems in this study are related to the authority of the religious court in Indonesia. In this case, there is no legal regulation regarding the authority of the religious court in handling cases of preventing forced marriages of children through decisions regarding *wali mujbir* in the religious court.

The case of preventing forced marriages of children through decisions regarding *wali mujbir* in the religious court is crucial. At least several things need to be used as a legal reflection, including the practice of forced marriages and arranged marriages without love among the people. Furthermore, these marital practices create disharmony in the household, which ends in divorce.

Based on the description above, it is important to formulate the legal authority of the religious court in the field of marriage, especially regarding the authority of the religious court in handling cases of preventing marriage. Thus, the authority of the religious court does not only handle cases of preventing marriages committed by external parties against parties who are about to marry or preventing marriages against the marriage plans of prospective husbands or prospective wives. In this case, the parties that can prevent marriage are the families in the straight line up and down, relatives, marriage

guardians, and guardians of one prospective bride and groom.<sup>54</sup>

The idea of legal formulation in this study relates to the authority of the religious court in handling cases of preventing forced marriages against children. Thus, new legal provisions regarding the active role of children can be accommodated directly and independently to prevent forced marriage against them by the marriage guardian. Furthermore, if the marriage guardian is proven to have taken forced actions to marry off a child or person under his guardianship, then the marriage guardian is declared as *wali mujbir* as outlined in the decision of the religious court. With this decision, the Office of Religious Affairs can reject the registration of forced marriages against children by guardians.

Legal ideas in this research are hoped to bring justice, certainty, and benefit to children and their future lives. This can be an alternative solution to prevent the practice of forced marriages that still occur in society. Ultimately, it is also one of the efforts to reduce the high number of divorces in the religious court.

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<sup>54</sup> Article 14 paragraph (1) Law Number 1 of 1974 on Marriage.

Table 2. Legal Formulations Explanation of Article 49 letter a number 4 Law Number 3 of 2006 concerning Amendments to Law Number 7 of 1989 concerning Religious Court

<b>Prior to Legal Formulation</b>	<b>Legal Vacuum</b>	<b>After doing Legal Formulation</b>
<p>Article 49 of the Law on Religious Court:</p> <p>The Religious Court has the duty and authority to examine, decide, and resolve cases at the first level between Muslim people in the fields of marriage, heir, will, grant, waqf, zakat, infaq, alms and shariah economy.</p> <p>Explanation of Article 49 letter number 4 of the Law on Religious Court:</p> <p>What is meant by marriage are matters that are regulated in or based on the</p>	<p>Void in the Explanation of Article 49 letter a number 4 of the Law on Religious Court:</p> <ul style="list-style-type: none"> <li>• It only regulates the prevention of marriage for those who are getting married. In a sense, the prevention of marriage is carried out by external parties against the marriage plans of the prospective husband or prospective wife;</li> <li>• There is no legal provision that regulates the prevention of forced marriages by marriage guardians against children whom children can directly and independently</li> </ul>	<p>The formulation of the Explanation of Article 49 letter number 4 of the Law on Religious Court becomes:</p> <p>What is meant by marriage are matters regulated in or based on the law regarding valid marriages that are carried out according to shariah, including: prevention of marriage; prevention of child forced marriages.</p> <p>Furthermore, if the marriage guardian is proven to have taken forced actions to marry off a child or person under his guardianship, then the marriage</p>

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applicable law regarding marriages that are carried out according to shariah, including number (4) prevention of marriages;	pursue to prevent forced marriages against themselves. In a sense, there is no legal regulation to accommodate children's efforts internally to prevent forced marriages against them by marriage guardians.	guardian is declared as <i>wali mujbir</i> as outlined in the ruling of the religious court.
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This research is further expected to provide positive and progressive implications and contributions in the field of marriage. In particular in terms of preventing child forced marriages. In this case, it includes the implications and contributions of academic, juridical, and sociological research.

The academic impact of this study is related to the legal formulation studied. This research is directed to contribute and develop academic concepts in the form of new legal formulations to prevent forced marriages of children through decisions regarding *wali mujbir* in the religious court. Through this research, an in-depth analysis and study is carried out regarding the relevant concepts, arguments, and legal basis. Furthermore, this research proposes that the context of *wali mujbir*, which has so far been at the level of normative discourse, is directed to an implementable level in the technical realm of justice.

The juridical impact of this study is directed to fill the legal vacuum (*rechts vacuum*) in the law on the religious court. This case concerns the vacuum of the legal authority of the religious court in handling cases of preventing forced marriages of children through decisions regarding *wali*

*mujbir* in the religious court. If so far, the religious court has the authority to handle cases of wali aḍal (reluctant guardians prevent, obstruct, or withhold the will of a marriage), then ideally, in the case of *wali mujbir* (guardians who force a marriage), it also needs to be accommodated as part of the authority of the religious court.

The sociological impact of this study is oriented as an alternative solution to prevent the practice of forced marriages that still occur in society. Ultimately, it is also one of the efforts to reduce the high number of divorces in the religious court. Furthermore, through this research idea, it is hoped that justice, certainty, and benefits will be realized for children and their lives.

### ***Maqāṣid Syari'ah* and Human Rights Analysis Toward the Prevention of Forced Marriage through Religious Court**

#### *Perspectives of Maqāṣid Syari'ah*

In general, *maqāṣid syari'ah* means the goals of the sharia. In the scope of *uṣul fiqh*, the study of *maqāṣid syari'ah* is oriented to determine the goals to be achieved by the formulators in making laws. The purpose of the law is one of the essential factors in determining Islamic law.<sup>55</sup> As for *maslahat*, it means benefit or goodness. The *maslahat* study is multifunctional in solving various legal problems.<sup>56</sup> The study of *maqāṣid syari'ah* and *maslahat* always go hand in hand. Thus, it can be understood that

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<sup>55</sup> Abdul Aziz Dahlan, *Abdul Aziz Dahlan, Ensiklopedia Hukum Islam Jilid 4* (Jakarta: Ichtiar Baru Van Hoeve, 1996), 1108.

<sup>56</sup> Asmawi, *Teori Maslahat Dan Relevansinya Dengan Perundang-Undangan Pidana Khusus Di Indonesia* (Jakarta: Badan Litbang dan Diklat Kemenag RI, 2010), 35.



the projection of *maqāṣid syari'ah* (the goal of Islamic law is prescribed) is for the benefit of humanity globally.<sup>57</sup>

Al-Ghazali emphasized the importance of *maqāṣid syari'ah* in establishing Islamic law. He explains the purpose of the Shari'a in terms of *maslahat*. According to al-Gazali, *maslahat* is realizing benefits and getting rid of harm.<sup>58</sup>

The discussion on *maqāṣid syari'ah* and *maslahat* is carried out by ash-Syaṭibi in his book *al-Muwafaqat*. He explicitly states that Allah, in establishing all His laws, is always based on the realization of human benefit, both in this world and in the hereafter. Therefore, *taklif* (legal imposition) in the field of law must lead to the realization of the purpose of the law.<sup>59</sup>

Asy-Syaṭibi further states that benefit can be appropriately realized if he maintains 5 (five) main elements, which he calls *al-kulliyatu al-khamsah*, namely: Protection of religion (*ḥifẓ ad-din*); Protection of the soul (*ḥifẓ an-nafs*); Protection of reason (*ḥifẓ al-'aql*); Protection of offspring (*ḥifẓ an-naṣl*); and Protection of wealth (*ḥifẓ al-māl*). The main elements of *maqāṣid syari'ah* must be maintained to realize benefits. Asy-Syaṭibi then divides the conditions for maintaining these basic elements, including: *Maqāṣid ad-Darūriyat* is maintaining the five basic elements of human life. If it is not maintained, it will impact the damage to human life in this world and the hereafter; *Maqāṣid al-Hajiyat* is an essential need that can avoid difficulties for humans. If it is not fulfilled, then it does not threaten the

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<sup>57</sup> Asmawi, 35.

<sup>58</sup> Abū Ḥamid Muḥammad bin Muḥammad Al-Gazali, *Al-Mustasyfa Min 'Ilmi Al-Uṣul* (Kairo: Al-Amiriyah, n.d.), 250.

<sup>59</sup> Abū Ishāq Ibrahim bin Musa bin Muḥammad al-Lakhmi Al-Syaṭibi, *Al-Muwafaqat Fī Uṣul Al-Syari'Ah* (Beirut: Abū Ishāq Ibrahim bin Musa bin Muḥammad al-Lakhmi Al-Syaṭibi, Al-Muwafaqat Fī Uṣul al-Syari'ah (Beirut: Dar al-Kutub al-Ilmiyah, n.d.), 42.

existence of the five basic elements but only creates difficulties for humans; and *Maqāṣid at-Taḥṣīniyyat* is a need that supports improvement for perfecting the maintenance of these basic elements.<sup>60</sup>

Based on this discussion, it can be understood that the orientation of Islamic law must be based on something more fundamental than the dogmatic level, in the sense of being a value system that is consciously embraced as a belief to realize justice and the benefit of humanity. Thus, it is clear that the fundamental purpose of establishing Islamic law is universal human benefit.

When connected with this research, the legal formulation of preventing forced marriages of children through decisions regarding *wali mujbir* in religious court is relevant to the concepts of *maqāṣid syari'ah* and *maslahat*, especially concerning protection of the soul (*ḥifẓ an-nafs*) and protection to offspring (*ḥifẓ an-naṣl*). Thus, new legal provisions regarding the role of children can be accommodated in an active, direct, and independent way to prevent forced marriages against them by marriage guardians.

Parents or guardians ideally do not force their children to marry without the child's prior consent. This is because, in essence, Islam does not teach an attitude of coercion (authoritarianism) and discrimination against fellow human beings, especially children. Islam considers the values of equality, equity (*al-musāwah*), and freedom (*al-hurriyah*) in resolving various legal problems.<sup>61</sup>

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<sup>60</sup> Al-Syaṭibi, 43.

<sup>61</sup> Ahmad Rasyidi Halim, "Pemikiran Ibnu Qayyim Al-Jauziyyah Tentang Wali Mujbir Dalam Pernikahan (Perspektif Hak Asasi Anak)," *Jurnal Studi Agama Dan Masyarakat* 12, no. 2 (2016): 140, <https://doi.org/https://doi.org/10.23971/jsam.v12i2.465>.

Every individual is free to carry out legal actions with a total sense of responsibility, including in matters of marriage. This also follows Islamic teachings, which always lead to the ideals of the Qur'an, which uphold human values and actualize its laws for the people's interests by prioritizing *maslahat*.

### *Perspectives of Human Rights*

The definition of human rights concerns protecting a person from oppression by anyone, state or non-state. Meanwhile, the notion of fundamental rights concerns the protection of a citizen or resident from oppression by the state.<sup>62</sup>

Human Rights are inherent in every human being from birth, are valid for life, and cannot be contested by anyone.<sup>63</sup> Referring to the provisions of Article 1 of Law Number 39 of 1999 concerning Human Rights, it is stated that Human Rights is a set of rights that are inherent in the nature and existence of humans as creatures of God Almighty and are His gifts that must be respected, upheld and protected by the state, law, government, and everyone for the honor and protection of human dignity.<sup>64</sup>

The Human Rights Convention explains the concept of Human Rights. 1948, the United Nations issued the Universal Declaration of Human Rights (UDHR). UDHR is basically about respecting the humanity of every person because he was born as a human being. The UDHR consists of 30 articles. Several human rights are listed in

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<sup>62</sup> Arini Robbi Izzati, "Kuasa Hak Ijbar Terhadap Anak Perempuan Perspektif Fiqh Dan HAM," *Al-Mawarid: Jurnal Hukum Islam* 11, no. 2 (2011): 249.

<sup>63</sup> Qurrotul Ainiyah, *Keadilan Gender Dalam Islam: Konvensi PBB Dalam Perspektif Mazhab Syafi'i* (Malang: Intrans Publishing, 2015), 44.

<sup>64</sup> Article 1 Law Number 39 of 1999 on Human Rights.

the UDHR, namely: Equal Rights (Articles 1 and 2); Right to Free Life (Articles 3, 4, and 5); Legal Rights (Articles 6, 7 and 8); the Right to Find a Match and Form a Family (Article 16); this article states that every adult, male and female, has the right to get a mate and form a family according to his preferences without being limited by his nationality, religion, and nationality and the same rights in marriage and divorce; the Right to Adopt a Religion (Article 17); right to Expression or freedom of thought (Article 18); the right to associate and assemble (Articles 19 and 20); i. Right to get a job (Article 25); the right to education and teaching (Article 26); the right to determine their future and enjoy this life naturally and freely (Article 29). This article states that the future of every human being cannot be forced; humans are given freedom.<sup>65</sup>

According to the provisions of Article 52 paragraph 1 of Law Number 39 of 1999 concerning Human Rights, children's rights are human rights, and for the sake of their interests, the rights of children are recognized and protected by law since the child is in the womb. Meanwhile, according to the provisions of Article 1 number 12 of Law Number 23 of 2002 concerning Child Protection, children's rights are part of human rights that must be guaranteed, protected, and fulfilled by parents, families, communities, government, and the state. Furthermore, in the provisions of Article 28B, paragraph 2 of the Constitution of the Republic of Indonesia, it is stated that "Every child has the right to survival, growth, and development and is entitled to protection from violence and discrimination."

Indonesia ratified the Convention on the Rights of the Child and committed according to national law to respect, protect, promote, and fulfill children's rights in

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<sup>65</sup> Universal Declaration of Human Rights 1948.

Indonesia. Article 26 of Law Number 23 of 2002 concerning Child Protection states that parents are obliged and responsible for: caring for, nurturing, educating, and protecting children; growing children according to their abilities, talents, and interests; prevent the occurrence of marriage at the age of children.<sup>66</sup>

Based on the above provisions, it is mandated for parents to prevent the marriage of their children who are still at the age of children and not to justify forced marriages. This is because every male and female child has the right to choose their life partner if they do not violate applicable laws and regulations.

All male and female children have the same right to enter into marriage. In addition, in matters of child marriage, it should be based on their consent and willingness. There should not be any coercion in the marriage by anyone or any party. This is because if there is an element of coercion in child marriage, it can potentially create resistance to the protection of children's rights, which results in not achieving the goals of marriage.

As contained in the Convention on the Elimination of All Forms of Discrimination Against Women or CEDAW contained in Article 16 Paragraph 1, it is stated that state parties must take all appropriate steps to eliminate discrimination against women in all matters relating to marriage and relations within the family as well, in particular, must guarantee based on equality between men and women; namely, first, equal rights to enter the marriage ladder. Second, the same right to freely choose a partner and enter into marriage only with his free and full consent.<sup>67</sup>

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<sup>66</sup> Article 26 of Law Number 23 of 2002 on Child Protection.

<sup>67</sup> Kelompok Kerja Convention Watch and Yayasan Pustaka Obor Indonesia, *Hak Azasi Perempuan: Instrument Hukum Untuk*

When it is associated with the concept of *wali mujbir* and *ijbār* rights, then parents should not unilaterally force their children to marry without asking for the child's permission and approval first. Because, in essence, the rights of parents are more directed to the right to marry as a form of responsibility towards children. Thus, it can be understood that within the context of marriage, every male and female child has the right to express opinions and determine the choice of a future life partner. Even so, the child's rights are not free without restrictions (absolute), but also need to pay attention to advice and suggestions from parents and extended family. Thus, in implementing it, children's human rights must be balanced with the implementation of the human rights of other related parties, including the role of parents.

The freedom given by Islam to women in choosing a partner is a form of caring and giving rights to be equal to men. Choosing a partner is the right of the woman with whom she will marry and when she will marry. Other people, even if they are guardians, do not have the prerogative right to intervene or revoke these rights. This right is a fundamental right given by Islam to women. In line with the rights granted by Islam, Human Rights also mentions and provides an explanation and elaboration of the urgency of rights for women, in this case, the right to choose a partner.

Likewise, in the CEDAW article 16, paragraph 1 that state parties must take all appropriate steps to eliminate discrimination against women in all matters relating to marriage and relationships in the family and in particular must guarantee, based on equality between men and

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*Mewujudkan Keadilan Gender* (Jakarta: Yayasan Pustaka Obor Indonesia, 2007), 67–68. Rhona K. M. dkk Smith, *Hukum Hak Asasi Manusia* (Yogyakarta: Pusat Studi Hak Asasi Manusia, 2008), 150.

women, namely: the same rights to enter the marriage ladder; the same right to freely choose a partner and enter into marriage only with his free and full consent; equal rights and responsibilities during marriage and at the time of marriage dissolution; the same rights and responsibilities as parents, regardless of their marital status, in matters relating to their children; in all cases, the interests of the children shall be paramount

When connected with this research, the legal formulation of the prevention of forced marriages against children through decisions regarding *wali mujbir* in the religious court is also relevant to the concept of human rights. If one uses the lens of human rights in this case, human rights, especially for children and women, then the tradition of forced marriage is very contrary to human values that uphold the human rights of each individual.

### **Conclusion**

This study initiates a legal formulation within the authority of the religious court in the field of marriage, namely the authority of the religious court in handling cases of preventing forced marriages. This research aims to formulate legal norms to prevent forced marriages that can be initiated by children or parties under guardianship through religious court. Thus, new legal provisions regarding the role of children can be accommodated in an active, direct, and independent way to prevent forced marriages against them by marriage guardians.

If the marriage guardian is proven to have taken forced actions to marry off a child or person under his guardianship, then the marriage guardian is declared a *wali mujbir*, as stated in the ruling of the religious court. Furthermore, the idea of legal formulation to prevent forced

marriages through religious court is relevant to *maqāṣid syari'ah* and human rights.



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