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# **FIQH OF RECIPROCITY**

## **(Exploring the Concept of Construction and Deconstruction of the Rights of Guardianship of Children; Perspectives of the Indonesian Islamic Marriage Registrar Association and the Indonesian Family Law Lecturers Association)**

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**Abstract.** This study aimed to reveal the essence of the rulings concerning guardianship in Islamic marriages through the construction and deconstruction of the perspectives of the Indonesian Family Law Lecturers Association (Asosiasi Dosen Hukum Keluarga Islam or ADHKI, *Ind.*) and the Indonesian Islamic Marriage Registrar Association (Asosiasi Penghulu Republik Indonesia or APRI, *Ind.*) based on the *fiqh* (Islamic jurisprudence) of reciprocity. The underlying background was various cases of neglect of girls that lead to problems when they become adults and need guardians in their marriages. In such a situation, the main construction of the parents' responsibilities is closely related to the right to be the daughters' guardians: does it belong to the parents or to those who have been carrying out the responsibility of taking care of the daughters? This study, based on a qualitative method with a multi-site study basis and the formulation of the *fiqh* of reciprocity, was expected to spawn new opportunities in Islamic legal *ijtihad* regarding guardianship in marriage. This comprehensive and in-depth study found that 1) the construction of the guardianship of adopted children in the perspectives of APRI and ADHKI means that the essence of guardianship is to fulfill the needs and bear the lives of the children under the guardianship and 2) based on the point of views of APRI and ADHKI, the deconstruction in the concept of guardianship of adopted children by adoptive parents or those who become protectors of the children is based on a reinterpretation of the *sharī'ah* texts, which show that guardianship must be of those who have *nasab* (lineage) paths or *wālī ḥākim* (a Muslim judge as the marriage guardian), using a sociological approach, human rights, and the embodiment of justice (*maṣlahah*).

**Keywords:** ADHKI; APRI; concept of guardianship; *fiqh* of reciprocity; *wālī ḥākim*; *wālī nasab*

### **1. Introduction**

This study departed from the discourse of a new model of *fiqh* and studies of women and children. Legal and humanitarian issues are attractive topics to address regarding social and family life, including marriage. Indonesia is a country that adheres to the principle “To believe in the One Supreme God.” Laws concerning marriage in it, consequently, are closely related to religious values. Therefore, marriage in Indonesia contains not only physical but also mental and spiritual elements [1].

Several problems concerning elements of family law always emerge and develop according to the differences in place and time. This phenomenon requires the existence of a legal instrument that must be able to resolve and accommodate several contemporary problems

arising. One of the problems which always come up is the issue of gender and equality between men and women. As in the case of guardianship in marriage, women are always positioned in the wrong position [2]. This problem needs to be resolved immediately with legal breakthroughs that are more friendly to women.

Family law has a critical position in the discourse in the study of Islamic law because there is an understanding which states that family law is the main gate in entering the subsequent provisions in Islamic law [3]. For example, in guardianship cases, some guardians do not want to act as guardians in their daughters' marriage, either for reasons justified by *sharī'ah* or not [4]. Such a practice often clashes with the community's socio-culture [5]. Moreover, this is juxtaposed with cases of neglect of children by their guardians (especially their fathers) [6]. It turns out that there is a lack of synchronization between the right and obligation, namely the obligation to provide a living for the family (especially for children) and the right to be a guardian in the children's marriages.

In the conception of marriage law in Indonesia, the issue of guardianship is faced with various problems that cannot be solved by existing regulations, including when children are neglected and adopted by others. In this case, the ADHKI, as an institution that pays attention to and focuses on the study of family law views the issue of marriage guardianship, revealed that "The 'person who takes care of... ' clause in the Indonesian Act No. 1 of 1974 concerning Marriage (Undang-Undang Perkawinan or UUP, *Ind.*) actually allows any adoptive father who has carried out his functions and responsibilities, to occupy the status of a marriage guardian. However, the regulations drafted after the UUP, such as the Compilation of Islamic Law (Kompilasi Hukum Islam or KHI, *Ind.*) clearly reduced the breadth of the 'guardian' elements to only *wālī nasab* and *wālī ḥākim*. The Indonesian Minister of Religious Affairs Regulation (Peraturan Menteri Agama or PMA, *Ind.*) No. 19/2018 concerning Marriage Registration also only duplicates the provisions of the KHI and ignores the 'person who takes care of'. In law enforcement, two aspects other than legal substance, - legal structure and legal culture, - need attention. Legal substance in the form of UUP with a general explanation turns out must be reduced by the regulations drawn up next, which limit that guardians only include *wālī nasab* and *wālī ḥākim*. Legal structures such as the marriage officials on the Offices of Religious Affairs (Kantor Urusan Agama or KUA, *Ind.*) and judges of the Religious Courts (Pengadilan Agama or PA, *Ind.*) have for many years carried out their duties and functions based on regulations relating to *wālī nasab* and *wālī ḥākim*. It is not surprising that at KUA Kartoharjo Madiun there was a re-marriage contract because, in the first marriage, it was the adoptive father who acted as guardian. In another region, namely the PA of Klaten, there was an annulment of marriage for the same reason. The collaboration of the two aspects above, legal substance and legal structure, that limits that a guardian must be *wālī nasab* or *wālī ḥākim*, becomes the understanding and practice occurring in society. In legal culture, a marriage in which the adoptive father acts as the guardian for the adopted daughter is considered unusual. Ignoring regulations that 'do not bring *maṣlahah*' is not easy. Law enforcement does not only depend on the substance of the law, but also the structure and culture of the law" [7].

APRI, an institution that deals with marriage practices in Indonesia, stated the same. There is a conflict between the regulations and conditions in realizing the benefits. "The justice I mean, for example, is when there is a father who works as an illegal Indonesian Migrant Worker (Tenaga Kerja Indonesia or TKI, *Ind.*), and his daughter wants to get married; since there is no longer a stipulation for *masafatul qosri* as the reason for transferring the rights of guardianship, then in accordance with article 12 paragraph 5 of the PMA No. 20 of 2019, the guardian must come to the KUA or consulate-general or local embassy to carry out *tawkil wālī bi al-kitābah* (a written down transferring of the guardianship right). If the father's status

is a legal migrant worker, then there will be no problem. It becomes a problem when the father of the bride-to-be is an illegal worker. In another case, the problem arises when a marriage guardian works in a remote place of Papua, or other secluded Indonesian islands, while the *tawkil* should be done at the local KUA, which obviously costs a lot because the plane is the only means of transportation. In fact, there are many cases showing that many *mudarat* (difficulties) arise from a law that is *zanniy*. We need an analysis of justice, to answer the problem 'Do people who carry out guardianship duties (providing a living, educating, meeting psychological needs, and providing the best interests of child), - whether they have a lineage or not, males or females, - have guardianship rights?' This is what we think is a domino effect; those who carry out guardianship duties have the right to become guardians" [8].

The description above shows that there is big issue in Islamic family law, especially the issue of guardianship for neglected women adopted by others, raising the following two questions: 1) What is the construction and deconstruction model of the relationship between the obligation to support children and guardianship by the guardian in the perspectives of the Indonesian Family Law Lecturers Association (ADHKI) and the Indonesian Penghulu Association (APRI)? and 2) What is the construction and deconstruction model of the relationship between the obligation to support children and guardianship by the guardian based on the *fiqh* of reciprocity? To answer these questions, the authors conducted a qualitative study with a multi-site study model at the Indonesian Family Law Lecturers Association (ADHKI) and the Indonesian Marriage Registrar Officer Association (APRI). The authors also performed a literature study (library research) to formulate a conception of the *fiqh* of reciprocity regarding guardianship in Islamic family law and then conducted a reconstruction through the concept of *fiqh* of reciprocity.

## 2. Literature Review

*Sharī'ah* is basically related to revelation and all knowledge obtainable from the Qur'an and Hadith only, while *fiqh* is a method developed by experts to provide an interpretation of the Qur'an and Hadith to obtain a rule regarding the reality and problems of society based on *mujtahid* (a Muslim scholar capable for doing intellectual exercise) reasoning [9]. Based on these understandings, *sharī'ah* has a larger scope, covering all areas of human life, while *fiqh* is narrower. It discusses matters relating to practical actions (*al-aḥkām al-'amaliyyah*) only. It is also interpreted as an understanding of *sharī'ah*, so *fiqh* and *sharī'ah* are something different but interrelated.

In the current study of social reality, *fiqh* (or what is also synonymous with the naming of Islamic jurisprudence) is closely related to human actions individually and in groups. It is always right *fī kulli zamān wa al-makān* (in any time and place), thus always required to be able to respond to every problem that exists in social reality [10]. The narrow and classical meaning of *fiqh* means limiting its application to all laws relating to certain fields that are private, not public, at very long time intervals which are well discussed [11]. In contrast to the definition of *fiqh* in the contemporary era, *fiqh* is defined as a rule that does not only speak of human actions related to law alone. Rather, it is a rule that regulates law, creed, ethics, morals, and all points of view of life that lead to the benefit of individuals and groups. This kind of definition is a response to phenomena in the lives of individuals, families, organizations, and the state.

In the history of Islamic scholarship, no doctrine has received great attention to date other than *fiqh* (Islamic jurisprudence). Several circles, both among Muslims themselves and external parties, expressed the same as what was stated by al-Jabiri [9], "Actually, if we look

at the products of Islamic civilization thought, both quantity and quality, we can see that *fiqh* is unequally ranked first. We can almost confirm that, until recently, not a single Muslim home, from the Gulf to the Atlantic to even in the interior of Asia and Africa, is deserted from it. So, in this respect, *fiqh* is something which is most evenly distributed in Islamic society”.

Furthermore, al-Jabiri expressed his statement [9]: “*izā jazā lanā an nusammī al-ḥaḍarah al-Islāmiyyah bi iḥdā muntajātihā fa innahū sayakūnu ‘alaynā an naqūla ‘anhā innahā ḥaḍarah al-fiqh*” (If we may name Islamic civilization with one of its products, then we must say that *fiqh* is the product of our civilization). In line with al-Jabiri, Charles J. Adams said, “there is no subject more important for Muslims than what is commonly called *fiqh*.” These statements show that Islamic law is one of the spaces for expressing religious experiences, which are very important in the survival of Muslim life.

*Fiqh*, occupying a crucial position in Islam, is a product of the thoughts of Islamic jurists who interpret and adapt the normativity of the texts to the needs of the times. In the classical *fiqh* treasures, there was a school of *fiqh* that describes the tendency of Islamic jurists (*fuqahā*) in conducting *ijtihād* (intellectual exercise). This tendency was influenced by the various approaches and methodologies used in the study of Islamic law (*ijtihād al-ḥukm*). One of these schools seemed liberal because it allowed the reason to be involved in the process of *istinbāt al-ḥukm* (determination of Islamic law). There was also a school that seemed literal, in which determining Islamic law (*istinbāt al-ḥukm*) involved text rather than reason.

The variety of schools of *fiqh* in the classical era focused on reflecting the needs of society, rather than arguing based on particular methodologies that lacked, not to say had no, practical value. Imam Abu Hanifah, for example, was considered more liberal in determining legal *istinbāt* because he was confronted with dynamics in Basra while the treasury of texts (Qur'an and Hadith) there was limited in number. Such a situation allowed him to be more creative in playing his intellectual experiments in determining Islamic law to answer the problems existing amid the community.

However, with all its patterns and variations, *fiqh* always describes concrete solutions to all societal problems. Furthermore, *fiqh* products function as guidelines to solve all issues experienced by the people. Hasan Hanafi considered it as the practical value of religious thought [12], a segment that is often overlooked by thinkers who prefer to wrestle with discourse (*al-khiṭābi*) which sometimes lacks practical weight (*al-‘amaliyyāt taṭbiqi*) in the field.

Regarding the *fiqh* of reciprocity, the core discourse is in line with social *fiqh*, minority *Ffiqh* (*nahwa fiqhīn li al-‘aqliyyāt*) [13], progressive Islam (*al Islāmi al-taqaddumi*) [14], and leftist Islam, which has been widely initiated by Hasan Hanafi and several other thinkers who placed Islam as the power of social criticism and revolution. Reciprocity is an attitude that realizes an obligation and provision regarding the reciprocity of rights and obligations based on divine values [15].

This *ijtihād* model of *fiqh* of reciprocity is oriented towards the realization of benefits (*maṣlahah*). Its basic concept is that the essence of responsiveness is a form of reinterpretation of mujtahids on texts (*nash*) as cultural products (*muntāj al-thaqāfi*) to respond to modernity in *istinbāt ḥukm* (*fiqh*). The author defined the term “responsiveness” based on the typology of law initiated by Philippe Nonet and Philip Shelznick in their book *Responsive Law*, which divided it into three types: repressive law, autonomous law, and responsive law. Responsive law is a law made to respond to legal phenomena, actions, behaviours, or events that make substantive justice the orientation of legal objectives (in the study of Islamic law referred to as *maqāsid sharī‘ah*) [16]. In the context of *fiqh*, the Qur'an, when revealed, could not be separated from its socio-historical context. The recording of history in the form of verses is a

form of “dialogization” or dialectic between religious texts and cultures. If there is no reinterpretation and tajdid, then *fiqh* will lose historical momentum and be unable to respond to modern challenges.

The history of *tadrij* al-verse above indicates that religion does not want a “finalization” of its legal products. In other words, the study of Islamic law is also “unfinished religion understanding,” meaning that Islamic law always pays attention to social and locality aspects and its contextualization in presenting dynamic Islamic law at all times. Islamic law products are a variety of constructions and polarities of human interpretation where when the context changes, the understanding of the law will also change (*al-aḥkām walidah al-ḥājah*). The claim for universality and authenticity of Islamic law is only regarding the essence values, not the historical side, which is the particular side in the study of Islamic law. Al-Qaradawi argued that the essence (philosophical) side of Islamic law is referred to as “*al-thābit*” (sacred/static), while the historical one is called “*al-mutatawwir*” (profane/dynamic). In *fiqh*, the philosophical side is in the form of fundamental values (*al-mabādi' al-asāsiyyah*) and *maqāṣid sharī'ah*, which are *qaṭ'iyy* (certain), while others are *ẓanniy* (multi-interpretative) [17].

In the current condition of society, understanding of religious texts is expected to be able to proceed in determining the substantive meaning contained in the texts by an adaptation to the very dynamic changes of place and time ( or “*taghayyur al-aḥkām bi taghayyur al-azminah wa al-amkinah*”). With such conditions and understanding, religious texts (Islamic law) can dialogue with the dynamics of changing times. A critical reading of religion by “revitalizing” the tradition (*turāth*) will be able to respond to the challenges of the modern era (modernity) [18] because religion and modernity are not two opposite poles but have a space that can be used for dialogue and providing a critique in addressing the existence of modernity. Thus, religion should not be “dead” and must even be present as a “problem solver” in the midst of global modernity which will continue to change all the time.

At the practical level, the concept of the *fiqh* of reciprocity has a focus on discussion and a mission of liberation and advocacy on issues of equality and humanity, such as responding to the issues of *sharī'ah* enforcement, state democracy, the relationship between religion and human rights, the position of women, and the position of minority groups. Thus, it is understandable that the urgency of the *fiqh* of reciprocity in the discourse of Islamic law is to formulate Islamic legal products (*fiqh*) that can be a solution in creating a society that upholds human values, creates mercy for all people, and brings *maṣlahah* to all people, and is fair. With such an understanding, the *fiqh* of reciprocity views that all human positions are equal; those in the minority must have their rights protected by law and the state [19].

The framework of thought and methodology of reciprocity described above depicts several points of view, such as that the reformulation of Islamic law (*fiqh*) applies to all very broad aspects, including legal reform in the fields of family law, state and government, culture, gender, human rights, and others. Therefore, the *fiqh* of reciprocity functions to formulate a set of Islamic laws as a reference for creating a just society and upholding human values, respecting women's rights, and creating benefits for all humans.

The *fiqh* of reciprocity is also a new formulation of Islamic law adapted to people's lives and culture. The consequences of the model of determining the *fiqh* of reciprocity can cover all aspects of Islamic law (both private and public). In the private aspect, it covers family law based on justice and gender equality, while in the public one, it covers the political field of the State, which has legal products that are fair to all castes and groups of society. In developing legal thought that has a vision regarding humanity and justice, the *fiqh* of reciprocity has an empirical-historical style that has reflection and critical evaluation as an important part in

developing the methodology of Islamic legal thought in the contemporary era. Such a methodology aims to direct Islamic law to solve the problems in the contemporary era, especially humanity problems [20].

In dealing with the problems above, Islamic law is expected to involve itself in social reform. Reflection, critical evaluation, and deconstruction of Islamic law require a revolutionary *ijtihad* model in solving these problems [21]. The renewal of Islamic law is an attempt to study the social structure, to explore the social institutions (such as economic, political, educational, cultural, and other institutions) that exist in it, and to see how much these institutions are involved in creating social injustice, which is the problem at the moment.

### 3. Results and Discussion

#### 3.1. Construction of Guardianship Rights to Children based on the Perspectives of the APRI and the ADHKI

In Islamic legal discourse, the word term “*wālī*” is known as *al-walāyah*, which has several implications, namely: love (*al-maḥabbah*), assistance (*al-naṣrah*), power, or authority (*al-wālī*). The essence of *al-walāyah* (guardianship) is to keep or control something (*tawallī al-amr*) [22]. This is in line with the APRI's view that, in general, a guardian is a person who has the power to help others. The term 'having power' here can mean very broadly: in terms of economics or other things, such as law. Helping other people also cannot be interpreted simply; not as simple as becoming a guardian of a person after providing him with food. There are more substantial things to be able to become someone's guardian. Meanwhile, ADHKI views that a guardian is a person who has responsibility, such as nurturing, educating, and caring for another one under his guardianship. Guardianship in this case does not entirely include guardians in marriage, because slaves are also under the guardianship of their masters [23].

The presence of a guardian in the views of APRI and ADHKI also has various purposes, the main of which is to provide protection, care, and education and to meet all the needs of people living in guardianship. In the aspect of its existence, a guardian can provide benefits to the lives of those who are in his guardianship. In addition, the existence of a guardian is a means of maintenance, protection, and education. Therefore, it is important and must exist. Furthermore, in the aspect of guardianship in marriage, guardians have various structures, namely guardians from the lineage line (*wali nasab*) and followed by guardian judges (*wali ḥākim*). Non-fulfillment of obligations of a guardian leads to the non-fulfillment of his rights. If a guardian does not fulfill his obligations, the guardianship rights attached to him are not void. Following Islamic law, he remains the guardian who has rights over the people in his territory. The implication of the position of a guardian and the importance of his position is that if a guardian is not found in a leading position, then the guardianship is transferred to *wālī ḥākim*.

From various constructions regarding the guardianship rights of adopted children in the perspective of the Indonesian Penghulu Association and the Indonesian Islamic Family Law Lecturers Association, a view emerges based on the fact that the essence of guardianship is not only to fulfill guardianship obligations in marriage, but also others obligations following them, namely to provide protection, care, and education and meet all the necessities of life for a child. In terms of benefits, what must be realized in the construction by APRI and ADHKI through the *maṣlahah* approach can be understood that all *ijtihad* efforts carried out by *aimmah al-mazāhib* (leaders of the schools of thought) are trying to realize a single goal: benefits. This is then internalized into an understanding of the construction of adopted

children's guardianship rights that the essence is how the presence of a guardian can provide protection and all forms of justice for children. Practically, the construction of guardianship rights for adopted children by APRI and ADHKI is an internalization of the value of *maṣlaḥah* that can detail attitudes and views on *ijtihād*, which previously changed the way of actualizing the law from *maẓhab*-oriented to *maṣlaḥah*-oriented.

The *maṣlaḥah*-based construction above means that exploring the purpose of enforcing the law in Islam in the form of guardianship is how to explore the essences in it. The scholars believe that Islamic law has universal goals: establishing universal benefits and achieving happiness in the world and the hereafter. This achievement is carried out by embodying benefits and rejecting harms. Al-Shaṭībī, in his magnum opus *al-Muwāfaqāt fī Uṣūl al-Sharī'ah*, classified the realization of benefits through five fundamental elements, namely: religion, soul, descendant, reason, and property, all of which are then formalized in terms of *maqāṣid sharī'ah* [24]. *Maqāṣid sharī'ah*, among the scholars of *uṣūl fiqh* (the fundamentals of Islamic jurisprudence), is referred to as *asrār al-sharī'ah* (the secrets behind textual legal institutions). This concept also refers to the concept of the benefits of servants in the world and the hereafter as initiated by al-Juwaini and al-Ghazali [21].

Fazlur Rahman historically proved that the transcendental source of Islam, namely the Qur'an, could not descend all at once but rather gradually by considering the psychological-sociological conditions of Arab society at the time of revelation. The Qur'an as a holy book was also a response to various problems that arose at the time. The Qur'an with its various legal institutions cannot be applied involving humans actively as recipients of His orders, as it was when the Apostle applied the law [25]. Substantially, providing protection and meeting all the needs of those under guardianship is part of the embodiment of protection for children and descendants (*ḥifẓ al-nasl*) which implies an obligation as a leader (*wālī*).

The guardianship construction model is essentially an embodiment of justice for children that has been expressed by the APRI and ADHKI experts above that view that children with various inherent statuses are a mandate from God that must always be guarded and protected, including several human rights that are closely related to dignity which must be upheld. Dark portraits of exploitation, discrimination, stereotypes, burdens, and violence against children as well as child neglect must be addressed massively and systemically, especially through the role of a guardian to provide protection.

Before discussing *maṣlaḥah* and its use as law, this section will first discuss the meaning and nature of *maṣlaḥah* itself. Etymologically, the word "*maṣlaḥah*," according to Abdurrahman [26], means something good and useful and the opposite of bad or damage. Abdurrahman [26] clearly said that *maṣlaḥah*, which means more generally, is all that has benefits for humans, both those that are useful for obtaining goodness and pleasure and those that are intended to remove difficulties.

Thus, the essence of *maṣlaḥah* is the creation of goodness and happiness in human life and avoiding anything that can harm it. However, *maṣlaḥah* is related to the arrangement of the values of goodness that are appropriate to meet human needs. Furthermore, the scholars of *'ushul* have the same view of *maṣlaḥah* in the sense of *sharā'*, although different in understanding. Abdurrahman [26], for example, said, "*Maṣlaḥah* is an attempt to maintain the aims and objectives of the *sharī'ah* law against various virtues that have been determined and the limits set, not based on mere human desires and passions". Furthermore, al-Ghazali [27] defined *maṣlaḥah* as basically trying to achieve and realize benefits or reject harm. Meanwhile, Ibn Taimiyah said, as quoted by Zahrah [28], that *maṣlaḥah* is the mujtahid's view of actions that contain goodness clearly, not those which are contrary to *sharī'ah* law.

The three definitions above have the same meaning and implications. That is, *maṣlaḥah* is the benefits that are the intent and purpose of *sharī'ah*, not those solely based on mere human desires and passions. Understandably, the purpose of implementing Islamic law and the *Sharī'ah* is none other than to realize *maṣlaḥah* for all human beings in all aspects of their lives in the world and to avoid various forms of harms. In other words, every provision of Islamic law determined by *al-Sharī'* (the Law Maker), that is God the Almighty, is aimed at creating benefit for all humans.

The theological aspects of Islamic law can be observed and studied from the nature of the goals of the establishment of Islamic law. Although there are many theories to explain this theory, the most famous and most prominent one is the theory of *maṣlaḥah*. Based on the doctrine, *maṣlaḥah* purposes to achieve, create benefits for humans, both Muslims and followers of other religions. Abdurrahman [26], Zahrah [28], and Rabuh [29] launched three priority scales that reinforce and complement each other: *ḍarūriyyāt*, *ḥājīyyāt*, and *taḥsīniyyāt*. *Ḍarūriyyāt*, according to al-Biri [30], means primary interests that must exist; their absence has implications for the destruction of human life.

Al-Biri [30] also defined *hajiyat* as secondary interests, which support or facilitate *ḍarūriyyāt*. Eliminating and avoiding what makes it difficult in realizing *ḍarūriyyāt*, therefore, makes *ḥājīyyāt* needed as a complement to primary interests. This means that the absence of these secondary interests does not cause human life destruction but complicates and even makes the primary ones imperfect. For example, one needs to realize the existence of prayer to uphold his religion. In this case, prayer is the primary goal (*ḍarūriyyāt*). To perform this prayer, he needs secondary needs, such as clothing, security for worship, and building a mosque. From this case, it is understandable that primary interests (*ḍarūriyyāt*) need support and perfection by secondary needs (*ḥājīyyāt*) [31].

*Taḥsīniyyāt*, according to Abdurrahman [26], means tertiary needs. Its presence is no longer needed but complementing and beautifying the process of realizing primary needs (*ḍarūriyyāt*) and the realization of secondary interests (*ḥājīyyāt*). On the other hand, the absence of tertiary interests (*taḥsīniyyāt*) does not destroy or complicate life but reduces the sense of beauty and ethics in life. This priority scale creates spaces for humans in which choice becomes something respected, as long as it does not conflict with the provisions of the texts [32].

In formulating the method of determining Islamic law by the mujtahids, the main problem is that the texts of the Qur'an and Hadith are limited quantitatively while civilization and social reality are developing from time to time. For this reason, various methods to determine the law have been developed and created by mujtahids to deal with the limited texts of the Qur'an and Hadith and the unlimited social problems. Unfortunately, they tend to be given a theological basis by humans, thus considered sacred [21]: Muslims are trapped and indoctrinated into idolization. They have or even still think that the determination of the law of a madhhab imam is "divine". Tensions and debates, as a result, occur because Muslims want to talk to Allah in Allah's language, whereas Allah invites humans to speak using human language (except in matters of divinity and monotheism) [33]. Islamic law also experienced a long sleep, in addition to the many victims fell to defend the opinion of a madhhab imam and his organization. *Maṣlaḥah* as a method of determining Islamic law is intended as an analytical knife or as glasses for reading problems in the reality of human life.

*Maṣlaḥah*, as a method of *ijtihād*, requires and positions its values in diversified schools with all the differences in *istinbāt* methods and legal products. When differences in rulings of a problem occur, the final decision as a mediator, according to al-Raysuni and Barut [34], is a compromise or comparison that favours an opinion that is more partial and realizes the

benefits for humans in general. Therefore, the *tarjīh* method is more dominant in using *maṣlaḥah* as an approach and an *istinbāt* method.

Legal arguments of an opinion that are different from those of another one, even though in the same matter, are conquered by the perspective "gaining *maṣlaḥah* and avoid *mafsadāt* (harms)," as the essence of the *istinbāt al-aḥkām* method, namely *maṣlaḥah*. Therefore, the use of *maṣlaḥah* as a method of *istinbāt al-aḥkām* emphasizes the universality values contained and implied in the texts, compared to the explicit meanings.

In its application, this *maṣlaḥah* theory is not simple and does not completely eliminate differences of opinion. The conflict between *maṣlaḥah* and *mafsadat* or the conflict between benefits on the one hand and those on the other side opens up space for debate because there are several levels and classifications of benefits, including personal and general. When a conflict, as described above, occurs, the main rule is to prioritize the rejection of *mafsadat* or the creation of *maṣlaḥah* (*dar'u al-mafāsīd muqaddam 'alā jalb al-maṣāliḥ*). However, this rule works when the benefits to be obtained, according to al-Qaradhawi [35] must be for a larger interest while the *mafsadāt* is on a narrower scale or when there is a conflict between two different benefits.

The use of *maṣlaḥah* also has significant legal implications for the style and format of contemporary Islamic law. The strength of *maṣlaḥah* in exploring Islamic law contemporary significantly opens up the possibility of the birth of different provisions of Islamic law in different places and in the development of time because considerations about *maṣlaḥah* are strongly dependent on situations at different times. Islamic law that once developed in the Middle East does not necessarily apply to other places, such as Indonesia, because of the different situations (society reality) and civilizations. Therefore, Islamic law becomes open and changeable, unlike the nature of *'aqidah* (creed) or *tawḥīd* (God's oneness), which is unchangeable.

In the history of the development of Islamic legal thought, from the early days until the formation of the *madhhabs*, there were differences between the imams in opinion based on their residences, like the Medina city, Kuffa and Bashra (both in Iraq), and other *maḏhab*, which then changed to the Maliki, the Hanafi, the Hanbali, the Shafi'i, and the Zahiri schools. The emergence of the *maṣlaḥah* theory aimed to fight transnationals and introduce the diversity of Islamic legal products under one big umbrella, namely "*maṣlaḥah*." Therefore, the emergence of *maṣlaḥah* has a significant role in creating a life order that is divine and just and has legal certainty and a universal understanding of benefit. With this kind of face, Islam will come with a peaceful and reassuring face [34].

The construction of the concept of guardianship of adopted children initiated by APRI and ADHKI above seems to lead to defining a guardian in the perspective of *maṣlaḥah* as the meaning and purpose of shara'. This interpretation is then implemented by APRI and ADHKI on an understanding, construction, and conception of the purpose of guardianship. Such construction does not only look at the purpose and urgency of a guardian but also interprets its function from the point of view of benefit and justice.

The construction, in a purely rational perspective, as in the study of Islamic legal philosophy, is with several legal traditions implanted by the Prophet that can then be called the originality of Islamic law built during the time of the Prophet and the Companions. It was reflected in the legal settlement that was based on the text, rationale, and sociological conditions of the time [36]. So, the construction of the concept of guardianship in marriage law by APRI and ADHKI, shows that the essence of the texts examined with rationality and sociological conditions gives rise to new construction in the meaning of guardianship in marriage law in Indonesia. This construction effort raises an understanding that, theologically

and religiously, guardians are those who can spread peace, piety, and goodness to those in their guardianship. Meanwhile, in the legal aspect, guardians are those who are responsible to those in their guard

### 3.2. Deconstruction of Guardianship Rights to Children based on the Perspectives of the APRI and the ADHKKI

Society has a dynamic character and is not static. Therefore, social change, namely the change of place and the time shift, will always occur in social life. As an implication, in every social change, there are demands for change and renewal in various fields, including Islamic law (*fiqh*), which is one of the spirits in the journey of humans, especially Muslims. Therefore, Islamic law must be responsive to changes and accommodate various changes in the socio-cultural context that continues to be dynamic. Islamic law has the elastic power to provide adequate space for the possibility of legal changes from time to time and from one place to another [37].

As a formulation of understanding of *sharī'ah*, Islamic law (*fiqh*) has two objectives: *first*, to build the behavior of every individual Muslim based on *aqidah*, *sharī'ah*, and morals, and; *secondly*, to realize a social order that has dimensions of justice and equality of rights. So, *fiqh* must have a style to be responsive, contextual, and social, not passive, formalistic, and individualistic. The use of the *ijtihād* model, which leads to the *tashrī'* (law enactment) spirit or *maqāṣid sharī'ah*, becomes an important agenda to reformulate the substance and objectives of Islamic jurisprudence (*fiqh*) [10]. Therefore, it becomes an important and urgent task to carry out a new and more contextual understanding of the current social reality, especially the reform of Islamic law relating to children and women.

One of the social phenomena that are very concerning and afflicting women is the position of children and women who sometimes represent men as the people in charge and meeting the family needs. Such a problem shows that an adopted child whose biological parents are unknown is under the guardianship of his adoptive parents, given that the function of a guardian is to care for, educate, nurture, and look after the child [23].

This view, reviewed in the concept of deconstruction, seems to correlate with the deconstruction of *sharī'ah*, as initiated by Abdullah Ahmed al-Na'im [38]. Al-Na'im said that the arguments regarding the deconstruction of *sharī'ah* in terms of human rights and the relationship between men and women and between parents and children have come to the same conclusion. If the basis of modern Islamic law does not shift from the texts of the Qur'an and Sunnah of the Medina period as the basis for the construction of *sharī'ah*, then there is no way to avoid a flagrant and serious violation of universal standards of human rights. In fact, there is no way to abolish slavery as a legal institution, and there is no way to eliminate all forms of discrimination against women, children, and certain groups, such as non-Muslims, as long as the understanding of Islamic law is still bound by the framework of classical *sharī'ah* provisions. As described in al-Naim's thought which explains its relationship with the constitution of nationalism, criminal law, and international law, the traditional techniques of reform within the framework of *sharī'ah* are not sufficient to achieve demands for reform. In the achievement of this level of reform, there has to be something complementary besides the clear and detailed texts of the Qur'an and Sunnah in Medina that served transitional purposes and the application of Meccan-era texts that were particularly inappropriate for practical application, but now is the only way to go [38].

Almost the same approach to achieve reconciliation, the deconstruction initiated by al-Naim regarding human rights has been fully identified through determined criteria. The key to

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this reconciliation and reconstruction effort is to convince Muslims that others with whom they must identify and accept equality in dignity and human rights, including all other human beings, are ignoring gender and religion. This effort requires an explanation of how these antagonistic verses introduced by Muslims as *awliyā'* (guardians) who befriend and help one another, and the stipulation that they may not work with all non-Muslims is not possible now. Al-Naim also required pointing out that the verse of the Qur'an Surah al-Nisā' [4]:34, which establishes the general provisions for male guardianship over women, and other verses that address a specific issue: discrimination against women, are impossible to apply now [38].

The logic of the evolutionary principle and deconstruction proposed by al-Naim stated that the Qur'anic texts emphasizing the solidarity of Muslims were revealed exclusively during the Medina period to provide Muslim communities who are developing psychological confidence in the face of non-Muslim attacks. Contrary to such verses, the fundamental and eternal messages of Islam revealed in the Qur'an of the Meccan period teach the solidarity of all humans. Given the vital need for the principle of peaceful coexistence in today's global society, Muslims must emphasize the eternal messages of universal solidarity of the Meccans rather than the spirit of exclusive solidarity of Muslims, with the transitional messages in Medina. On the other hand, Muslims may provoke the outrage of the exclusive solidarity of non-Muslims if they do not want to cooperate peacefully and cooperate in fighting for and protecting human rights [38].

The application of evolutionary principle and deconstruction by al-Naim to the provisions of *qawāmā* (guardianship) for men states that men are *qawwām* (guardians), as the implementation rationalized by the Qur'an Surah al-Nisā' [4]:34, as another result of women's dependence on men in economics and security. Because such dependence no longer exists, al-Naim explained that the guardianship of men over women is over. Both men and women now have the same freedom and responsibility before the law, which ensures economic opportunity and security for all members of society [38].

The application of the evolutionary principle interpretation and deconstruction to issues of specific discrimination against women and non-Muslims can be illustrated by the *sharī'ah* rules, which prohibit marriage between a Muslim woman and a non-Muslim man. These rules are based on a combination of male guardianship operations, regarding a husband over his wife and a Muslim over a non-Muslim. Since a non-Muslim husband cannot be the guardian of his Muslim wife, *sharī'ah* prohibits such marriage. If the guardianship of a husband over his wife, or a Muslim over a non-Muslim, is removed, then there will be no justification for prohibiting marriage between a Muslim woman and a non-Muslim man. Al-Naim's evolutionary principle and deconstruction clearly reject both types of guardianship [38].

The evolutionary principle and deconstruction would also eliminate another possible reason for the prohibition of marriage: between Muslim women and non-Muslim men, namely the assumption that a wife is more vulnerable to her husband's influence than the other way around. In other words, he raises a paradigm that if the marriage is permitted, it is more likely that a non-Muslim husband will influence his Muslim wife out of Islam than the wife to drag her husband into Islam. This reasoning, of course, is part of a broader sociological phenomenon, namely the weakness of confidence in the integrity of women and their good decisions. Education and other efforts are needed to eradicate this sociological phenomenon in all its various manifestations. In addition to its immediate practical impact, legal reform can also be an effective tool of education and leadership. This task can start by replacement through applying the evolutionary principles and deconstruction of *sharī'ah* by al-Naim to understand the legal aspects that discriminate against women by encouraging and sustaining a positive view of women.

From the efforts made by al-Naim regarding the deconstruction of *sharī'ah* above, it appears that the sociological aspect, namely upholding human values and eliminating discrimination, is a must. It can also be seen in the efforts to deconstruct the meaning of guardianship as presented by APRI and ADHKI experts that the deconstruction of the concept of guardianship of adopted children by adoptive parents or those who are their protectors represents the attempt of reinterpretation of the *sharī'ah* texts regarding guardianship, which must be from *wālī nasab* and *wālī ḥākim* by using a sociological approach, human rights, and the embodiment of justice (*maṣlahah*).

The approach, using sociology, human rights, and the embodiment of justice (*maṣlahah*), attempts to connect the community's needs to the texts. The deconstruction by APRI and ADHKI seems to be a form of *sharī'ah* reform unable to answer the methodological deadlock to solve the paradox inherent in *sharī'ah* that discriminates against women and even continues to legalize slavery. These issues, therefore, become important for the future of humanity and women, including regarding the concept of marriage guardianship.

As a form of deconstruction by APRI and ADHKI, the seemingly transcendent nature of the relationship between Islam (as a religion) and the formulation of historical Islamic law, known as *sharī'ah*, is not the whole of Islam itself but the interpretation of the basic texts understood in a particular historical context only. Therefore, this deconstruction model rejects the traditional formulations of Islamic law developed in the Middle Ages. In addition, they do not accept the efforts of the modernists to reform the structure of the Middle Ages because they remain trapped in the epistemological assumptions of the Middle Ages themselves.

Re-reading the texts by APRI and ADHKI also means that the concept of guardianship in marriage in the discourse of Islamic family law must move away from traditionalist Islamic law. The rulings of guardianship in marriage today must be able to answer the challenges and needs of society. As Derrida views, deconstruction, in such reading practice, cannot be done in any way other than by playing and taking a distance from each concept to be stabilized [39]. The effort to deconstruct the concept of marriage guardianship must suspect the hidden tendencies of the texts. Just criticizing the logic silenced by traditional law is insufficient. It must further challenge the process of forming that logic. Derrida, with his extraordinary precision, traced the sequence of signifiers, the formation of the term *pharmakon* from his linguistic genealogy, and the structure of differences that make the *pharmakon* seem problematic and paradoxical. All of that ultimately has led to the deconstruction of binary logic in the texts re-enabling other logics repressed and included in the alienated referent domain [39].

#### **4. Conclusion**

The construction of the concept of guardianship of adopted children and mothers' children in the perspectives of APRI and ADHKI from the point of view of the basic, purpose, urgency, and structure of the guardianship, the fall of guardianship rights, and the transfer of guardian rights interpret that the essence of guardianship is to meet the needs and bear the lives of the people under the guardianship. Guardians who carry out these duties and responsibilities properly will give *maṣlahah*, goodness, and justice to anyone under their guardianship. The construction model is guided by the sources of Islamic law based on the texts as the primary and first basis. However, to understand the contents, reason in determining the principle of *maṣlahah* becomes very important and even a determining factor.

The deconstruction of the concept of guardianship of adopted children and mothers' children in the perspective of APRI and ADHKI aims to redefine the essence of the function of a guardian. From the point of view of APRI and ADHKI, the deconstruction of the concept

of guardianship of adopted children and mothers' children by adoptive parents or mothers who become protectors of the children is based on a reinterpretation of the *sharī'ah* texts, which say that guardianship must be owned by *wālī nasab* and *wālī ḥākīm*, using a sociological approach, human rights, and the embodiment of justice (*maṣlahah*).

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