

**THE ROLE OF *WALI MUJBIR* ON SYAFI'I MADHHAB
IN THE PERSPECTIVE OF JASSER AUDA'S MAQASID SHARIA**

THESIS

by:

Fithrotin Najiyah

Student ID Number 12210007



AL-AHWAL AL-SYAKHSHIYYAH DEPARTMENT

SHARIA FACULTY

THE STATE ISLAMIC UNIVERSITY

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STATEMENT OF THE AUTHENTICITY

In the name of Allah (Swt),

With consciousness and responsibility towards the development of science, the writer declares that the thesis entitled:

**THE ROLE OF *WALI MUJBIR* ON SYAFI' I MADHHAB
IN THE PERSPECTIVE OF JASSER AUDA'S MAQASID SHARIA**

is truly the writer's original work. It does not incorporate any material previously written or published by another person. If it is proven to be another person's work, duplication, plagiarism, this thesis and my degree as the result of this action will be deemed legally invalid.

Malang, June 07th, 2017



Fithrotin Najiyah
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APPROVAL SHEET

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THE ROLE OF *WALI MUJBIR* ON SYAFI' I MADHHAB IN THE PERSPECTIVE OF JASSER AUDA'S MAQASID SHARIA

The supervisor states that this thesis has met the scientific requirements to be proposed and to be tested by the Board of Examiners.


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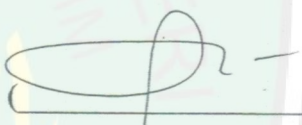
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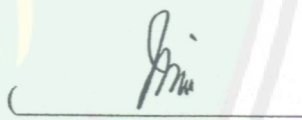
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MOTTO

يُؤْتِي الْحِكْمَةَ مَنْ يَشَاءُ وَمَنْ يُؤْتَ الْحِكْمَةَ فَقَدْ أُوتِيَ خَيْرًا كَثِيرًا وَمَا
يَذَّكَّرُ إِلَّا أُولُو الْأَلْبَابِ

He gives wisdom (the knowledge and understanding of the religion and of the Qur'an) to whom He wills, and whoever has been given wisdom has certainly been given much good. And none will remember except those of understanding.

(al-Baqarah (2): 269)



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All praise due to Allah, the Cherisher and Sustainer of all the worlds. There is neither might nor power but with Allah the Great, the Exalted. With only His Grace and Guidance, this thesis entitled “**The Role of *Wali Mujbir* on *Syafi’i Madhhab* in the Perspective of Jasser Auda’s *Maqasid Sharia*” could be completed, and also with His benevolence and love, peace and tranquility of the soul. Peace be upon the Prophet Muhammad (saw) who had brought us from the darkness into the light, in this life. May we be together with those who believe and receive intercession from Him in the day of Judgement. Amîn**

With all the support and help, discussions, guidance, and directions from all parties involved during the process of completing this thesis, the writer wishes to express his utmost gratitude to the following:

1. Prof. Dr. H. Mudjia Rahardjo, M.Si., as the Rector of State Islamic University, Maulana Malik Ibrahim Malang.
2. Dr. H. Roibin, M.H.I, as the Dean of the Sharia Faculty of State Islamic University, Maulana Malik Ibrahim Malang.
3. Dr. Sudirman, M.A as the head of Al-Ahwal Al-Syakhshiyah Department of the Sharia Faculty of State Islamic University, Maulana Malik Ibrahim Malang.
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11. I am rightfully proud of my Big Family of El-Zawa Volunteer, Farida, Fitri, Anissia, As'ad, Rizqi, Shofi, Bibah, Ida, Isti, Irma, Miss Naima, Miss Yuli, Lisa, and all members I do not mention. Your togetherness teaches me to value life.

12. Moreover, my deepest gratitude is to my family. It could not have been possible without the undying love and support of my father ‘Moh. Solikin’, my mother ‘Listiana’, and my siblings, Amim, Iim, and Mufa who always encourage my education.

Hopefully, by imparting what has been learned during the course of study in the Faculty of Sharia of State Islamic University, Maulana Malik Ibrahim, Malang, the benefit will be gotten all readers and the writer herself. Realizing the fact that error and weakness is impartial to being human, and that this thesis is still far perfection, the writer appreciates constructive criticism and suggestions for the improvement and betterment of this thesis

Malang, June 7th, 2017

Writer,

Fithrotin Najiyah
Student ID Number 12210007

TRANSLITERATION GUIDANCE

A. General

The transliteration guide used by the Sharia Faculty of the State Islamic University, Maulana Malik Ibrahim Malang, is the EYD plus. This usage is based on the Consensus Directive (SKB) from the Religious' Ministry, Education Ministry and Culture Ministry of the Republic of Indonesia, date 22 January 1998, No. 158/1987 and 0543. b/U/1987, which is also found in the Arabic Transliteration Guide book, INIS Fellow 1992.

B. Consonant

-	= ا	ز	= z	ق	= q
ب	= b	س	= s	ك	= k
ت	= t	ش	= sy	ل	= l
ث	= ts	ص	= sh	م	= m
ج	= j	ض	= dl	ن	= n
ح	= h	ط	= th	و	= w
خ	= kh	ظ	= dh	ه	= h
د	= d	ع	= ' (comma facing upward)	ي	= y
ذ	= dz	غ	= gh		
ر	= r	ف	= f		

The hamzah (ء) which is usually represented by an *alif*, when it is at the beginning of a word, hence for it is transliterated following its vocal pronouncing and not represented in writing. However, when it is in the middle or end of a word, it is represented by a coma facing upwards (’), as oppose to a comma (,) which replaces the “ع”

C. Long Vowel and Diphthong

In every written Arabic text in the *latin* form, its vowels *fathah* is written with “a”, *kasrah* with “i”, *dlommah* with “u”, whereas elongated vowels are written as such:

Elongated (a) vowel = â example قال becomes *qâla*

Elongated (i) vowel = î example قيل becomes *qîla*

Elongated (u) vowel = û example دون becomes *dûna*

Especially for the pronouncing of *ya’ nisbat* (in association), it cannot represent by “i”, unless it is written as “iy” so as to represent the *ya’ nisbat* at the end. The same goes for sound of a diphthong, *wawu* and *ya’* after *fathah* it is written as “aw” and “ay”. Study the following examples:

Diphthong (aw) = و example قول becomes *qawlun*

Diphthong (ay) = ي example خير becomes *khayrun*

D. Ta’ marbûthah (ة)

Ta’ marbûthah is transliterated as “t” in the middle of word, but if it is *Ta’ marbûthah* at the end of word, it is transliterated as “h” e.g. الرسالة للمدرسة will be *al-risalat li al-mudarrisah*, or if it happens to be in the middle of a phrase which

constitutes *mudlaf* and *mudlaf ilayh*, then the translation will be using “*t*” which is enjoined with the previous word, e.g. *الله فى رحمة* becomes *fi rahmatillâh*.

E. Definite Article

Arabic has only one article, “*al*” (*ال*) and it written in small letters, unless at the beginning of a word, while “*al*” in the phrase of *lafadh jalalah* (speaking of God) which is in the middle of a sentence and supported by an (*idhafah*), then it is not written. Study the following:

1. Al-Imâm al-Bukhâriy said...
2. Al-Bukhâriy explains, in the prolog of his book...
3. *Masyâ’ Allah kâna wa mâ lam yasya’ lam yakun*
4. *Billâh ‘azza wa jalla.*

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ABSTRACT

Fithrotin Najiyah, 12210007, 2017. *The Role of Wali Mujbir on Syafi'i Madhhab in The Perspective of Jasser Auda's Maqasid Sharia*. Thesis. Al-Ahwal Al-Syakhshiyah Department, Sharia Faculty, The State Islamic University Maulana Malik Ibrahim, Malang.
Supervisor: Dr. Hj. Umi Sumbulah, M.Ag

Keywords: *Wali Mujbir, Syafi'i Madhhab, Maqasid Sharia*

The presence of a wali is one of marriage pillars based on Syafi'i *madhhab*. The involvement of the *wali* is important because determines the validity of marriage. However, the involvement of *wali* is often misused, especially by *wali mujbir*, who seems to have an absolute right to his daughter.

The main objectives of this research are: a) to describe the role of *wali mujbir* in Syafi'i *madhhab*, and b) to analyze the role of *wali mujbir* on Syafi'i *madhhab* in the perspective of Jasser Auda's Maqasid Sharia.

This research is normative research and also called library research. Moreover, this research included in the category of *fiqh* research model which discusses one of the substance of *fiqh* in one of the *madhhabs*, that is *wali mujbir* in Syafi'i *madhhab*. In addition, this research used conceptual approach and philosophical approach, especially the system approach offered by Jasser Auda based on Maqasid Sharia.

The result indicates that: First, in Syafi'i *madhhab*, *wali mujbir* is only father or grandfather (if the father was dead), who has the authority to marry off his virgin daughter either with the permission or not for her benefit, and her willingness is preferred. The authority of *wali mujbir* is not absolute right; some requirements must be fulfilled by the father as *wali mujbir*. If the marriage does not give the intent for the daughter, the marriage can be annulled. Asking permission before marrying off the daughter is encouraged matter. In addition, it would be advisable for *wali mujbir* to consult with her whether she is a virgin or a widow, because consulting of marriage is an important thing to keep the carefulness, and it is better to do for the daughter's soul and categorized as the good behavior. Second, in the perspective of Jasser Auda's Maqasid Sharia, the concept of *wali mujbir* in Syafi'i *madhhab* can be interpreted as follows: a) *wali mujbir* is a *wali* in marriage who has a significant role in protecting women's rights, b) the presence of *wali* in marriage can be interpreted as the intention of Islamic universality and local wisdom that his existence as a pillar of marriage is not binding but it is in accordance with the customary rules of each region, c) *wali mujbir* can be interpreted as the purpose of the Prophet to 'teach the high ideals' in society, it means the society would not give the bad assumption to any woman who will get married; d) *wali mujbir* as "a means" in "realizing the purpose of marriage", that makes both spouses commingle nicely in their marriage and live quietly and affectionately.

ملخص البحث

فطرة الراجية، 12210007، 2017. مقام الوليِّ المجرر عند المذهب الشافعي بوجهة النظر المقاصد الشرعية لجاسر عودة . رسالة البحث. قسم الأحوال الشخصية. كلية الشريعة. جامعة مولانا مالك إبراهيم الإسلامية الحكومية مالانج. المشرفة: الدكتورة أمي سنبله الحاجة الماجستير.

الكلمة الرئيسية: الوليِّ المجرر. المذهب الشافعي. المقاصد الشرعية.

من احدى أركان عقد النكاح وجود الوليِّ عند المذهب الشافعي. كان تدخّل الوليِّ مهمّاً لتعيين صحيح عقد النكاح. ولكن تدخّل الوليِّ مستعملاً للأمر الأخرى، وخاصة عند الوليِّ المجرر وكان له الحقوق كلّها على الأبناء مطلقاً.

كانت الأهداف الأساسية لهذا البحث وهي: (1) لمفهوم كيف مقام الوليِّ المجرر عند المذهب الشافعي، (2) لتحليل مقام الوليِّ المجرر عند المذهب الشافعي بوجهة النظر المقاصد الشرعية لجاسر عودة.

هذا البحث من أنواع البحث الرسميّ يعني البحث المكتبيّ *library research*. فضلاً عن ذلك، يتضمّن هذا البحث من أتمّوذج البحث الفقهي الذي يبحث واحد من بعض مادّات الفقهية عند المذهب الواحد، والمراد يعني الوليِّ المجرر عند المذهب الشافعيّ. المنهج المستخدم هو المنهج التصوّري والمنهج الفلسفي، والخاصة المنهج الذي يُعرّض عند جاسر عودة بناءً على المقاصد الشرعية. نستطيع استنتاج نتائج البحث كما تلي: الأولى، كان الوليِّ المجرر عند المذهب الشافعيّ مَنْ الذي يستحقّ لتزويج ابنته سواء بإذنها أم لا، والوليِّ المجرر هو الأب أو الجدّ (لو الأب قد توفّق)، والأمر الأساسي لمصلحة الإبنة ورضاها. ليس الحقوق لوليِّ المجرر مطلقاً، ولكن ينبغي لوليِّ المجرر أي الأب أن يقضي الشروط المعيّنة. إذا ليست المصلحة في النكاح فيفسخ النكاح. ينبغي لوليِّ المجرر أن يستأذن لابنته قبل أن يتزوجها. سوى ذلك، عليه أن يشاور مع ابنته أو أرملة لأن المشاورة هي الحيلة والأحسن عند نفس الإبن ومن الأخلاق الكريمة. الثاني، الإستناد إلى منهج المقاصد الشرعية فالمفهوم عند المذهب الشافعيّ سيُفسّر كما يلي: (أ) كان الوليِّ المجرر له الدور الجوهريّ في محافظة حقوق المرأة، (ب) ذلك المفهوم كعموم ورحمة الإسلام والمعرفة المحليّة يعني كان وجود الوليد المجرر كشرط النكاح غير المقيدة لكنّ توافق على تنظيم العادة في بعض البلدة، (ج) كرسالة النبيّ لتعليم المبدأ المثاليّ في المجتمع لكي الإبنة التي ستزوّج لاتنزل في المجتمع بمقدّم الإستجابة القبيحة إليها، (د) الوليِّ المجرر "كالوسيلة" في تحقيق هدف النكاح يعني لكي العروسان يستطيعان المعاملة ويقومان العيشة بالإطمئنان والسكينة.

ABSTRAK

Fithrotin Najiyah, 12210007, 2017. *Kedudukan Wali Mujbir dalam Madzhab Syafi'i Perspektif Maqasid Syariah Jasser Auda*. Skripsi. Jurusan Al-Ahwal Al-Syakhshiyah, Fakultas Syariah, Universitas Islam Negeri, Maulana Malik Ibrahim, Malang.
Pembimbing: Dr. Hj. Umi Sumbulah, M.Ag

Kata Kunci: Wali Mujbir, Madzhab Syafi'i, Maqasid Syariah

Salah satu rukun pernikahan dalam Madzhab Syafi'i yakni adanya seorang wali. Keterlibatan seorang wali merupakan hal penting karena menentukan sah atau tidaknya pernikahan. Namun keterlibatan seorang wali sering disalahgunakan oleh para wali, khususnya wali mujbir yang seolah-olah ia memiliki hak mutlak sepenuhnya terhadap anak.

Tujuan utama penelitian ini adalah: a) untuk memahami bagaimana kedudukan wali mujbir dalam Madzhab Syafi'i, dan b) menganalisis kedudukan wali mujbir dalam madzhab Syafi'i Perspektif Maqasid Syariah Jasser Auda.

Penelitian ini tergolong ke dalam jenis penelitian normatif, artinya penelitian ini disebut penelitian kepustakaan atau library research. Selain itu, penelitian ini termasuk dalam kategori model penelitian fiqih yang membahas salah satu substansi fiqih dalam satu madzhab, yakni wali mujbir dalam Madzhab Syafi'i. Pendekatan yang digunakan dalam penelitian ini adalah pendekatan konseptual dan pendekatan filosofis khususnya pendekatan sistem yang ditawarkan oleh Jasser Auda berbasis Maqasid Syariah.

Hasil penelitian dapat disimpulkan bahwa, *pertama*, wali mujbir menurut madzhab Syafi'i merupakan wali yang berhak menikahkan anak gadisnya dengan izin ataupun tanpa izinnnya yaitu hanya ayah atau kakek (apabila ayah telah tiada), untuk kemaslahatan anak tersebut dan kerelaannya sangat diutamakan. Kekuasaan wali mujbir tidak sepenuhnya mutlak, beberapa persyaratan harus dipenuhi oleh seorang ayah yang berwenang sebagai wali mujbir. Apabila dengan pernikahan tersebut tidak mendatangkan kemaslahatan, maka pernikahannya dapat dibatalkan. Wali mujbir dianjurkan untuk meminta izin terlebih dahulu kepada yang bersangkutan ketika akan menikahnya. Selain perizinan, dianjurkan juga untuk bermusyawarah dengan anak yang bersangkutan baik ia gadis maupun janda karena musyawarah merupakan suatu tindakan kehati-hatian, lebih baik bagi jiwa seorang anak dan merupakan akhlak yang mulia. *Kedua*, berdasarkan Maqasid Syariah Jasser Auda, maka konsep wali mujbir dalam madzhab Syafi'i dapat diinterpretasikan sebagai berikut: a) wali mujbir memiliki peran signifikan dalam melindungi hak-hak perempuan, b) dapat diinterpretasikan sebagai maksud universalitas islam dan kearifan lokal yakni keberadaannya sebagai syarat pernikahan tidak mengikat tetapi sesuai dengan aturan adat masing-masing daerah, c) sebagai maksud Nabi saw untuk mengajarkan norma yang ideal di masyarakat yakni agar anak perempuan yang akan menikah tidak dikucilkan oleh masyarakat dengan memberikan anggapan buruk kepadanya; d) wali mujbir sebagai "sarana" dalam "mewujudkan tujuan pernikahan", yaitu agar kedua mempelai dapat bergaul dan menjalani hidup tenang dan tenteram.

CHAPTER I

INTRODUCTION

A. Background of Research

Indonesian is the largest adherents of Syafi'i *madhhab* in the world. Perhaps, many of them are unaware that they are adhering *madhhab*.¹ One of the implementations, i.e. Indonesian requires the presence of *wali* in marriage. This requirement has been mentioned in the article (19) of Islamic law Compilation (in Indonesian namely *Kompilasi Hukum Islam*) that the presence of *wali*, who will marry the bride off, is one of marriage pillars that must be fulfilled. If the pillar is unfilled, the status of her marriage will be invalid.² It is based on the hadith of Prophet SAW that was narrated from Aisyah R.A.:

حَدَّثَنَا مُحَمَّدُ بْنُ كَثِيرٍ، أَخْبَرَنَا سُفْيَانُ، أَخْبَرَنَا ابْنُ جُرَيْجٍ، عَنْ سُلَيْمَانَ بْنِ مُوسَى، عَنْ

الرُّهْرِيِّ، عَنْ عُرْوَةَ، عَنْ عَائِشَةَ، قَالَتْ: قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: أَيُّمَا امْرَأَةٍ

¹Nurcholish Madjid, *Pengantar: Imam Syafi'i Peletak Dasar Metodologi Pemahaman Hukum dalam Islam*, in book Imam Syafi'i, *Ar-Risalah*, translated by Ahmadi Thoha (5th ed; Jakarta: Pustaka Firdaus.2004), 9

²Ahmad Rofiq, *Hukum Perdata Islam di Indonesia*, (Jakarta: PT Raja Grafindo Persada, 1st ed., 2013), 64; See more in article (19) of *Kompilasi Hukum Islam*

نَكَحَتْ بِغَيْرِ إِذْنِ مَوَالِيهَا، فَنِكَاحُهَا بَاطِلٌ، ثَلَاثَ مَرَّاتٍ فَإِنْ دَخَلَ بِهَا فَالْمَهْرُ لَهَا بِمَا
أَصَابَ مِنْهَا، فَإِنْ تَشَاجَرُوا فَالسُّلْطَانُ وَلِيُّ مَنْ لَا وَلِيَّ لَهُ.³

“Aisha narrated that the Messenger of Allah said: "Any woman who marries without the permission of her wali – then her marriage is void. So if he consummated the marriage with her, she is entitled to the dowry because of what he has attained from her. And if they differ, then the Sultan is the wali of the one who does not have one.”⁴

According to Imam Al-Syafi‘i, guardianship is one of the conditions for the validity of marriage. The contract of marriage process will be invalid without *wali*. It is based on the words of Exalted:⁵

وَإِذَا طَلَّقْتُمُ النِّسَاءَ فَبَلَغْنَ أَجَلَهُنَّ فَلَا تَعْضُلُوهُنَّ أَنْ يَنْكِحْنَ أَزْوَاجَهُنَّ⁶

“And when you have divorced women and they have fulfilled the term of their prescribed period, do not prevent them from remarrying their (former) husbands.”⁷

These propositions give the implication that woman must be married with the consent of the *wali* as someone authorized on her. The view of Imam Al-Syafi‘i reaffirmed his opinion that even if she is a widow or a woman who reaches puberty and has healthy mind, she should be represented by their *wali* when she does marriage contract because no woman should arrange her own marriage and the marriage of another woman.⁸

³ Abu Dawud, *Sunan Abu Dawud*, Bab fi al waliy (2083) Vol. II, (Beirut:al-Maktabah al-‘Ashriyah, t.t.), 229

⁴ Abu Dawud, *Sunan Abu Dawud*, Bab fi al waliy (2083), vol. II, in English translated by Yaser Qadhi (Riyadh:Maktaba Dar-us-Salam, 2008), 520

⁵ Muhammad bin Idris al-Syafi‘i, *al-Umm*, Vol. VI, 1st ed, (Mansoura: Dâr al-Wafa, 2001), 31

⁶ Q.S Al-Baqarah: 232

⁷ Imam Syafi‘i, *Mukhtashar Kitab Al-Umm fi Al-Fiqh*, Indonesian trans.by Muhammad Yasir Abd. Muthalib, *Ringkasan Kitab Al-Umm*, Book II Vol. 5, 3rd ed, (Jakarta: Pustaka Azzam, 2007), 355

⁸ Muhammad bin Idris al-Syafi‘i, *al-Umm*, Vol. VI, 1st ed, (Mansoura: Dâr al-Wafa, 2001), 50

According to Imam Syafi‘i, guardianship are divided into two types, compulsion right guardianship (*ijbar*) and voluntary guardianship (*ikhtiyari/ghoiru ijbar*).⁹ *Ijbar* guardianship is a guardianship for a virgin either a minor or major. A man who has the power of compulsion namely *wali mujbir*, is simply a father or grandfather (if the bride has no father). Imam Al-Syafi‘i said that anyone who became *wali* for a woman (either the widow or virgin), and he married her off without her permission, the marriage is void except for the father of virgin daughter and the master of female-slave.¹⁰

Voluntary guardianship (*ikhtiyari/ghoiru ijbar*), is the authority of all *ashabah* (a *wali* from among agnates) in marrying off a widow.¹¹ For Imam Syafi‘i, a widow should be accompanied by a *wali* when executing a contract marriage but she couldn’t be forced without any clear agreement.¹²

For Syafi‘ites (the follower or the disciples of Imam Syafi‘i), the power of compulsion (*ijbar* right) cannot be used absolutely forever because a *mujbir* guardian can compel his daughter to marry her off with the chosen groom with the following criteria’s:¹³

1. There is no hostile between the father (as *wali mujbir*) and his daughter.
2. The groom is at least her social equal (*kafaah*)
3. There is no hostile between the groom and bride.
4. He can find the means for her dowry (*mahar*) and maintenance

⁹Wahbah Zuhaili, *Fiqih Islam Wa Adillatuhu*, trans. Abdul Hayyie al-Kattani, dkk, 1st ed, (Jakarta: Gema Insani, 2011), 181

¹⁰al-Syafi‘i, *Mukhtashar Kitab*, Ind. trans by. Muhammad Yasir, *Ringkasan Kitab*,..., 361

¹¹Wahbah Zuhaili, *Fiqih Islam*,..., 200

¹²al-Syafi‘i. *al-Umm*,..., 48

¹³ Abdullah bin Ahmad Bâsaudan, *Zaitûnah al-Ilqah Syarh Mandhûmah Dlou’i al-Mishbâh*, (Beirut: Dâr al-Minhâj, 2011), 106

5. The dowry is equal to or greater than fair dowry (*mahr al-mitsl*)
6. The dowry is calculated with reference to her female relatives as well as the standards of her premarital place of residence and adjusted upward or downward to account for her personal qualities.
7. Submission of dowry must be direct.

The existence of these criteria - Syafi'ites' view - about the right of *wali mujbir* also considers the rights of a woman. It is understood when a *wali* will marry her off with his groom but otherwise, the groom's criteria are not like the above, a woman would have the right to refuse. If the marriage still proceeds, it will not be valid.¹⁴ Therefore, Syafi'ites' opinion about *wali's* power compulsion is not an absolute right.¹⁵

In fact, *wali's* power compulsion is often misused. An example is taken from Tamimi's research which states that the practice of mating compulsion has been done by most of the communities in Desa Gampingan Kecamatan Pagak Kabupaten Malang. Tamimi argued that the occurrence of marital compulsion is caused by some factors. One of them is the fact that the *wali* doesn't agree with his daughter's choice.¹⁶

¹⁴ Muhammad Shathâ al-Dimyati, *Hâshiyah i'anatu al-Thâlibîn*, Juz III, (Beirut-Lebanon: Dâr al-Kutub al-Ilmiyah, 2009), 563 quoted by Shoim, *Studi Komparasi antara Pemikiran Madzhab Hanafi dan Madzhab Syafi'i tentang Konsep Wali Mujbir*, Undergraduate Thesis, (Surabaya: UIN Sunan Ampel, 2015), 11

¹⁵ Shoim, *Studi Komparasi*, ..., 11

¹⁶ Tamimi, *Kasus Kawin Paksa di Desa Gampingan Kecamatan Pagak Kabupaten Malang Tinjauan Maqashid Al-Syari'ah*. Tesis, Program Magister (Malang: Universitas Islam Negeri Maulana Malik Ibrahim Malang, 2015)

Parents generally assume that they have greater understanding than their children in marital affairs since they are still minority and never been married.¹⁷ Through the right of *ijbar*, a *wali* can marry off her daughter without the consent. Although *ijbar* is considered as a form of accountability's father against his daughter, it does not eliminate the possibility that what is considered good by the parents is not good for the daughter.¹⁸

When the right of *ijbar* is more noteworthy without accompanied by the opinion and consent of the daughter, a dream of beautiful marriage will be a source of misfortune and suffering.¹⁹ This matter is contrary to marriage principles; those are the principles of *mawaddah warahmah*, *mu'asyarah bil ma'ruf*, and the partner choosing.²⁰ The application of *ijbar* right that is deviated by a *wali* is incompatible with the existence of Islam as *rahmatan lil 'alamîn religion*, religion based on Syariah

The matters of *wali mujbir* are not described in the Qur'an explicitly. However, the *ulama's* interpretation of the legal sources results in *ijtihad* of Islamic law. Even though the sources are same, but the legal products are different.²¹ Hence, the concept of *wali mujbir* needs to be studied more seriously and critically, especially the Syafi'i *madhhab*. Thus, the public understanding

¹⁷Miftahul Huda, *Kawin Paksa Ijbar Nikah dan Hak-hak Reproduksi Perempuan*, 1st.ed, (Yogyakarta: STAIN Ponorogo, 2009), 4

¹⁸Arini Robbi Izzati, "Kuasa Hak Ijbar Terhadap Anak Perempuan Perspective Fiqh dan HAM," *Al-Mawarid*, Vol. XI, No. 2, (Sept – Jan 2011), 243

¹⁹Arini Robbi Izzati, "Kuasa,...., 243

²⁰Lima prinsip perkawinan yang dikemukakan oleh Musdah Mulia: *Pertama*, prinsip monogami. *Kedua*, prinsip *mawaddah wa rahmah*. *Ketiga*, prinsip saling melengkapi dan melindungi. *Keempat*, prinsip *mu'asyarah bil ma'ruf* (pergaulan dengan sopan santun), baik dalam relasi seksual maupun relasi kemanusiaan. *Kelima*, prinsip memilih jodoh, baik bagi laki-laki maupun perempuan. See in Siti Musdah Mulia, *Perempuan dan Hukum*, (Jakarta: YOI, 2008), 146.

²¹Habba Zuhaida, *Studi Analisis,...., 8*

wouldn't be the opposite of the significant presence of *wali mujbir*. Thus, avoiding unwanted things are indispensable for establishing a mutual relationship in general, even the interest of other parties. This is similar to *al-Qawaid al-Fiqhiyyah*:

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“Avoid/resist of damage is to taking precedence over than bringing of benefits”.²²

Further, this research will expose the concept of *wali mujbir* in Syafi'i *madhhab* in the perspective of Jasser Auda's Maqasid Sharia. Jasser Auda is one of the contemporary Muslim thinkers who concerns on the reform of Islamic law philosophy. He uses the Maqasid Sharia as the basis of thinking while using the systems approach as the method and analysis.²³

The researcher is interested in the systems approach offered by Jasser Auda. Moreover, a system approach is a new approach that hasn't been thought to be implemented in the discussion of Islamic law.²⁴ Therefore, the researcher takes the theme of *wali mujbir* as the problem and analyzes it using Maqasid Sharia offered by Jasser Auda. The last, researcher hopes that the public's view about *wali mujbir* that has been less precise will be straightened, and they can interpret the positive role of *wali mujbir* through the interpretation of Maqasid Sharia.

²²Abdul Mudjib. *Kaidah-Kaidah Ilmu Fiqh*. (Jakarta: Kalam Mulia,2001), 39

²³M. Amin Abdullah, *Pengantar: Pembacaan Ulang atas Pendekatan Maqasid Sharia*, in book Jasser Auda, *Membumikan Hukum Islam Melalui Maqasid Sharia*, trans. Rosidin and 'Alí 'Abd el-Mun'im, 1st.ed, (Bandung: PT Mizan Pustaka.2015), 11

²⁴M. Amin Abdullah, *Pengantar: Pembacaan, ..., 11*

B. Statements of Problem

Based on the background of research above, the issues are to be discussed in this research as follows:

1. What is the role of *wali mujbir* in Syafi'i *madhhab*?
2. What is the role of *wali mujbir* on Syafi'i *Madhhab* in the perspective of Jasser Auda's Maqasid Sharia?

C. Objective of Research

1. To describe the role of *wali mujbir* in Syafi'i *Madhhab*.
2. To analyze the role of *wali mujbir* on Syafi'i *Madhhab* in the perspective of Jasser Auda's Maqasid Sharia

D. Significance of Research

Theoretically, the results of this study are expected to provide a proper understanding of the concept of *wali mujbir* in Syafi'i *Madhhab*. Besides, it is expected to contribute in establishing Islamic law especially about *wali mujbir* in Jasser Auda's Maqasid Sharia perspective.

Practically, this research can be used as reference material for academics, legal institutions, boarding *madhhabs*, and the public to respond to the problems of *wali mujbir* in marriage. It needs to be confirmed that the understanding of the public related *wali mujbir* is still considered weak. In addition, this research can also be used as a foundation or a reference for future researchers.

E. Operational Definition

The operational definitions used in this study are:

1. *Wali Mujbir*: The *wali* who has the direct authority to marry off women who are under his responsibility even without permission from her.²⁵
2. Syafi'i *Madhhab*: *Madhhab* is school of thought or perspective in the field of fiqh which later became the community in Islamic society.²⁶ *Madhhab* is the Arabic word which means the road traveled. In terms of Islamic jurisprudence, it means fatwa or *Imam Mujtahid's* opinion.²⁷ In this research, Syafi'i *Madhhab* is a *madhhab* founded by Muhammad Ibn Idris al-Syafi'i who compromises the flow of *ahl al-ra'yi* (rationalist) pioneered by Abu Hanifa with *ahl al-hadith* (traditionalist) pioneered by Malik Bin Anas.²⁸ Then, the disciples or followers of Imam Syafi'i are called Syafi'ites.
3. Maqasid Sharia: The group of divine intents and moral concepts upon which the Islamic law is based, such as justice, human dignity, free will, magnanimity, facilitation, and social cooperation.²⁹

²⁵ Abdul Ghofur Anshori, *Perkawinan Islam Perspective Fikih dan Hukum Positif*. (Yogyakarta: UII Press.2011), 40

²⁶ Cik Hasan Bisri, *Model Penelitian Fiqh*, Vol. I, 1st ed, (Bogor: Kencana, 2003), 239

²⁷ Siradjuddin Abbas, *Sejarah dan Keagungan Madzhab Syafi'i*, 6th ed, (Jakarta: Pustaka Tarbiyah, 1994), 53

²⁸ Cik Hasan Bisri, *Model Penelitian...*, 257

²⁹ Jasser Auda, *Maqasid al-shariah as Philosophy of Islamic Law: a Systems Approach*. (London: The International Institute of Islamic Thought, 2007), 2; Jasser Auda, *Membumikan Hukum Islam Melalui Maqasid Sharia*, trans. Rosidin and 'Ali 'Abd el-Mun'im, 1st ed, (Bandung: PT Mizan Pustaka.2015), 32

F. Previous Research

Previous research is needed to emphasize, see the advantages and disadvantages of various theories used by another researcher in reviewing the same problem. Previous research needs to be mentioned in research to confirm and facilitate the readers to see and assess the difference of theory used by researcher with other researchers in conducting studies on the same issue.³⁰

The research discussing *wali* had been conducted by researchers, recently. Nor Salam³¹ conducted research about the analysis of hadith of *lâ nikahâ illa biwaliyyin*. His research showed that the hadith, viewed by the aspect of sanad or matan, is included on hadith Sahih (validity hadith) and it can be a proposition. However, besides considering its validity, historical aspect in comprehending religion texts, including hadith of the prophet, cannot be ignored. Therefore, this research concluded that the validity of the hadith does not give the absolute right of *wali*. The *wali* only consents on giving consideration and cannot force the women who are under his guardianship.

The second research was conducted by M. Aenur Rosyid³², entitled “Hak *Ijbar* Wali dalam Pandangan Imam Syafi’i Perspective Gender”. The compulsion rights of guardian according to Imam Syafi’i is prevailed for the daughter, the adult woman, and the widow. Implementing compulsion rights, for the widow, must be discussed by asking her agreement assertively. Meanwhile, a virgin’s

³⁰Tim Penyusun, *Pedoman Penulisan Karya Tulis*, (Malang: Fakultas Sharia Universitas Islam Maulana Malik Ibrahim, 2012), 42

³¹Nor Salam, *Studi atas Hadis ” LÂ NIKAHÂ ILLÂ BIWALIYYIN”* (Analisis Ilmu Hadis), Undergraduate Thesis, (Malang: UIN Maulana Malik Ibrahim Malang, 2010)

³²M. Aenur Rosyid, *Hak Ijbar Wali dalam Pandangan Imam Syafi’i Perspective Gender*, Undergraduate Thesis, (Malang: UIN Maulana Malik Ibrahim Malang, 2011)

agreement can be discovered through her silence. The gender activist stated that compulsion rights, according to Imam Syafi'i, does not reflect the justice of gender because it seized the rights for the girl to choose a partner for her life.

The interesting research was also conducted by Faizal Azhari.³³ This thesis discussed the view of *maqashid al-Sharia* as *hikmah al-tasyri'* on guardianship concept, especially on law of *wali* in marriage. Moreover, Imam Hanafi and Imam Syafi'i specified the topic in their books and related it on hermeneutic and cross perspective that is gender. The result of this research showed that *maqashid al-Sharia* is a solution to confront problem of gender, particularly problem about the difference of guardianship concept. Then, the existence of *ijbar* rights does not become a reason of force, but it is used to protect little girls and used as a medium of communicating on for adult woman.

Another research focused on *wali mujbir* (the guardian forcer) is conducted by Shoim.³⁴ This research discussed comparison *madhhab* between Hanafi and Syafi'i about the concept of *wali mujbir*. This research concluded that argumentation of Hanafi and Syafi'i of this topic is not the same, concerning on who has a right, law of reason and requirement of *wali mujbir*. The similarity of these *madhhabs* concerning this topic is that concept of *wali mujbir* is only applied for witless woman.

³³Faizal Azhari, *Tinjauan Maqashid al-Syari'ah sebagai Hikmah al-tasyri' terhadap Hukum Wali dalam Pernikahan (Studi Komparatif Pandangan Imam Hanafi dan Imam Syafi'i dalam Kajian Hermeneutika Dan Lintas Perspective)*, Undergraduate Thesis, (Malang: UIN Maulana Malik Ibrahim Malang, 2015)

³⁴Shoim, *Studi Komparasi antara Pemikiran Madzhab Hanafi dan Madzhab Syafi'i tentang Konsep Wali Mujbir*, Undergraduate Thesis, (Surabaya: UIN Sunan Ampel, 2015)

Habba Zuhaida,³⁵ a student of the Walisongo Islamic State University of Semarang, graduated in 2016, conducted a research discussing the *istinbath* method of Imam Hanafi and Syafi'i about *wali mujbir*. Habba concluded that *istinbath* method used by Imam Hanafi for this topic is al Qur'an, Sunnah, and 'Urf. Whereas, Imam Syafi'i used al Qur'an, Sunnah, and Qiyas as *istinbath* method. *The Illat* used by Imam Hanafi is *ghairu 'aqilah* because the witless woman cannot act toward the thing for herself, while Imam Syafi'i used *bikr* (virginity). The different factors that make *istinbath* method of Imam Hanafi and Imam Syafi'i are the factor of learning Qur'an, hadith, and social culture. Habba stated that the relevance of *wali mujbir* for Indonesian context is the argumentation of Imam Syafi'i, and it seems better if the agreement of woman is also observed.

Based on the explanation above, the writer chose the topic since it is different previous research and new research. The different point of the previous researches conducted by Nor Salam, Rasyid, Azhari, Rosyid and Habba is the analysis perspective. This research uses Maqashid Sharia proposed by Jasser Auda in confronting contemporary phenomena.

G. Research Method

1. Type of Research

Type of main research that is commonly used is normative or empirical research study. This research includes normative research type, namely legal

³⁵Habba Zuhaida, *Studi Analisis Metode Istinbat Hukum Imam Hanafi dan Imam Syafi'i tentang Wali Mujbir*, Undergraduate Thesis, (Semarang: UIN Walisongo, 2016)

research conducted through researching library materials (*library research*)³⁶, because it focused on the systematic of Islamic law i.e. Maqasid Sharia and used literary as research materials. In addition, this research includes the fiqh research model, which discusses one of the substances of fiqh in one of the scholars, i.e. fiqh of *munakahat* especially *wali mujbir* on Syafi'i *madhhab*.³⁷

2. Approach of Research

From the background and statements of the problem that have been described in the previous section, it can be concluded that this research is using a conceptual approach. This research examines the concept of moving on from the views and doctrines developed in the science of Islamic law i.e. about *wali mujbir* and Maqasid Sharia.³⁸

Moreover, this research includes fiqh research models that focus on the model of the scholar's entities. Therefore, this research employs a philosophical approach,³⁹ particularly systems approach. Systems theory is another type of philosophy approach. The proposed system features are cognitive nature of systems, wholeness, openness, interrelated hierarchy, multi-dimensionality, and purposefulness.⁴⁰

³⁶Tim Penyusun, *Pedoman Penulisan Karya Tulis*, (Malang: Fakultas Sharia Universitas Islam Maulana Malik Ibrahim, 2012), 17, 20

³⁷Cik Hasan Bisri, *Model Penelitian Fiqh Jilid I: Paradigma Penelitian Fiqh dan Fiqh Penelitian*, (Jakarta: Kencana, 2003)

³⁸Tim Penyusun, *Pedoman Penulisan Karya Tulis*, (Malang: Fakultas Sharia Universitas Islam Maulana Malik Ibrahim, 2012), 21

³⁹Cik Hasan Bisri, *Model Penelitian Fiqh*,...,275

⁴⁰M. Amin Abdullah, "Hak Kebebasan Beragama dan Berkeyakinan: Pendekatan Filsafat Sistem dalam Usul Fikih Sosial", *Salam*, Vol. 14 No. 1 (Januari-Juni, 2011), 18

3. Data Sources

In this study, the material library is a data base in the research that are categorized as secondary data.⁴¹ Secondary data in this research can be classified into three characteristics, namely the primary legal materials, secondary legal materials, and tertiary legal materials.⁴²

a. Primary legal materials

The Primary material is the data of the research that became the main sources in research,⁴³ those are:

- 1) Muhammad bin Idris as-Syafi'i. *al-Umm*. Mansoura: Dâr al-Wafa. 2001
- 2) Al-Imâm Al-Nawawiy. *Al-Majmû' Sharh al-Muhadzdzab*. Vol. XVII. Jeddah: Maktabah al-Irsyad. tt
- 3) Jasser Auda. 2008. *Maqasid al-shariah a Beginner's Guide*. London: The International Institute of Islamic Thought.
- 4) Jasser Auda. 2007. *Maqasid al-shariah as Philosophy of Islamic Law: a Systems Approach*. London: The International Institute of Islamic Thought.

b. Secondary legal materials

The secondary material is a material that provides a description of the primary sources, such as previous research which is related to the discussion of *wali mujbir* and Maqasid Sharia, or academic journals, books, translations, and other secondary legal materials that can be used as a reference for supporting the research.

⁴¹Soekanto dan Mamudji, *Penelitian Hukum Normatif Suatu Tinjauan Singkat* (Jakarta: Rajawali, 2003), 23-24.

⁴²Tim Penyusun, *Pedoman*,..., 22

⁴³Tim Penyusun, *Pedoman*, ..., 22.

c. Tertiary legal materials

In this study, both encyclopedia and dictionary are made as tertiary legal materials that give instructions or additional information to the primary and secondary legal materials.

4. Data Collection Method

The primary legal materials collection method in normative research those are: doing the determination of legal materials, inventorying of relevant legal materials, and studying of material law.⁴⁴ The method of collecting the data from the library is conducted at the following stages:⁴⁵

- a. Submitting all references and other materials that will be selected as the data source that contains information about schools of thought (*madhhabs*) with the specified research focus, it is Syafi'i *Madhhab*.
- b. Picking the specific library materials to be used as the primary data source. In addition, it is equipped with a secondary data source i.e. library materials and other materials that support the primary data source.
- c. Reading the references that have been selected carefully.
- d. Taking note of the contents of the library materials that are related to this research questions.
- e. Translating the contents of the note if the library materials are written in foreign language.

⁴⁴Tim Penyusun, *Pedoman*,..., 41.

⁴⁵Cik Hasan Bisri, *Model Penelitian Fiqh*,..., 279

5. Data Analysis Method

Processing data is the technique to process or analyze data that has been obtained. Processing data is aimed to explain data clearly. As a result, the researcher will obtain deep comprehension. In this case, there are some steps which are:

a. Editing data:

In editing data, the collecting data is examined to determine whether it corresponds to the focus of the deliberations of the researcher. The focus of this research is about *wali mujbir* for both virgins and widows but reached puberty and intelligence. This research analyzes the *mujbir's* role in accordance to Jasser Auda's Maqasid Sharia theory.

b. Classifying data

In this step, data is classified based on the deliberations of the research. Books, journals, articles, and references that have been collected are clarified according to the respective division

c. Verifying data

In data verification, the truth, the author, and the time was written in the data or material are checked.

d. Analyzing data:

The next step is to analyze the data that have been classified and systematized according to the approach, so it will get the right conclusion.

e. **Conclusion**

The last step of processing data is conclusion. This step is conducted by taking important point. At this step, researcher concluded the results of the analysis so that reader will get clear and comprehensive information easily, especially about *wali mujbir* on Syafi'i *madhhab* in Jasser Auda's Maqasid Sharia perspective.

H. **Structure of Discussion**

This research is prepared with a systematic procedure, and organized in four chapters. Each chapter has its focused discussions as described as follows:

Chapter I is Introduction. The researcher gives an idea about the direction of the research. It contains the background of research, statement of the problem, objective of research, significance of research, definition of the key terms, previous research, and also research method.

Chapter II contains thoughts and concepts as a theoretical foundation for the study and analysis of the problem, either substantial or relevant methods related to problems of research. Specifically, it contains the concept of *wali* in marriage. The Maqasid Shariah concepts that have been developed by thinkers of contemporary Islamic law i.e. Jasser Auda, are then elaborated.

Chapter III contains the results of research and discussion. The researcher will expose the concept of *mujbir* guardian in Syafi'i scholars. Then, the researcher will analyze the role of *wali mujbir* in marriage according to the Syafi'i scholars by using the concept of Jasser Auda's Maqasid Sharia as the basis for its analysis.

Chapter IV presents the conclusions of the study which analyzes the previous chapters, so the *wali mujbir's* role on Syafi'i *madhhabs* based on Jasser Auda's Maqasid Sharia perspective is clear. In this chapter also states some suggestions that are expected to become a contribution of scientific idea.



CHAPTER II

GUARDIANSHIP IN MARRIAGE AND MAQASID SHARIA OF JASSER AUDA

A. Guardianship in Islamic Law

1. Understanding the Guardian (*Wali*)

The word “wali” comes from the Arabic language that is وليّ, the plural of this word is اولياء, meaning love and government.⁴⁶ Alaudin al Khurafa explained that, terminologically, guardianship is a right to conduct a contract for another person although he or she does not want it. It happens because of his or her infirmity and the lower competence to conduct contract for his or herself.⁴⁷

KBBI explained that *wali* is a person, according to the law of religion or custom, who is responsible for taking care of orphans and their wealth before they become adults. *Wali* can be described as guardian for the bride who makes

⁴⁶Mahmud Yunus, *Kamus Arab-Indonesia*, (Jakarta: Yayasan Penyelenggara Penterjemah/ Penafsiran Al Qur'an, 1983), 507

⁴⁷Djohan Effendi, “Wali” in *Ensiklopedia Nasional Indonesia*, XVIII (Jakarta : PT.Cipta Adi Pustaka, 1991), 232.

marriage agreement with the groom.⁴⁸ In terminology of Fiqh, *wali* is named as *wilâyah* meaning authority and protection. Thus, *wali* in marriage is a person who has the power to do the marriage contract with those under his authority determined by *syara*.⁴⁹ Abdurrahman bin Muhammad Aud Al-Jaziri defined *wali* as explained below:

الولي في النكاح هو الذي يتوقف عليه صحة العقد فلا يصح بدونه، وهو الأب

أو وصيه والقريب العاصب والمعتق والسلطان والمالك⁵⁰

“Guardian in marriage is a person who is believed to determine the validity of marriage contract, so that the contract will not valid without him, he is father or person burdened heirloom, family member leaned on father, mu’tiq (person liberating slaves), sultan (king), and powered government”.

Amir Syarifuddin explained that, generally, guardian is a person who, by his position, represents a person who has power to act. This act is caused by the weakness of a person who, according to the law, is not capable of doing the act, neither of his wealth nor himself.⁵¹ In marriage, *wali* is a person who is capable of representing and doing a contract for a bride. Moreover, Amir explained that marriage contract is conducted between two persons, a man (groom) and a guardian of a woman (bride).⁵²

⁴⁸Frista Artmanda W, *Kamus Lengkap Bahasa Indonesia*, (Jombang: Lintas Media, t.t), 347

⁴⁹Musthofa Al-Khin dkk., *Kitab Fiqih Madzhab Syafi’i*, trans. Azizi Ismail and M. Asri Hasim, (Kualalumpur: Pustaka Salam, 2002), 622

⁵⁰Abdurrahman al-Jazîriy, *al-Fiqh ‘alâ al-Madzâhib al-Arba’ah*, Vol. IV, 2nd ed, (Beirût: Dâr al-Kutub al-‘Ilmiyah, 2003), 29

⁵¹Amir Syarifuddin, *Hukum Perkawinan Islam di Indonesia*, 3rd ed, (Jakarta: Kencana, 2009), 69.

⁵²Amir Syarifuddin, *Hukum Perkawinan*,..., 69.

2. The Basic Source of Wali

a. Basic sources of Wali in the Qur'an

وَأَنْكِحُوا الْأَيَامَىٰ مِنْكُمْ وَالصَّالِحِينَ مِنْ عِبَادِكُمْ وَإِمَائِكُمْ إِنْ يَكُونُوا فُقَرَاءَ يُغْنِهِم

اللَّهُ مِنْ فَضْلِهِ وَاللَّهُ وَاسِعٌ عَلِيمٌ⁵³

““And marry those among you who are single (i.e. a man who has no wife and the woman who has no husband) and (also marry) the *Sâlihûn* (pious, fit and capable ones) of your (male) slaves and maid-servants (female slaves). If they be poor, Allah will enrich them out of His Bounty. And Allah is All-Sufficient for His creatures' needs, All-Knowing (about the state of the people)”.⁵⁴

The word *al-Ayâmâ*, the plural from *Ayyim*, is used to describe a woman who has no husband and a man who has no wife, regardless of whether they have been married and then separated, or have never been married at all. Al-Jawhari reported this from the scholars of the (Arabic) language, and the word is applied to men and women alike.⁵⁵

وَلَا تُنْكِحُوا الْمُشْرِكِينَ حَتَّىٰ يُؤْمِنُوا⁵⁶

“And give not (your daughters) in marriage to *Al-Musyrikûn* till they believe (in Allah Alone) and verily”.⁵⁷

⁵³ QS.An-Nur (24): 32.

⁵⁴ Muhammad Taqi-ud-Dîn Al-Hilâlî and Muhammad Muhsin Khân, *Translation of the meanings of The Noble Qur'an in the English Language*, (Madinah: King Fahd Complex, 1404 H), 471

⁵⁵ Imam Abu Al-Fida Ismail Ibn Kathir, *Tafsir ibn Ibnu Kathir*, vol.7. English translated by Syaikh Safiur Rahman al-Mubarakpuri, (Riyadh: Maktaba Dar-us-Salam, 2003), 76

⁵⁶ QS.Al-Baqarah (2): 221.

⁵⁷ *Al-Musyrikûn*: polytheists, pagans, idolaters, and disbelievers in the Oneness of Allah and His Messenger Muhammad Saw. See more in Muhammad Taqi-ud-Dîn, *Translation,....*, 48

وَإِذَا طَلَّقْتُمُ النِّسَاءَ فَبَلَغْنَ أَجَلَهُنَّ فَلَا تَعْضُلُوهُنَّ أَنْ يَنْكِحْنَ أَزْوَاجَهُنَّ إِذَا تَرَاضَوْا
 بَيْنَهُمْ بِالْمَعْرُوفِ ذَلِكَ يُوعَظُ بِهِ مَنْ كَانَ مِنْكُمْ يُؤْمِنُ بِاللَّهِ وَالْيَوْمِ الْآخِرِ ذَلِكَ
 أَزْكَى لَكُمْ وَأَطْهَرُ وَاللَّهُ يَعْلَمُ وَأَنْتُمْ لَا تَعْلَمُونَ⁵⁸

“And when you have divorced women and they have fulfilled the term of their prescribed period, do not prevent them from marrying their (former) husbands, if they mutually agree on reasonable basis. This (instruction) is an admonition for him among you who believe in Allah and the Last Day. That is more virtuous and purer for you. Allah knows and you know not.”⁵⁹.

Al-Syafi'i said in *al-Umm*, quoted by Imam al Muthi'i in *al-Majmu'*, that some scholars who understand the Qur'an argue that Ma'qil ibn Yasar married off his sister to his uncle's son, then his uncle's son divorced her. Then his uncle's son was about to marry her again after his iddah. However, Ma'qil refused it by saying, "I have married you off and placed you above others, but you did divorce her. I will not marry you off again with her forever." Then, came the verse وَإِذَا

طَلَّقْتُمُ النِّسَاءَ فَبَلَغْنَ أَجَلَهُنَّ, “And when you have divorced women and they have fulfilled the term of their prescribed period” that is the end of their iddah, فَلَا أَنْ يَنْكِحْنَ “do not prevent them,” means the wali cannot prevent them,

أَزْوَاجَهُنَّ “from remarrying their (former) husbands,” i.e they had previously divorced their wives but did not do the *talak ba'in*. In this case, the *wali* is told

⁵⁸ QS. Al-Baqarah (2): 232

⁵⁹ Muhammad Taqi-ud-Din, *Translation,....*, 51

not to prevent women who want to marry because the marriage will be perfect with the *wali*'s presence. If a husband has divorced his wife and then his *iddah* is over, then the *wali* should not prevent him if he wishes to remarry her.⁶⁰

b. Basic sources of *wali* in the hadith

حَدَّثَنَا مُحَمَّدُ بْنُ كَثِيرٍ، أَخْبَرَنَا سُفْيَانُ، أَخْبَرَنَا ابْنُ جُرَيْجٍ، عَنْ سُلَيْمَانَ بْنِ مُوسَى،
عَنِ الرَّهْرِيِّ، عَنْ عُرْوَةَ، عَنْ عَائِشَةَ، قَالَتْ: قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ:
أَيُّمَا امْرَأَةٍ نَكَحْتُ بِغَيْرِ إِذْنِ مَوْلَاهَا، فَنِكَاحُهَا بَاطِلٌ، ثَلَاثَ مَرَّاتٍ فَإِنْ دَخَلَ بِهَا
فَأَلْمَهُرُ لَهَا بِمَا أَصَابَ مِنْهَا، فَإِنْ تَشَاجَرُوا فَالسُّلْطَانُ وَإِيَّ مَنْ لَا وِلِيَّ لَهُ.⁶¹

Aisyah narrated that the Messenger of Allah Saw said: "Any woman who marries without the permission of her wali – then her marriage is void," (he repeated it) three times, and he added: "So if he consummated the marriage with her, she is entitled to the dowry because of what he has attained from her. And if they differ, then the Sulthan is the wali of the one who does not have one."⁶²

This hadith, according to *Hanafites* scholars, is included on hadith *dhaif* (the weak hadith). It is caused by the narrators who couldn't be trusted. One of them is Ibn Juraij who is the narrator of al-Zuhri. Ibnu Aliyah narrated the hadith given by Ibn Juraij that he asked al-Zuhri about this hadith but he did not know the truth. In this case, they stated that the argumentation causing the weak of

⁶⁰Imam al-Nawawiy, *al-Majmū' Sharḥ al-Muḥadzdzab*, trans. Ali Murtadho, Fahrizal, 1st ed, (Jakarta: Pustaka Azzam), 221

⁶¹Abu Dawud, *Sunan Abu Dawud*, Bab fi al waliy (2083) vol. II, (Beirut:al-Maktabah al-‘Ashriyah, t.t.), 229

⁶²Abu Dawud, *Sunan Abu Dawud*, Bab fi al waliy (2083), vol. II, English translated by Yaser Qadhi (Riyadh:Maktaba Dar-us-Salam, 2008), 520

hadith about al-Zuhri, who does not require *wali*'s presence in marriage, is not Aisyah's argumentation.⁶³

حَدَّثَنَا أَبُو كُرَيْبٍ قَالَ: حَدَّثَنَا عَبْدُ اللَّهِ بْنُ الْمُبَارَكِ، عَنْ حَجَّاجٍ، عَنِ الزُّهْرِيِّ، عَنْ عُرْوَةَ، عَنْ عَائِشَةَ، عَنِ النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ، وَعَنْ عِكْرِمَةَ، عَنِ ابْنِ عَبَّاسٍ، قَالَا: قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: لَا نِكَاحَ إِلَّا بِوَالِيٍّ، وَفِي حَدِيثِ عَائِشَةَ: وَالسُّلْطَانُ وَوَالِيٌّ مَنْ لَا وَالِيَّ لَهُ⁶⁴

*“Abu Kuraib told us: Abdullah bin Mubarak told us, from Hajjaj, from Al-Zuhri, from Urwah, from Aishah r.a., from Prophet SAW, and from ‘Ikrimah from Abbas said “The Messenger of Allah Saw said: ‘There is no marriage except with a guardian.’” According to The Hadits of Aishah: And the ruler is the wali of the one who does not have a guardian.”*⁶⁵

حَدَّثَنَا جَمِيلُ بْنُ الْحَسَنِ الْعَتَكِيُّ قَالَ: حَدَّثَنَا مُحَمَّدُ بْنُ مَرْوَانَ الْعُقَيْلِيُّ قَالَ: حَدَّثَنَا هِشَامُ بْنُ حَسَّانَ، عَنْ مُحَمَّدِ بْنِ سِيرِينَ، عَنْ أَبِي هُرَيْرَةَ، قَالَ: قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: لَا تُزَوِّجُ الْمَرْأَةَ الْمَرْأَةَ، وَلَا تُزَوِّجُ الْمَرْأَةَ نَفْسَهَا، فَإِنَّ الزَّانِيَةَ هِيَ الَّتِي تُزَوِّجُ نَفْسَهَا⁶⁶

“It was narrated from Jamil bin Hasan al-‘Ataki: narrated from Muhammad bin Marwan Al-Uqaili, he said: It was narrated from Hisyam bin Hasan, from Muhammad bin Sirrin, narrated from Abu Hurairah that the Messenger of Allah (Saw.) said: No woman should arrange the marriage of another woman, and no woman should

⁶³Ibnu Rusy, *Bidayatul Mujtahid*, trans. Abu Usamah Fakhtur Rokhman, Vol. II, 1st ed, (Jakarta: Pustaka Azzam, 2007), 15

⁶⁴Ibnu Mâjah Abu ‘Abdillah, *Sunan Ibn Mâjah*, vol. I (t.t: Dar Kutub al Ihya’ al-‘Arobiyah, t.th), 605

⁶⁵ Ibnu Majah, *Sunan Ibnu Majah* (1880), vol. III, English translated by Nasiruddin al-Khattab. (Riyadh: Maktaba Dar-us-Salam, 2007), 79

⁶⁶Ibnu Mâjah Abu ‘Abdillah, *Sunan Ibn Mâjah*,..., 606

arrange her own marriage. The adulteress is the one who arranges her own marriage."⁶⁷

The hadiths narrated by Aisha is a proposition used by the Syafi'ites who require a *wali* in marriage. It is also explained by Imam al-Muthi'i in *al-Majmu'* that the Syafi'ites scholars mention some conclusions with regard to the hadith, including:⁶⁸

1. Wali may cancel the marriage of the woman if the marriage is done without the *wali's* permission.
2. The guardianship applies to all women because the sentence is general.
3. The correlation in the sentence is permissible because of its "Anyone." It means "Who are women."
4. *Walis* may represent others in the marriage contract.

3. Types of *Wali*

In *Bidayatul Mujtahid*, Ibnu Rusyd mentioned the types of *wali* based on three aspects: *wali nasab* (descent guardian), *sultan* (hakim) guardian, and *maula* (*wali* for slaves although they had been liberated).⁶⁹ Then, Abdul Manan also mentioned the types of *wali*: *wali nasab*, *sultan* guardian, and *wali muhkam*.⁷⁰

a. *Wali nasab* (Descent guardian)

This kind is a guardian connected between family member and bride, in which it is divided by two kinds:⁷¹

⁶⁷ Ibnu Majah, *Sunan Ibnu Majah* (1882), transl. by Nasiruddin, ..., 79

⁶⁸ al-Nawawiy, *al-Majmû' Sharh*, trans. Ali Murtadho, 223

⁶⁹ Ibnu Rusy, *Bidayatul*, trans. Abu Usamah, ..., 22

⁷⁰ Abdul Manan, *Aneka Masalah Hukum Perdata Islam di Indonesia*, (Jakarta: Kencana Prenada Media Group, 2006), h. 61

⁷¹ Amir Syarifuddin, *Hukum Perkawinan*, ..., 75

1) Close Guardian (*Wali qarib/aqrab*)

Either father or grandfather is categorized into this group. He has an absolute power to marry off their girls. They can marry their girl off who is underage without asking for her permission. In this case, that *wali* is called *wali mujbir*. Because the girl does not have the skill to give agreement, *wali mujbir* does not have to ask her the reason. Hanabilah scholars determined that the man who is given authority from the biological father to marry off his girl is considered as father.⁷²

2) Distant Guardian (*wali ab'ad*)

Wali ab'ad consists of family member besides father and grandfather. Moreover, child and grandchild also cannot be guardian because of, according to Jumhur Ulama, they are children. If the child as sultan (*wali hakim*), he may marry off his mother.⁷³ People categorized as *wali ab'ad* are mentioned below:⁷⁴

- a) Blood-related brother
- b) Half brother
- c) Son of blood-related brother
- d) Son of half brother
- e) Blood-related uncle
- f) Half-uncle
- g) Son of blood-related uncle
- h) Son of half brother
- i) Brother of blood-related grandfather

⁷²Amir Syarifuddin, *Hukum Perkawinan Islam di Indonesia*, 3rd ed, (Jakarta: Kencana, 2009), 75

⁷³Amir Syarifuddin, *Hukum Perkawinan*,..., 75

⁷⁴Amir Syarifuddin, *Hukum Perkawinan*,..., 76

- j) Brother of half grandfather
- k) Son of brother of blood-related grandfather
- l) Son of brother of half grandfather
- m) Brother of blood-related grand-grandfather
- n) Brother of half grand-grandfather
- o) Son of blood-related grand-grandfather
- p) Son of half grand-grandfather
- q) Other heirs

Hanafites scholars determined all of the types above as *ashabah* or not included the list of in inheritance, and *zawil arham* is included as *wali nasab*. They stated that not only father and grandfather who have the authority of compulsion (*ijbar*) but also all of these types of *wali* have that authority if the girl who is married off by them is underage girl or crazy woman. It contradicts to *Jumhur ulama*'s argumentation which stated that the child can be a *wali* for his mother who will get married.⁷⁵

Malikites scholars stated that all family descents who are *ashabah* are determined as *wali nasab* and allow the child to marry off his mother, even if their position is higher than father and grandfather. A person given an authority by biological father to be a *wali* for his girls, according to this group, is determined by father. Whereas, Hanafites scholars give an authority of compulsion only father as *wali aqrab*.⁷⁶

⁷⁵Amir Syarifuddin, *Hukum Perkawinan*,..., 76

⁷⁶Amir Syarifuddin, *Hukum Perkawinan*,..., 76

b. *Wali Hakim (Sulthan)*

A person who becomes *wali* because of his position as *Sultan* or government is called *Sultan* or *wali hakim*.⁷⁷ Compilation of Islamic Law (KHI) explained that *wali sulthan* has a role when:⁷⁸

- 1) *Wali nasab* (descent guardian) is not able to come, or is
- 2) *Wali nasabs'* home or place is unknown.
- 3) *Wali nasab* is adhal/ unwilling.
- 4) If the above reasons are completed, *wali sulthan* may take a role as *wali* in marriage after the Islamic Court decides this case.

c. *Wali Maula*

Wali Maula is the *wali* who marries off his slave. A man may marry off a female slave who is under his authority if she gives him the permission.⁷⁹

d. *Wali Muhkam*

Wali Muhkam is the man who is neither family member of the bride nor government, but he has the good religious knowledge and may replace the position of the government to be *wali*. This *wali* exists when descent guardian, maula guardian, and Sultan guardian are absent.⁸⁰

⁷⁷Amir Syarifuddin, *Hukum Perkawinan*,..., 75

⁷⁸Kompilasi Hukum Islam in article 23 verse (2) and (3), in Amir Syarifuddin, *Hukum Perkawinan*,..., 81

⁷⁹Tihami and Sohari, *Fikih Munakahat*, (Jakarta: PT Raja Grafindo Persada, 2009), 99

⁸⁰Sayuti Thalib, *Hukum Kekehuargaan Indonesia Berlaku Bagi Umat Islam*, (Jakarta: UI Press, tt.), 65-66

4. Requirements of *Wali*

The requirements of *wali* are explained as follow:⁸¹

- a. *Wali* is adult man and *baligh* (he was reaching puberty, either children or crazy man could not be *wali*).

This is a general requirement for those who do the contract. This statement is based on the hadith of the prophet:

أَخْبَرَنَا يَعْقُوبُ بْنُ إِبْرَاهِيمَ، قَالَ: حَدَّثَنَا عَبْدُ الرَّحْمَنِ بْنُ مَهْدِيٍّ، قَالَ: حَدَّثَنَا حَمَّادُ بْنُ سَلَمَةَ، عَنْ حَمَّادٍ، عَنْ إِبْرَاهِيمَ، عَنْ الْأَسْوَدِ، عَنْ عَائِشَةَ، عَنِ النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ، قَالَ: " رُفِعَ الْقَلَمُ عَنْ ثَلَاثٍ: عَنِ النَّائِمِ حَتَّى يَسْتَيْقِظَ، وَعَنِ الصَّغِيرِ حَتَّى يَكْبُرَ، وَعَنِ الْمَجْنُونِ حَتَّى يَعْقِلَ أَوْ يُفِيقَ"⁸²

“Ya’qub bin Ibrahim told us, he said: Abdurrahman bin Mahdi told us, he said: Hammad bin Salamah told us, from Hammad, from Ibrahim, from Aswad, from Aishah that Prophet Muhammad SAW, he said: “The pen has been lifted from three: From the sleeper until he wakes up, from the minor until he grows up, and from the insane until he comes back to his senses or recovers.”⁸³

- b. The man, woman is forbidden

Scholars of Hanafites and Imami Syi’ites have different opinions. They assumed that adult woman who has a good mind may be a guardian for herself or others who need a guardian for their importance. It is based on the explanation above.⁸⁴

⁸¹ Amir Syarifuddin, *Hukum Perkawinan*,..., 76-78

⁸² Abu Abdurrahman Ahmad bin Syu’aib an-Nasa’i, *as-Sunan an-Nasa’i*, Juz VI, 2nd ed, (Halab: Maktab al-Mathbu’at, 1986), 156

⁸³ Abu Abdurrahman Ahmad bin Syu’aib an-Nasa’i, *as-Sunan an-Nasa’i*, vol. VI, in English translated by Nasiruddin al-Khattab (Riyadh: Maktaba Dar-us-Salam, 2007), 237

⁸⁴ Amir Syarifuddin, *Hukum Perkawinan*,..., 77

- c. Wali is Muslim. It is not valid for a person who is not Muslim to be a guardian for Muslim in marriage. This argument is based on al-Imran verse 28:

لَا يَتَّخِذِ الْمُؤْمِنُونَ الْكَافِرِينَ أَوْلِيَاءَ مِنْ دُونِ الْمُؤْمِنِينَ وَمَنْ يَفْعَلْ ذَلِكَ فَلَيْسَ مِنَ اللَّهِ فِي شَيْءٍ إِلَّا أَنْ تَتَّقُوا مِنْهُمْ تُقَاةً وَيُحَذِّرُكُمُ اللَّهُ نَفْسَهُ وَإِلَى اللَّهِ الْمَصِيرُ⁸⁵

“Let not the believers take the disbelievers as Auliya (supporters, helpers) instead of the believers, and whoever does that will never be helped by Allah in any way, except if you indeed fear a danger from them. And Allah warns you against Himself (His punishment), and to Allah is the final return.”⁸⁶

- d. Independent Man
- e. He does not include in *mahjur 'alaih*, in which he can not act, in law perspective, for himself. His existence as a *wali* is the action of law.
- f. *Wali* should have a good thinking (healthy mind). Old people whose mind is not in a good condition cannot act as *wali* since it will not give any positive elements for the marriage.⁸⁷
- g. Fair man. It is intended for one who does not commit major sins or, often, minor sins. He always keeps *murū'ah* (good manners). Syi'ites scholars do not request fair man in marriage.⁸⁸ The necessity of fair man is based on the hadith of the Prophet SAW in Aisyah's hadith taken from al-dâr Quthniy:

⁸⁵QS. al-Imron (3): 28.

⁸⁶ Muhammad Taqi-ud-Dîn, *Translation*,..., 51

⁸⁷ Amir Syarifuddin, *Hukum Perkawinan*,..., 77.

⁸⁸ Hasan bin Ali al-Thusiy, *al-Mabsuth fi Fiqh al-Imamiyah*, vol. IV (Teheran: Mathba'ah al-Murtadhawiyah, 1388 H), 163, in Amir Syarifuddin, *Hukum Perkawinan*,..., 78

نا أَبُو ذَرٍّ أَحْمَدُ بْنُ مُحَمَّدٍ بْنِ أَبِي بَكْرٍ نَا أَحْمَدُ بْنُ الْحُسَيْنِ بْنِ عَبَّادِ النَّسَائِيِّ , نَا
 مُحَمَّدُ بْنُ يَرِيدَ بْنِ سِنَانٍ , نَا أَبِي , عَنْ هِشَامِ بْنِ عُرْوَةَ , عَنْ أَبِيهِ , عَنْ عَائِشَةَ ,
 قَالَتْ: قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: لَا نِكَاحَ إِلَّا بِوَالِيٍّ وَشَاهِدَيْنِ عَدْلٍ⁸⁹

“Abu Dzar Ahmad bin Muhammad bin Abu Bakr told us, Ahmad bin Husain bin Abbad an Nasa’I told us, Muhammad bin Sinan told us, There is no marriage except with a wali and two of fair witnesses.”

- h. A wali is not in pilgrimage ritual. This is based on the prophet’s hadith from ‘Usman, narrated by Muslim:

حَدَّثَنَا يَحْيَى بْنُ يَحْيَى، قَالَ: قَرَأْتُ عَلَى مَالِكٍ، عَنْ نَافِعٍ، عَنْ نُبَيْهِ بْنِ وَهْبٍ، أَنَّ
 عُمَرَ بْنَ عَبْدِ اللَّهِ، أَرَادَ أَنْ يُزَوِّجَ طَلْحَةَ بْنَ عُمَرَ بِنْتَ شَيْبَةَ بْنِ جُبَيْرٍ، فَأَرْسَلَ إِلَى
 أَبَانَ بْنِ عُثْمَانَ يَحْضُرُ ذَلِكَ وَهُوَ أَمِيرُ الْحَجِّ، فَقَالَ أَبَانُ: سَمِعْتُ عُثْمَانَ بْنَ عَفَّانَ،
 يَقُولُ: قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: لَا يَنْكَحُ الْمُحْرِمُ، وَلَا يُنْكَحُ، وَلَا
 يَخْطُبُ⁹⁰

Yahya bin Yahya told us, he said: I read the narration of Malik, it was narrated from Nafi’, from Nubaih bin Wahhb that ‘Umar bin ‘Ubaidullah wanted to marry Talhah bin ‘Umar to the daughter of Shaibah bin Jubair, and he sent for Aban bin ‘Uthman, who was the Commander of Hajj, to attend the wedding, Aban said: “I heard ‘Uthman bin Affan say: ‘The Messenger of Allah (Saw) said: The Muhrim should not get married, have a marriage arrange for him, nor propose marriage.’”⁹¹

⁸⁹ Abu al-Hasan ‘Ali bin Umar al-dar Quthniy, *Sunan al-Dar Quthniy*, vol. IV, 1st ed, (Beirut, Libanon: Muassasah ar-Risâlah, 2004), 324.

⁹⁰ Muslim bin al-Hajjâj, *Shahih Muslim*, vol. II (Beirut: Dâr Ihya’ at-Turâts al-‘Arabiyy, tt), 1030

⁹¹ Muslim bin al-Hajjâj, *Shahih Muslim*, vol. VI, English translated by Nasiruddin al-Khattab (Riyadh: Maktaba Dar-us-Salam, 2007), 34

Hannafites provided different opinion in this case. They stated that *wali* who performs *ihram* may marry off the couple who also performs *ihram*.⁹²

5. The Order of Guardianship

Jumhur ulama provide the order of people who can be properly chosen as long as he *wali nasab* is existed. Meanwhile, the *wali sultan* cannot be a *wali* when *wali nasab* is existed. Besides, the *wali ab'ad* cannot be a *wali* as long as the close *wali* of *wali nasab* is also existed. Basically, people become *wali* is *wali aqrab*. If *wali aqrab* does not fulfil the requirements: baligh, intelligent, Islam, independent, having good thought and is fair, guardianship may be given to *wali ab'ad* based on the formation above. If the close-*wali* still performs pilgrimage, the guardianship does not move to the *wali ab'ad* but move to the *wali sulthan*

The *wali sulthan* is also prevailed when *wali ab'ad* is absent, or the *wali qarib* is categorized was 'adhhal or reluctant in marrying off someone with the unreasonable motivation, or the *wali qarib* lives with the distance between 60 kilometers (*two marhalah*).⁹³

6. The Role of *Wali* in Marriage

The role of *wali* is the important thing in the marriage contract which considers the validity of marriage. Principally, the scholars agree that *wali* is one of the marriage pillars. *Wali* may represent his girl or another woman who asks him to represent herself in marriage.⁹⁴

⁹²Ibnu al-Hummam, *Syarh Fath al-Qadir*,..., 232, in Amir Syarifuddin, *Hukum Perkawinan*,..., 78

⁹³Amir Syarifuddin, *Hukum Perkawinan*,..., 78-79

⁹⁴Amir Syarifuddin, *Hukum Perkawinan*,..., 69

The scholars of *madhhabs* have different argument on how the guardian to represent the woman in marriage contract. Focusing on the child bride and the child groom, the scholars also agreed that it becomes the pillar or condition in marriage. Their reason is that the bridegroom child cannot do marriage contract by themselves and that is why the contract is represented by *wali*. However, for the adult woman, virgin or widow, the scholars have different opinion which is caused by uncertain proposition which can be made as reference.⁹⁵

In the Qur'an, the verse that indicated the clear *ibarat al-nash* requiring *wali* in marriage is not found. However, the guideline of *nash* in which the *ibarat* does not show to the importance of *wali* is assumed by *isyarat nash* as the indication of the importance of *wali*'s presence. Moreover, the verses comprehended by women to conduct marriage by themselves are also found.⁹⁶

Some of the verses in the Qur'an indicating *wali*'s presence in marriage are surah al- Baqarah: 221, 232, and Surah an-Nur: 2. *Ibarat nash* from the verses above does not indicate the existence of *wali* in marriage. The reason of why each verse does not indicate the *wali* is: the first verse discusses the prohibition about blocking woman who had completed iddah period for marriage, the second verse discusses the prohibition of the marriage of Muslim woman and polytheist man, and the last verse discusses the command to marry off people who are still single. In the last verse, the *khitab* of Allah Swt is connected with the marriage represented by *wali* or with the existence of *wali* in marriage. Based on the explanation above, *jumhur ulama* ' considers that *wali* must exist in marriage.

⁹⁵ Amir Syarifuddin, *Hukum Perkawinan*,..., 69

⁹⁶ Amir Syarifuddin, *Hukum Perkawinan*,..., 70

It is true that Allah Swt addressed His command to *wali* to do the contract in marriage because when that verse was descended, in Arabic society, marriage contract was performed by *wali* so that it seems to give reinforcement for the existence of *wali*. However, it is not impossible if that reinforcement is considered as the legal duty or pillar in marriage.⁹⁷

In the second group, the verses related woman may get married by herself without *wali* is also explained in the Qur'an. Surah al-Baqarah verse 232 stated that woman may marry her ex-husband and *wali* is prohibited to forbid her. Then, Surah al-Baqarah verse 230 explained that woman is permitted to marry another man, and in surah al-Baqarah verse 234 explained that woman can do the marriage by herself. The verses above indicated that the doer (*fa'il*) in marriage is woman without a *wali*. Focusing on this group, the scholars of Hanafites and Imami Syi'ites concluded that adult woman who has healthy mind may get married by herself without *wali*. The rational argument is that a person who is an adult and has healthy mind may do the act without *wali*'s helping.⁹⁸ The different opinions between the two groups can be summarized below:⁹⁹

- a) The scholars of Hanafites and Imami Syi'ites stated that marriage of the child who is witless or does not have to be represented by *wali*, while an adult woman who is not witless may get married by herself without a *wali*.
- b) Hanafites and Hanbalites stated that marriage contract is conducted by *wali*, despite the fact that the woman is child or adult, virgin or widow, witless or not, a woman does not have the right to conduct the contract.

⁹⁷ Amir Syarifuddin, *Hukum Perkawinan*,..., 70-71

⁹⁸ Amir Syarifuddin, *Hukum Perkawinan*,..., 72

⁹⁹ Amir Syarifuddin, *Hukum Perkawinan*,..., 74

- c) Imam Malik stated, as narrated by Ashab, *wali* is an absolute pillar in marriage and without him, marriage will be not valid. However, according to Ibn Qasim's narration, the existence of *wali* is Sunnah. Another source said that *wali*'s presence is an obligation when he marry off a countess and a woman who has high dignity. Besides the two of them, it is not an obligation.
- d) Zahirites stated that little girl who is witless must be represented by *wali*, while an adult woman must be permitted by *wali* to conduct the marriage. Their proposition is the hadith from Asiyah as narrated by four narrators beside al-Nasai:

حَدَّثَنَا مُحَمَّدُ بْنُ كَثِيرٍ، أَخْبَرَنَا سُفْيَانُ، أَخْبَرَنَا ابْنُ جُرَيْجٍ، عَنْ سُلَيْمَانَ بْنِ مُوسَى،
عَنِ الزُّهْرِيِّ، عَنْ عُرْوَةَ، عَنْ عَائِشَةَ، قَالَتْ: قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ:
أَيُّمَا امْرَأَةٍ نَكَحْتَ بِغَيْرِ إِذْنِ مَوْلَاهَا، فَنَكَاحَهَا بَاطِلًا، ثَلَاثَ مَرَّاتٍ فَإِنَّ دَخَلَ بِهَا
فَأَلْمَهُرُ لَهَا بِمَا أَصَابَ مِنْهَا، فَإِنْ تَشَاجَرُوا فَالْسُّلْطَانُ وَوَيْلٌ مَنْ لَا وَليَّ لَهُ.¹⁰⁰

*Muhammad bin Katsir told, Sufyan reported us, Ibnu Huraij, reported us, from Sulaiman bin Musa, from al-Zuhriy, from 'Urwah, Aishah narrated that the Messenger of Allah said: "Any woman who marries without the permission of her wali – then her marriage is void," (he repeated it) three times, and he added: "So if he consummated the marriage with her, she is entitled to the dowry because of what he has attained from her. And if they differ, then the Sulthan is the wali of the one who does not have one."*¹⁰¹

¹⁰⁰ Abu Dawud, *Sunan Abu Dawud*, Bab fi al waliy (2083) vol. II, (Beirut:al-Maktabah al-Ashriyah, t.t.), 229

¹⁰¹ Abu Dawud, *Sunan Abu Dawud*, Eng. trans. by Yaser Qadhi..., 520

In this hadith, what is demanded is the *wali*'s permission only. He does not need to conduct the contract marriage because when *wali* represents contract marriage, his permission is not important.¹⁰²

B. Maqasid Sharia of Jasser Auda

1. Jasser Auda's Biography

Professor Auda is the Chairman of the Maqasid Institute, a global think tank based in London, UK, with educational and research projects in a dozen other countries. He is a Professor and Al-Shatibi Chair of Maqasid Studies at the International Peace College South Africa, and a Visiting Professor for the Study of Islam at Carleton University in Canada.

He is a Founding and Board Member of the International Union of Muslim Scholars, Member of the Executive Board of the Fiqh Council of North America, Member of the European Council for Fatwa and Research, and Fellow of the Islamic Fiqh Academy of India. He has a PhD in the philosophy of Islamic law from University of Wales in the UK, and a PhD in systems analysis from University of Waterloo in Canada. Early in his life, he memorized the Quran and studied Fiqh, Usul and Hadith in the halaqas of Al-Azhar Mosque in Cairo.

He previously worked as: Founding Director of the Maqasid Center in the Philosophy of Islamic Law in London; Founding Deputy Director of the Center for Islamic Ethics in Doha; professor at the University of Waterloo, Alexandria

¹⁰² Amir Syarifuddin, *Hukum Perkawinan*,..., 74

University, Islamic University of Novi Pazar, Qatar Faculty of Islamic Studies, and the American University of Shariah.¹⁰³

Jasser Auda is also a contributor for political report related to Muslim minority and Islamic Education for Society Ministry and Council of High Education Funding. Moreover, he lectured and trained on Islam, its law, spirituality and ethics in more than 50 countries around the world. He wrote 25 books in Arabic and English, some of which were translated to 25 languages.¹⁰⁴

2. Introduction of Maqasid Sharia

Jasser Auda explains that the term Maqasid is the plural form of the Arabic word '*maqshid*', which refers to a purpose, objective, principle, intent, goal, end, telos (Greek), finalite (French), or Zweck (German). *Maqasid* of the Islamic law are the objectives (*al-hadaf*), purposes (*al-garadl*), intents (*al-mathlûb*), ends (*al-ghâyah*) or principles behind the Islamic rulings.¹⁰⁵

For a number of Islamic legal theorists, it is an alternative expression to 'people's interests' (*al-Masâlih*). The example is 'Abdul Malik al-Juwayni (d: 478 H/ 1185 M), one of the earliest contributors to Maqasid theory. Al-Juwayni used *al-Maqâshid* and public interest (*al-Mashâlih al-'Ammah*) interchangeably. Then Abu Hamid al-Ghazali (d. 505 H/ 1111 M) elaborated the classification of

¹⁰³ <http://www.jasserauda.net/portal/biography/?lang=en>, accessed on Oktober 18th 2016

¹⁰⁴ M. Amin Abdullah, "Bangunan Baru Epistemologi Keilmuan Studi Hukum Islam dalam Merespon Globalisasi", *Asy-Syir'ah*, Vol 46 No. II, (Juli-Desember, 2014), 327-328. See more at website: www.jasserauda.net about the biography of Jasser Auda

¹⁰⁵ Jasser Auda, *Maqasid al-shariah a Beginner's Guide*. (London: The International Institute of Islamic Thought, 2008), 3; see also Jasser Auda, *Maqasid al-Shari'ah a Beginners Guide*, trans. Ali 'Abdelmon'im, *Al-Maqasid Untuk Pemula*, 1st ed, (Yogyakarta: SUKA-Press, 2013), 6

Maqasid, and put it entirely under what he called as ‘unrestricted interest’ (*al-Mashâlih al-Mursalah*).¹⁰⁶

Fakhruddin al-Razi (d. 606 H/ 1209 M) and al-Amidi (d. 631 H/ 1234 M) followed Al-Ghazali in his terminology. Najmuddin at-Thufi (d. 716 H/ 1316 M) defined *Mashlahah* as, “what fulfills the purpose of the Legislator (Pembuat arahan-arahan Syariat: Allah SWT dan RasulNya SAW)”. Al-Qarafi (d. 1285 H/ 1868 M), linked *mashlahah* and *maqâshid* by the basic of fiqh (*ushuli*): “*Lâ yu’tabaru al-Syar’u min al-Maqâshid illa ma ta’allaqa bihî ghardlun shahîhun, muhâshilun li-mashlahatin aw dâri’un li-mafsadatin*”.¹⁰⁷ It means: “A purpose (Maqasid) is not valid unless it leads to the fulfillment of some good things (*mashlaha*) or the avoidance of some mischief (*mafsadah*)”. Therefore, the aim of a *maqshid*, purpose, objective, principle, intent, goal, end, or principle in the Islamic law is the ‘interest of humanity’. This is the rational basis for the Maqasid theory.¹⁰⁸

The most significant pioneers of Maqasid theory between third and fifth Islamic centuries are: al-Tirmidzi al-Hakim (w. 296 H/908 M), Abi Zayd al-Balkhi (w. 322 H/ 933 M), al-Qaffal al-Kabir Syayhi (w. 365 H/ 975 M), Ibn Babawayh al-Qummi (w. 381 H / 991 M), and al-Amiri al-Faylasuf (w. 381 H/ 991 M).¹⁰⁹

The most significant jurist of Maqasid theory between fifth and eight Islamic centuries, are: Abu al-Ma’ali al-Juwayni (w. 478 H/ 1085 M), Abu Hamid

¹⁰⁶Jasser Auda, *Maqasid al-shariah*, 4

¹⁰⁷Jasser Auda, *Maqasid al-shariah*, 3

¹⁰⁸Jasser Auda, *Maqasid al-shariah*, 3

¹⁰⁹Jasser Auda, *Maqasid* trans. Ali ‘Abdelmon’im, 30-36

al-Ghazali (w. 505 H/ 1111 M), al-'Izz ibn 'Abd al-Salam (w. 660 H/ 1209 M), Syihab al-Din al-Qarafī (w. 684 H/ 1285 M), Syamsuddin Ibn al-Qayyim (w. 748 H/ 1347 M), and Abu Ishaq al-Syathibi (w. 790 H/ 1388 M).¹¹⁰

In addition, the Maqasid contemporary *ulamas*, are: Rasyid Ridha (w. 1354 H/ 1935 M), Al-Thahir Ibn 'Asyur (w. 1325 H/ 1907 M), Muhammad al-Ghazali (w. 1416 H/ 1996), Yusuf al-Qardhawi (1345 H/ 1926 M-....), Thaha Jabir al-'Alwani (1354 H/ 1935 M-.....)¹¹¹

3. Reformation of Classical Maqasid

Jasser Auda is one of the contemporary Muslim thinkers concerning on reformation of Philosophy of Islamic Law (*Ushul Fiqh*) by using Maqashid Shariah as the basic philosophy of his thought with the system approach as the thinking method and analysis tool. It is the new theory that has never been used in discussing Islamic Law and *Ushul al-Fiqh*.

Jasser Auda provided six features optimized as basic analysis; cognition, wholeness, openness, interrelated hierarchy, multidimensionality, and purposefulness. These features are semipermeable among others, so that it makes the totality of thinking system. However, the only system reaching all features and representing the content of system analysis methodology is Maqashid (objectiveness). This makes Jasser established Maqashid Shariah as a fundamental methodology to reform Contemporary Islamic Law. Considering the effectiveness of system measured by reaching purpose level in Islamic Law, the effectiveness is measured by the Maqashid Shariah achievement. In another

¹¹⁰Jasser Auda, *Maqasid* trans. Ali 'Abdelmon'im, 37-48

¹¹¹Jasser Auda, *Maqasid* trans. Ali 'Abdelmon'im, 16-21

word, it shows how effective it is for certain problems, is it more effective, more useful, or does it bring benefit for human ¹¹²

The first reformation suggested by Jasser is reforming Maqashid Shariah in contemporary perspective, from Maqashid Shariah containing *protection* and *preservation*, into Maqashid Sharia containing *development* and *Human Rights*. Moreover, Jasser added that exploring human resources must be the main topic for the benefit of public policy. The impact of this reformation is shown by adopting development concept of Human Resource (Sumber Daya Manusia). Then, the realization of *Maqashid Sharia* can be evaluated by taking targets from the perspective of agreement of Nations Organization. ¹¹³

The second reformation is that Jasser offers proposition authority level and source of recent Islamic Law- like human rights -as the basic for compiling tipology of Contemporary Islamic Law theory. Based on the spectrum of legitimacy level and source of contemporary Islamic Law, Jasser offers theories of Islamic law as reformation approach of Contemporary Islamic Law. He assumed that there are three ideologies of Islamic Law: traditionalism, modernism, and postmodernism, in which all of these are not scholastic. By using this reformation, the limit among Sunni, Syi'ah, Mu'tazilah, Khawarij, and others will be deleted, as always learned and taught in Islamic education in early period. So, *faqih* (the master of religion-elder, teacher, lecturer, religion figure, and even common person) will be more flexible in analyzing *fiqh* case. *Faqih* may change

¹¹²M. Amin Abdullah, *Pengantar: Pembacaan Ulang atas Pendekatan Maqashid Sharia*, in book Jasser Auda, *Membumikan Hukum Islam Melalui Maqashid Sharia*, trans. Rosidin dan 'Alî 'Abd el-Mun'im, 1st ed, (Bandung: PT Mizan Pustaka.2015), 11

¹¹³M. Amin Abdullah, *Pengantar...*, 11

the ideology as what he wants according to the approach in authority context of argument or law source which he uses.

The third reformation is shown by offering Law system of Islamic Law based on Maqashid Shariah. Jasser provides a significant contribution in order to reform philosophy of Islamic Law by using function of system features.¹¹⁴

Jasser Auda uses theory, approach, and system analysis to formulate and establish the epistemology of Islamic Law in global era. Without engaging and using relevant ideas and thoughts from another perspective, such as sociology, anthropology, psychology, communication, and science, research about fundamental theory of Islamic Law will be stagnant in limiting classic literature with its manuscripts. Moreover, Islamic Law will be outdated in establishing its basis of theory and practices in implementing the law on the field, especially society life in multicultural society in the global era. Therefore, the relevance and the importance of using multi-discipline approach, inter-discipline approach, and trans-discipline approach to respond to fundamental issues in early Islamic Law is fully observed by Jasser.

The next explanation is about six features of epistemology of Islamic Law by using philosophy of system approach. These features aim to survey and answer question of Maqasid Sharia actually plays its role and how it is used as Islamic law method in this era. From intellectual aspect, this effort is important. It means that its success and failure will actually influence on education and teaching. Moreover, it also will influence the process of keeping justice and

¹¹⁴M. Amin Abdullah, *Pengantar...*, 11-12

increasing society's prosperity. The formula of theory, method, and approach are always applied and used in Islamic education, Islamic preach, culture, and social-politic, research and science development in Muslim society wherever they are.¹¹⁵

a) Cognitive feature

This feature offers system of Islamic Law that breaks up apocalypse (wahyu) from its cognition. It means that fiqh is moved to cognition (rational comprehension) of human from Divine knowledge. The difference between Sharia and Fiqh affect the absent of opinion of fiqh's practice as claimed by Divine knowledge.¹¹⁶

b) Wholeness feature

This feature repairs the weakness of Classic *Ushul Fiqh* that often uses reductionist and atomistic approach. The atomistic approach is visible in relying on *nash* to finish the cases without viewing the relation of *nash*. The solution offered is applying holism principle to pass operationalization of thematic exegesis which is not limited by verses of law but it is determined by all verses in the Qur'an as consideration to determine Islamic Law.¹¹⁷

c) Openness feature

The function of this feature is to expand the range of *'urf* (custom). In the past, *'urf* is intended to accommodate which is different from Arabic habit (focused on place, time, and region) and recently *'urf* is focused on worldview and knowledge perception of *faqih* (*nadzariyyat al-ma'rifah* possessed by *faqih*)

¹¹⁵M. Amin Abdullah, "Hak Kebebasan Beragama dan Berkeyakinan: Pendekatan Filsafat Sistem dalam Usul Fikih Sosial", *Salam*, Vol. 14 No. 1 (Januari-Juni, 2011), 18-19

¹¹⁶M. Amin Abdullah, *Pengantar*,..., 12

¹¹⁷M. Amin Abdullah, *Pengantar*,..., 12

besides place, time, and region, in which the word view must be competent, created by scientific basis.

At least, in Islamic Law, there are two implication of this reformation; confronting literalism by popularizing and opening system of Islamic Law toward the advancement of natural sciences, social sciences, and cultural sciences. Moreover, Islamic Law also reaches self-renewal through its wholeness to other science which will contribute to making the competence of world view of the *faqih*, including *critical philosophy*.¹¹⁸

d) Interrelated Hierarchy Feature

This feature provides repairing two dimensions of Maqashid Sharia. The first is repairing the reach of Maqashid. If, in the past, traditional Maqashid is particular or specific which causes it limits its expansion. Now interrelated hierarchy feature classifies Maqashid based on the hierarchy including general maqashid learned from all parts of Islamic Law, specific maqashid observed from all contents of Islamic Law, and particular maqashid derived from *nash*.

The implication is that maqashid is derived from all aspects of Islamic Law, from the general to particular maqashid, so that it produces various knowledge of maqashid. Then, if traditional Maqashid is individual, interrelated hierarchy provides social dimension and social public on contemporary maqashid. The implication is that maqashid can reach society, nation, and even human.

¹¹⁸ M. Amin Abdullah, *Pengantar*,...,13

Then, public maqashid is prioritized when people confront is the dilemma with individual maqashid.¹¹⁹

e) Multidimensionality Feature

This feature is combined with maqashid approach which may offer solution for contradicting arguments. It can be learned by looking at the example below. An attribute, if it is seen by mono-dimension, like war and peace, order and prohibition, masculinity and femininity, and other, will affect contradicting arguments. Whereas, if a person wants to expand his view by importing one more dimension that is Maqasid contradicting arguments may not be contradicted at all when it is viewed and learned through different contexts. Thus, the contradicting argument can be reconciled with the new context, that is maqashid. The implication is shown by the flexibility of Islamic law in dealing with the complex contemporary problems even the arguments which have not been functioned, can be used again by the multidimensionality of these features, only if it can achieve the Maqasid.¹²⁰

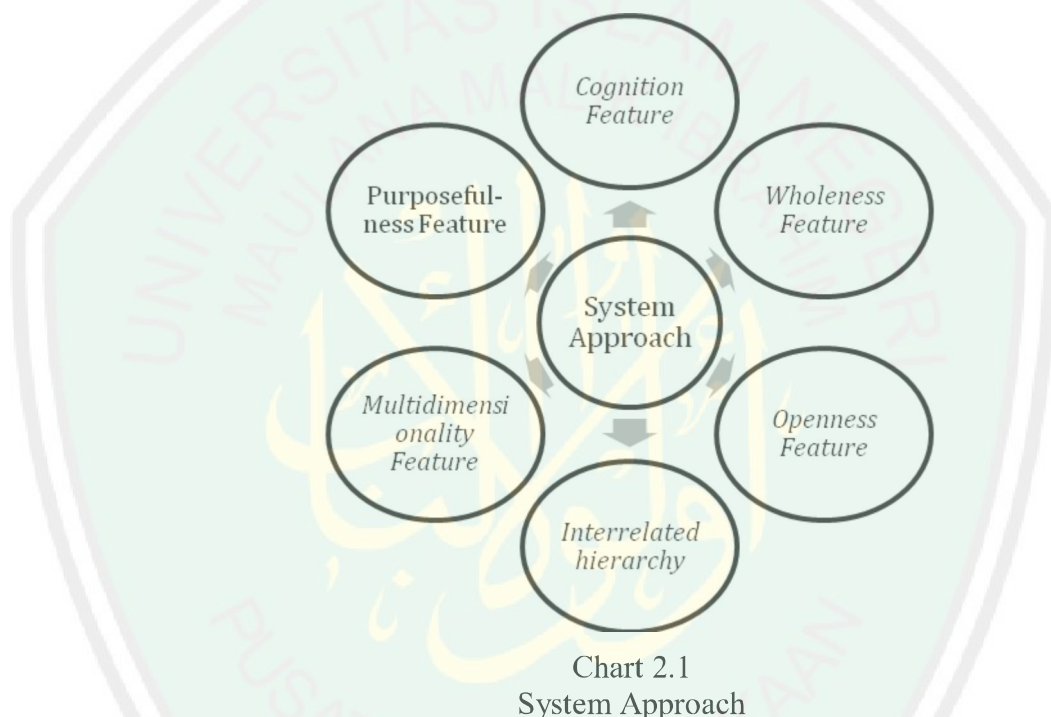
f) Purposefulness Feature

This feature is intended for the primary sources, al-Qur'an, and hadith. It also intended for rational sources, these are *Qiyas*, *Istihsan*, and others. The example of this case is al Qur'an which is viewed and learned by holistic approach, so that surahs and verses discussing Islamic faith, story of prophets, hereafter, universe, and all aspects become a whole sample that will take roles in making judicial law.

¹¹⁹M. Amin Abdullah, *Pengantar*,...,13

¹²⁰M. Amin Abdullah, *Pengantar*,...,13

The authenticity of hadith does not only refer to coherence of sanad and matan, but also it is added by systematic coherence. Therefore, systematic coherence may be the term for method offered by many modern reformers who said that authenticity of hadith needs to be based on how the hadiths is similar with the principle of Qur'an. Therefore, the systematic coherence must be added to the requirement of matan's authenticity of hadith.¹²¹



4. Contemporary Conception of Maqasid Sharia

Jasser Auda has classified several realizations of Maqasid for contemporary Islamic renewal among others:¹²²

1. Maqasid as a Project for 'Development' and 'Human Rights'

Jasser Auda explained that contemporary jurist/scholars developed traditional Maqasid terminology in today's language, despite some jurists'

¹²¹M. Amin Abdullah, *Pengantar*,..., 14

¹²²Jasser Auda, *Maqasid al-shariah*, 23

rejection of the idea of contemporarisations of Maqasid terminology.¹²³ In the hadith, the Prophet described the blood, money, and honor of every Muslim as a ‘sanctuary’ (*haram*) that is not to be breached. However, the expression of preservation of honor is gradually being replaced in the Islamic law literature with ‘preservation of human dignity’ and even the ‘protection of human rights’ as a purpose of the Islamic law in its own rights.¹²⁴

Jasser Auda suggested ‘human development’ to be a prime expression of *maslahah* (public interest) in this era, which *maqashid al-sharia* should aim to realize through the Islamic law.¹²⁵

2. Maqasid Sharia as the basis for new Ijtihad, these are:

a. To understand the difference between *Ta’arud* and *Tanaqudl*

In Islamic juridical theory, there is a differentiation between opposition and disagreement (*ta’arudl or ikhtilaf*) and contradiction (*tanaqudl or ta’anud*) of evidences (verses or narrations). Those two seemingly disagreeing (*muta’arid*) evidences are not necessary non-resolvable contradiction.

b. The constructive solutions to *Ta’arudl* are the following explanations:

- 1) A *Maqsid* that the Prophet did carry out the rituals in various ways, suggesting flexibility and tolerance in such matters.
- 2) Understanding both narrations in the context of considering customs based on the law’s ‘universality’
- 3) Understanding in terms of the prophetic ‘tradition’ of gradual application of high ideal in any given society and, especially, in the case of new

¹²³ Jasser Auda, *Maqasid al-shariah*, 23

¹²⁴ Jasser Auda, *Maqasid al-shariah*, 24

¹²⁵ Jasser Auda, *Maqasid al-shariah*, 26

Muslim who should slowly grow into their practice of Islam and its teachings.

4) Understanding the compatibility of *maslahah* and various conditions.

3. Maqasid Sharia for Differentiating between Means and Ends

According to Jasser Auda, the key for this understanding is, to differentiate between changeable means and fixed principles and ends. Means could ‘expire’, while ends and principles are non-changeable. Based on such multi-dimensional understanding, Qur’anic specifics could very well present an ‘ethical vision’ for today.¹²⁶

4. Purposeful Interpretations of Primary Sources

The ‘thematic exegesis school’ took steps towards a more purposeful/*maqashidi*, Quranic exegesis. The method of reading the Qur’anic text in term of themes, principles, and higher values, is based on a perception of the Qur’an as a ‘unified whole’. Based on this holistic approach-according to Jasser Auda-the small number of verses related to rulings, which are traditionally called the ‘verses of the rulings’ (*ayat ahkam*), will extend from a few hundred verses to the entire text of the Qur’an. Chapters and verses addressing faith, prophets’ stories, the hereafter, and nature will all comprise parts of a holistic picture, and thus, play a role in shaping Islamic juridical rulings.¹²⁷

A purpose-oriented approach to the narrations of hadith proceeds from a similar holistic perception of the Prophet’s life and sayings. This method also

¹²⁶ Jasser Auda, *Maqasid al-shariah*, 35

¹²⁷ Jasser Auda, *Maqasid al-shariah*, 35

attempts to draw a holistic picture of the prophetic traditional (Sunnah).¹²⁸ Thus the authenticity of individual narrations that are incoherent with obvious Islamic values and principles would be put into question. If jurists are not able to reconcile the (linguistic) implication of the two narrations is based on how much they agree with the principles of the Qur'an. Thus, 'systematic coherence' should be added to the conditions of authenticating the content (*matn*) of these narrations. Finally, a *maqashid*-based approach could fill a crucial gap in the narration of hadith, in general, which is the gap of missing context.¹²⁹

5. Interpretation of the Prophetic Intents,

Maqasid or the 'intents' of the Prophet, could also be utilised in contextualising narrations. Al-Qarafi differentiated between the Prophet's actions 'as a conveyer of the divine message, a judge, and leader,' and suggested that each of these intents has a different 'implication in the law.' Ibn Ashur added other types of 'prophetic intents', which is a significant expansion of al-Qarafi's work, and demonstrated the prophetic intents that he proposed via a number of hadith narrations. The following are some examples, according to Ibnu Ashur cited by Jasser Auda:¹³⁰

- a. The intent of legislation (Pembuat Undang-undang)
- b. The intent of issuing edicts/fatwa
- c. The intent of judgeship
- d. The intent of leadership

¹²⁸ Jasser Auda, *Maqasid al-shariah as Philosophy of Islamic Law: a Systems Approach*. (London: The International Institute of Islamic Thought, 2007), 232

¹²⁹ Jasser Auda, *Maqasid al-shariah*, 36

¹³⁰ Jasser Auda, *Maqasid al-shariah*, 36-40; See also in Jasser Auda, *Maqasid al-shariah as Philosophy of*, 233-236

- e. The intent of guidance (which is more general than that of legislation)
 - f. The intent of conciliation
 - g. The intent of giving advice
 - h. The intent of counseling
 - i. The intent of teaching high ideals
 - j. The intent of disciplining his Companions
 - k. The intent of non-instruction
6. 'Opening the Means' in Addition to 'Blocking the Means' (*fath al-dzara'i dan Sadd al-dzara'i*)

Blocking the means (*Sadd al-dzara'i*) in the Islamic law entails for bidding, or blocking, a lawful action because it could be means that lead to unlawful actions. Jurists from various schools of Islamic law agreed that in such case 'leading to unlawful actions' should be 'more probable than not', but they differed over how to systemise the comparison of probabilities. Jurists divided 'probability' of unlawful actions into four different levels, namely, certain, most probable, probable, and rare.¹³¹

Jasser Auda clarified that some Malikites proposed 'opening the means' (*fath al-dzara'i*) in additions to 'blocking' them (*Sadd al-dzara'i*). Al-Qarafi divided rulings into means (*al-wasail*) and ends/purposes (*maqashid*). He suggested that means that lead to prohibited ends should be blocked, and means that lead to lawful ends should be opened. Thus al-Qarafi linked the ranking of means to the ranking of their ends, and he suggested three levels for ends, namely,

¹³¹ Jasser Auda, *Maqasid al-shariah*, 40

‘most repugnant’ (*aqbah*), best (*afdal*), and ‘in between’ (*mutawassitah*). Ibn Farhun, also from Maliki *madhhab*, applied al-Qarafi’s ‘opening the means’ to a number of rulings.¹³²

Thus, Malikites does not restrict themselves to the negative side of ‘consequentialist’ thinking (assessment of an action based on the results), to borrow a term from moral philosophy. They expand this method of thinking to the positive side of it, which entails opening means to achieving good ends, even if these ends were not mentioned in specific scripts. And in order to give al-Qarafi’s Maqasid-based expansion of blocking the means more flexibility. ‘Neutral’ ends, then, would entail ‘lawful’ means.¹³³

7. Achieving the ‘Universality’ of Maqsid

Based on the purpose of ‘universality’ of the Islamic law Jasser Auda explained that Ibn Ashur suggested a method of interpreting narrations through understanding their underlying Arabic cultural context, rather than treating them as absolute and unqualified rules. Thus he read the narrations in terms of their higher moral purposes, rather than norms in their own right. This approach allows great flexibility in the law and accommodation of local cultures, especially in non-Arabic environments.¹³⁴

8. Maqasid as Common Grounds between *Madhhabs* of Islamic Law

Jasser Auda clarified that a Maqasid approach to fiqh is a holistic approach that does not restrict itself to one narration or view, but rather refers to general principles and common ground. Implementing the ‘higher’ purposes of unity and

¹³² Jasser Auda, *Maqasid al-shariah*, 42

¹³³ Jasser Auda, *Maqasid al-shariah*, 43

¹³⁴ Jasser Auda, *Maqasid al-shariah*, 45

reconciliation of Muslims has a higher priority over implementing fiqh details. Accordingly, Ayatullah Mahdi Shamsuddin prohibited aggression along Shia-Sunni lines based on ‘the higher and fundamental purposes of reconciliation, unity, and justice. A Maqasid approach takes the issues to a higher philosophical ground and, hence, overcomes differences over the political history of Muslims and encourages a much-needed culture of conciliation and peaceful co-existences.¹³⁵

9. Maqasid as Common Basis for Inter-Faith Dialogue

A holistic (*maqashidi*) view allows theologians to place specific religious teachings and commands within a general framework of their underlying principles and governing objectives, rather than focusing on a piece-by-piece understanding and, therefore, a literal application of these teachings and commands. Thus, moral values intended by various commands will not be different across the religious spectrum, despite the fact that they take different forms in their specific practical environments. Hence, the above purpose-based approach to theology could play a significant role in inter-faith dialogue and also in understanding. It reveals commonalities that are necessary for such as dialogue and understanding.¹³⁶ The following chart represents the classification of contemporary concept of Maqasid Sharia, offered by Jasser Auda.

¹³⁵ Jasser Auda, *Maqasid al-shariah*, 46

¹³⁶ Jasser Auda, *Maqasid al-shariah*, 48

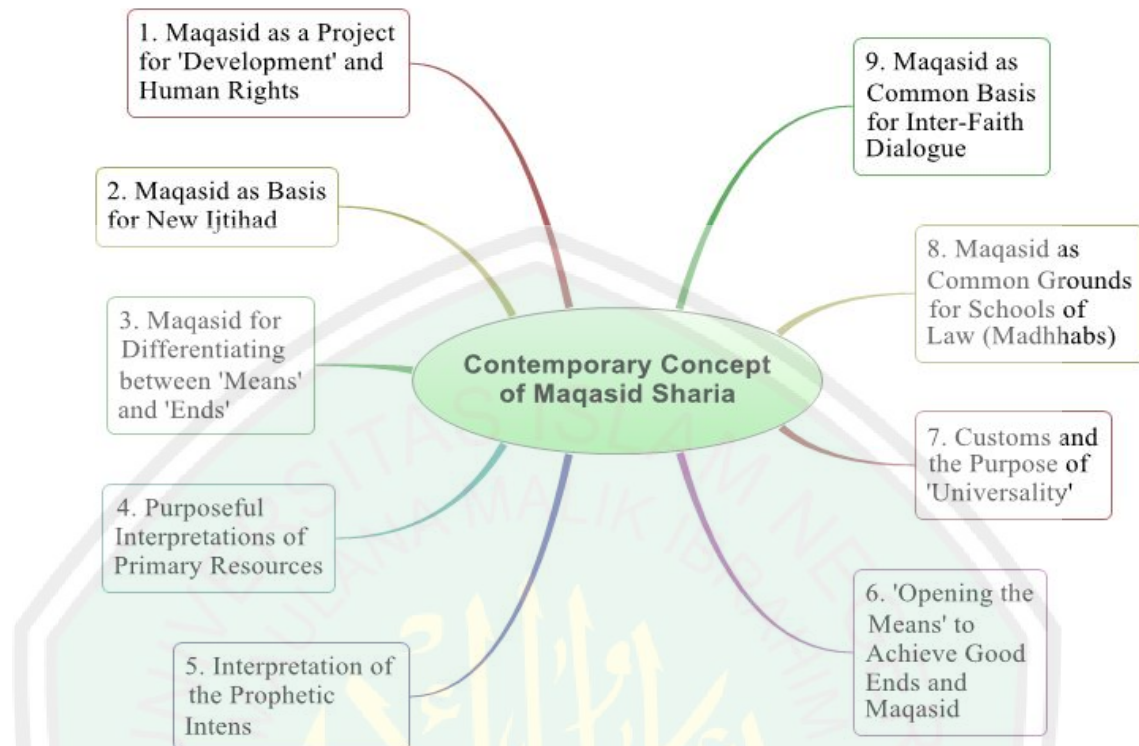


Chart 2.1
Contemporary Concept of Maqasid Sharia

Essentially, Jasser Auda's maqasid of Islamic Law is the main of all methodologies of *ijtihad ushul* of linguistic or rationality. Moreover, realization of maqashid as viewed by system, maintains openness, renewal, realism, and softness of Islamic Law system. Therefore, the validity of *ijtihad* or law must be determined by the realization of maqashid sharia that he does. Finally, the results of *ijtihad* and conclusion in reaching maqashid have to be valid. The conclusion indicates that the process of *ijtihad* effectively becomes a process of realizing maqashid of Islamic Law. On the other hand, the in-depth research conducted by Jasser Jasser Auda shows actualization of the principal of '*al-muhâfadhât 'alâ al-qadîm al-shâlih wa al-akhdz bi al-jadîd al-ashah*', which means conserving the

past knowledge by accommodating contemporary knowledge which is assumed as the effective-functional reformation of contemporary Islamic Law.¹³⁷

Then, for next chapter, *wali mujbir* on Syafi'i *madhhab* will be analyzed in four categories of Maqasid, namely: maqasid as a project for 'Development' and 'Human Rights', maqasid as the customs and the purpose of universality, maqasid as the interpretation of the prophetic intens, and maqasid for differentiating between 'means' and 'ends'.



¹³⁷M. Amin Abdullah, *Pengantar*,...,14-15

CHAPTER III

WALI MUJBIR ON SYAFI'I MADHHAB

IN THE PERSPECTIVE OF JASSER AUDA'S MAQASID SHARIA

A. Imam Syafi'i's Biography

1. His Name, Genealogy, and Academic History

Imam Syafi'i's full name is Muhammad bin Idris. In writing names, the Arabs write their title preceding their names (*its equivalent in English language is the word filial*), so it will be read: Abu Abdillah Muhammad bin Idris.¹³⁸ Syafi'i's family lineage (Father's Side): Muhammad bin Idris, bin Abbas, bin Uthman, bin Syafi', bin Saib, bin Ubaid, bin Abdu Yazid, bin Hasyim, bin Abdul Muthalib, bin Abdu Manaf, bin Qushai, bin Kilab, bin Murrah. Syafi'i's lineage connects to the Prophet Muhammad (blessings and peace be upon him)'s lineage from 'Abd Manaaf bin Qusayy. His lineage goes back to the tribe of Banu Hasyimbin Muttalib from the tribe of Quraish in Mecca which is from the descendant of

¹³⁸Siradjuddin Abbas, *Sejarah dan Keagungan Madzhab Syafi'i*, 6th ed, (Jakarta: Pustaka Tarbiyah, 1996), 13

Ismael, son of Ibrahim (peace be upon them). His family lineage (mother's side): Fatimah binti Abdullah, bin Hasan, bin Husein, bin Ali bin Abi Thalib.¹³⁹

Imam Syafi'i was born in Gaza (Asqalaan), South of Palestine in the year of 150 A.H., the year the Great Imam in Baghdad Abu Hanifah Nu'man bin Tsabit and Imam Ibn Jureij Al-Makki (Mufti in Hejaz) had passed away in.¹⁴⁰

Imam Syafi'i got married in Yemen with Hamidah binti Nafi'¹⁴¹ bin Unaisah bin Amru bin Uthman bin Affan.¹⁴² The age when he married was about 30 years old. From this marriage, he had three children, a boy, and two daughters.¹⁴³ His first child's name is Abu Usman Muhammad bin Syafi'i (was a judge in Medina, grew up in Syria), second child's name is Fatimah and third child's name is Zainab.¹⁴⁴

Imam Syafi'i's father died when he was very young. Imam Syafi'i and his mother migrated to Makah, the place he grew up when he was about two years old. He lived in Makah into the age of twenty. It was in 170 A.H. Shafi's mother was an ingenious and smart woman. She and Umm al-Basyar al Marisi was the strong supporter of the Mukhtazilah sect. Besides, Syafi'i's mother was also as a legal expert who criticized judges' decisions. His mother, who has good educational background, contributed to Imam Syafi'i's personality. Syafi'i succeeded in studying and memorizing the Qur'an at the age of seven, for the guidance of the *muqri'* Makkah, Ismail bin Qusthantein. He also memorized the

¹³⁹Husain Abdul Hamid Nil, *Mukhtashor Kitab Al-Umm Fil-Fiqhi Lil Imam Al-Syafi'i*, (Beirut: Dar al Arqam bin Abi al Arqam, tt), 7

¹⁴⁰Sirajuddin Abbas, *Sejarah dan Keagungan*,...,13

¹⁴¹Sirajuddin Abbas, *Sejarah dan Keagungan*,...,26

¹⁴²Husain Abdul Hamid Nil, *Mukhtashor*,...,8

¹⁴³Sirajuddin Abbas, *Sejarah dan Keagungan*,...,26

¹⁴⁴Husain Abdul Hamid Nil, *Mukhtashor*,...,11

great work of Imam Malik, al-Muwattha' at the age of ten years old. In addition, he was deemed capable of giving legal opinions (issuing edicts/ fatwas) when he was fifteen years old.¹⁴⁵

Initially, Imam Syafi'i was interested in prose and poetries, poems, and Arabic classical rhymes, so he came to Bedouins Tribe in the desert, Hudzel Tribe, and others. Sometimes he stayed long in the tribes for learning Arabic literature and fluently memorizing the Arabic poems (*sya'ir*) from Imrun al-Qais, Sya'ir Zuheir, Sya'ir Jarir, and others. This turn out to be able to help him for understanding the Qur'an that is revealed in the Arabic originally, eloquently, and purely¹⁴⁶

a. Imam al-Syafi'i's Teachers

Imam Syafi'i studied tafsir, fiqh, and hadith to many teachers, where the land between each other was away.

In Makkah:

1. Muslim bin Khalid al-Zanji
2. Ismail bin Qusthantein
3. Shofyan bin 'Uyainah
4. Sa'ad bin Abi Salim al Qaddah
5. Daud bin Abdurrahman al 'Athar
6. Abdul Hamid bin Abdul Aziz

¹⁴⁵Zaenul Mahmudi, *Sosiologi Fikih Perempuan: Formulasi Dialektis Fikih Perempuan dengan Kondisi Sosial dalam Pandangan Imam Syafi'i*, (1st ed.; Malang: UIN-Malang Press, 2009), 19-20

¹⁴⁶Siradjuddin Abbas, *Sejarah dan Keagungan Madzhab Syafi'i*, 6th ed, (Jakarta: Pustaka Tarbiyah, 1996), 16

In Madinah:

7. Imam Malik bin Anas. (The founder of Maliki *madhhab*)
8. Ibrahim Ibn Sa'ad al Anshari
9. Abdul 'Aziz bin Muhammad ad Darurdi
10. Ibrahim Ibn Abi Yahya al Asâmi
11. Muhammad bin Sa'id
12. Abdullah bin Nafi'

In Yaman:

13. Mathraf bin Mazin
14. Hisyam bin Abi Yusuf Qadli Shan'a
15. Umar bin Abi Salamah. (The founder of Auza'i *madhhab*)
16. Yahya bin Hasan (The founder of Leits *madhhab*)

In Iraq:

17. Waki' bin Jarrah
18. Humad bin Usamah
19. Isma'il bin Ulyah
20. Abdul Wahab bin Abdul Majid
21. Muhammad bin Hasan
22. Qadhi bin Yusuf

Those are the names of Imam Syafi'i's teachers. From these names, it is discovered that Imam Syafi'i has studied various studies of Maliki Fiqh from the real founder, Imam Malik. He also studied the fiqh of Hanafi from Qadhi ibn Yusuf and Muhammad ibn Hasan, who are the disciples of Imam Hanafi in Kufa.

Imam Syafi'i also studied the fiqh of Auza'i in Yemen from the developer, Umar bin Abi Salamah and studied the fiqh of Al-Leits in Yemen from the developer, Yahya bin Hasan. Thus, Syafi'i has understood various fiqh from the expert of Mecca, Medina, Yemen, and Iraq.

Imam Syafi'i had a lot of attention to Tafsir Ibn Abbas, that advanced when Imam Syafi'i in Mecca. Besides, he also went to Egypt and Turkey (Anadhuli), and lived in Harmalah Palestine. Where he was on the way he always contacted the scholars while exchanging the thought between each other. His journey was always scientifically.¹⁴⁷

b. Imam al-Syafi'i's disciples

❖ In Baghdad

There are many disciples of Imam Syafi'i in Baghdad, but the ones who become the famous and main mouthpiece of him, are:

1. Abu Ali al-Hasan as Shabah as Za'faran, (death in 260 H)
2. Husein bin Ali al Karabisi, (d. 240 H)
3. Imam Ahmad bin Hanbal, (d. 240 H)
4. Abu Tsur al-Kalabi. (d. 240 H)
5. Ishak bin Rahuyah, (d. 277 H)
6. Ar-Rabi' bin Sulaiman al Muradi, (d. 270 H)
7. Abdullah bin Zuber al Humaidi, (d. 219 H)
8. and others.

¹⁴⁷Siradjuddin Abbas, *Sejarah dan Keagungan*,...,118-119

Students numbers 6 and 7 above followed Syafi'i to Egypt, so they are also included in the list of Syafi'i's disciples in Egypt.

❖ In Egypt.

When Imam Syafi'i developed his *madhhab* in Egypt, he had hundreds of disciples and perhaps even thousands because his halaqah is visited by Muslims from all directions. Moreover, his disciples who heard and wrote down the teachings of Imam Syafi'i and help in compiling the book are not a lot, they are:

1. Ar-Rabi'i bin Suleiman al Muradi, who came together with Imam Syafi'i from Baghdad. (d. 270 H).
2. Abdullah bin Zuber al Humaidi, who also came together from Baghdad. (d. 219 H).
3. Al Buwaithi his complete name is Abu Ya'kub Yusuf Ibn Yahya al Buwaithi. (d. 232 H).
4. Al Muzany, his complete name is Abu Ibrahim Isma'il bin Yahya al Muzany. (d. 264 H).
5. Al Rabi'i bin Suleiman al Jizi. (Take note! this is not ar Rabi'i bin Suleiman al Muradi). (d. 256 H).
6. Harmalah bin Yahya at Tujibi. (d. 243 H)
7. Yunus bin Abdil A'ala. (d. 264 H).
8. Muhammad bin Abdullah bin Abdul Hakam. (d. 268 H)
9. Abdurrahman bin Abdullah bin Abdul Hakam. (d. 268 H)
10. Abu Bakar al Humaidi. (d. 129 H).
11. Abdul Aziz bin Umar (d. 234 H)

12. Abu Utsman, Muhammad bin Syafi'i (Imam Syafi'i's child) (d. 232 H)
13. Abu Hanifah al Aswani an Egyptian from Qibth (d. 271 H)
14. and others.

By the intercession of the disciples, Imam Syafi'i's lessons was widespread in the outposts of the Islamic or the non-Islamic world. After the death of Imam Syafi'i, Imam al Buwaithi replaced the taught in his *halaqah* (the place for teaching) for about 27 years. Then, Imam al Muzani replaced al Buwaithi until he died at 264 H, it is 60 years after the death of Imam Syafi'i. The disciple of Imam Syafi'i, ar Rabi'i bin Suleiman al Muradi, was the man who wrote the book of ar-Risalah al Jadidah and al-Umm. Imam Harmalah was a disciple who wrote many of the teachings of Imam Syafi'i.¹⁴⁸

2. Knowing the *Hujjah* of Syafi'i *Madhhab*

All of the scholars of jurisprudence in Islam agree that the Qur'an and Sunnah are the evidences for taking *istinbath* or legal conclusion. Then, the *ijma'* and *qiyas* (analogy) are used also by the four of the famous *madhhabs*. For all of the *madhhabs*, not only *fuqaha'* but also *mufasssir* and *muhaddits* contributed for developing the *madhhab*. In fact, the *mufasssir* and *muhaddits* are adherents of the *madhhab* (*Ahl al-Hadith*, *Ahl al-Madhhab*). Thus, the -evidences- both the Qur'an and the Sunnah have been the study of Islamic scholars for a long time and it is continual. However, they are the ones who have authority in their field, so the *madhhab* was built upon their arguments. Finally, each *madhhab* has the products

¹⁴⁸Siradjuddin Abbas, *Sejarah dan Keagungan,...*, 140-141

in form of books showing the evidences of the Qur'an and as-Sunnah which became the foundation of the *madhhab*.

1) Al-Umm is the Hadith Book.

Since the beginning from the imam of the *madhhab*, the book of fiqh was written including the evidences. Al-Umm, the work of Imam Syafi'i is the result of *ijtihad* that the evidences- both Quran and Hadith- are included by him. Hadith and *atsars* are the direct narrations of Imam Syafi'i that continued into the Companions and the Messenger of Allah. Therefore, Syeikh Muhammad bin Jakfar al-Kattani classified it in the category of hadith book in ar-Risalah al-Mushtatharrifah.

2) Ma'rifah as-Sunan wa al-Atsar

Imam al-Baihaqi compiled the *Hujjahs* of Sunnah of Syafi'i *madhhab*, the great work entitled Ma'rifah as-Sunan wa al-Atsar, which was printed in 15 volumes. Imam as-Subki explained the meaning of the title of the book that is Ma'rifah Syafi'i bi as-Sunan wa al-Atsar (the knowledge of Syafi'i against *Sunnahs* and *Atsars*).

3. Knowing the *Takhrij* of Dalil of Syafi'i *Madhhab*

In Syafi'i *madhhab*, there are many fiqh books that are not only the evidences but also the *takhrij* of the Sunnah are included. In these books, the authors explained the position of the origin of hadith and its status included the answer to the criticism of the other *madhhab* against hadiths that are used as the bases of the *madhhab*. The books of *takhrij* of Syafi'i *madhhab* are mentioned below:

1) Takhrij Syarh al-Kabir

Badr al-Munir is the book of *takhrij* (extraction) of hadith of Syarh al-Kabir by Imam ar-Rafi'i that is compiled by al-Hafidz Ibn al-Mulaqqin and printed in 10 volumes, then it is summarized into Khulashah Badr al-Munir. Later, it summarized as Muntaqa Khulashah Badr al-Munir which is also written by Ibn al-Mulaqqin.

The disciple, al-Hafidz Ibnu Hajar al-Asqalani, also extracted the hadith of Syarh al-Kabir, namely Talhis al-Habir. Imam as-Suyuthi also extracted it and cited it, which is entitled Nasyr al-Abir. In these books, the authors explained the status of hadiths and the criticism of other *madhhabs* against the hadith that is used as the bases of the Syafi'i *madhhab*.

In addition of the three names above, some scholars of Syafi'iyah who also compiled the extraction of the hadiths of Syarh al-Kabir are Qadhi al-Qudhat Abu Umar bin Abdil Aziz al-Hamawi Syafi'i, Badruddin Ibn Jam'ah al-Kinani Syafi'i, and Badruddin az-Zarkasyi.

2) Takhrij al-Wasith

Al-Hafidz Ibn al-Mulaqqin also compiled the extraction of hadiths of al-Wasith by Imam al-Ghazali entitled Tadzkirah al-Ahyar.

4. The Methodology of Syafi'i *Madhhab* in *Istidlal*

The followers of Syafi'i (Syafi'is) place the Qur'an and Sunnah at the same level, i.e hadith is as valid as the verses in the Qur'an, and if they contradict, the more 'specific' and 'qualified' expression restricts the more 'general' and 'unqualified' expression. Consensus (of the Companions) is applied in the Syafi'i

methodology, on condition that it does not contradict to the implication of the Qur'an or hadith. If the Companions do not have consensus over a certain issue, the opinion of one of them is applied.¹⁴⁹ According to one narration, Syafi'i applied more the Companions' opinion in his *Qaul Qadim* than *Qaul Jadid*. However, according to Rabi' Ibn Sulaiman, Imam Syafi'i also applied it in his *Qaul Jadid*. The Companions' opinions are divided into three:

- (1) the companion's opinion, which is agreed by every member of the consensus. According to him it is the certain matter of *hujjah*;
- (2) the individual of companion opinion, which is ignored by each other is called *ijma' sukuti* (silent consensus). For this consensus, Syafi'i still held it on as long as there is no the evidence in the Nash and the announced consensus of companions; and
- (3) The companion's opinion that is disputed by *ulamas*. For this evidence, Syafi'i preferred the closer evidence to the Nash and the consensus of companion (*ijma'*). However, Qiyas, according to Imam Syafi'i, is the most prioritized of rational evidence as opined by Abu Hanifah. If none of the Companions opinion above is available, he applied the opinion of Abu Bakar, Umar, and Ali.¹⁵⁰

¹⁴⁹Jasser Auda, *Membumikan Hukum Islam Melalui Maqasid Sharia*, trans. Rosidin and 'Alî 'Abd el-Mun'im, 1st ed, (Bandung: PT Mizan Pustaka.2015), 180. See more in Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law: a Systems Approach*, (London: The International Institute of Islamic Thought, 2007), 134

See also in Amir Syarifuddin, *Ushul Fiqh*, Vol. II, 6th ed, (Jakarta: Kencana, 2011), 306.

¹⁵⁰Abdul Mughits, *Kritik Nalar Fiqh Pesantren*, 1st ed, (Jakarta: Kencana Prenada Media Group, 2008), 81

Then, if none of the above is available, Syafi'i should apply the analogy (*Qiyas*) in his methodology.¹⁵¹ Finally, Imam Syafi'i applied the Presumption of Continuity (*Istishab*) as a last resort. Presumption of Continuity is a reasoning principle, rather than an evidence or a source of legislation in its own right. It entails the continuation of current status (permissibility, innocence, and so on) until some event entails otherwise. Presumption of Continuity is evidence that is approved by all various *madhhabs* of law. According to Jasser Auda, the jurists defined presumption or *istishab* in various ways. The following are four examples of these definitions:¹⁵²

- a. The presumption of permissibility until proven forbidden;
- b. The presumption of innocence until proven guilty;
- c. The presumption of attributes until proven otherwise;
- d. The presumption of duty until proven fulfilled.

Syafi'i did not use *istihsan* as *hujjah*. According to him that "whoever used *istihsan*, is similar as making the Sharia", while the authority of *tasyri'* is only at "the hand" of Divine. In detail, he mentioned the reason for rejecting the *istihsan*:

- (1) Applying *istihsan* is similarly assumed that Sharia is not covering all the legal issues, while Sharia is applied in all period and contexts;
- (2) The obedience is only for Allah and His Messenger, so that all of the laws should be based on Their decrees;

¹⁵¹Jasser Auda, *Membumikan*, 180; See also in Amir Syarifuddin, *Ushul Fiqh*, Vol. II, 6th ed , (Jakarta: Kencana, 2011), 306.

¹⁵²Jasser Auda, *Maqasid as Philosophy*, 132

- (3) The Prophet never explained his laws with the *istihsan* but he explained it with the revelation and *Qiyas*;
- (4) The Prophet ever denied the decision of a Companion who used the *istihsan*;
- (5) *Istihsan* is a legal theory with no standard and measure so it will lead to disputes; and
- (6) If *istihsan* is allowed, the intelligent person will apply it for *istinbath* in all of the laws without involving the experts of science.¹⁵³

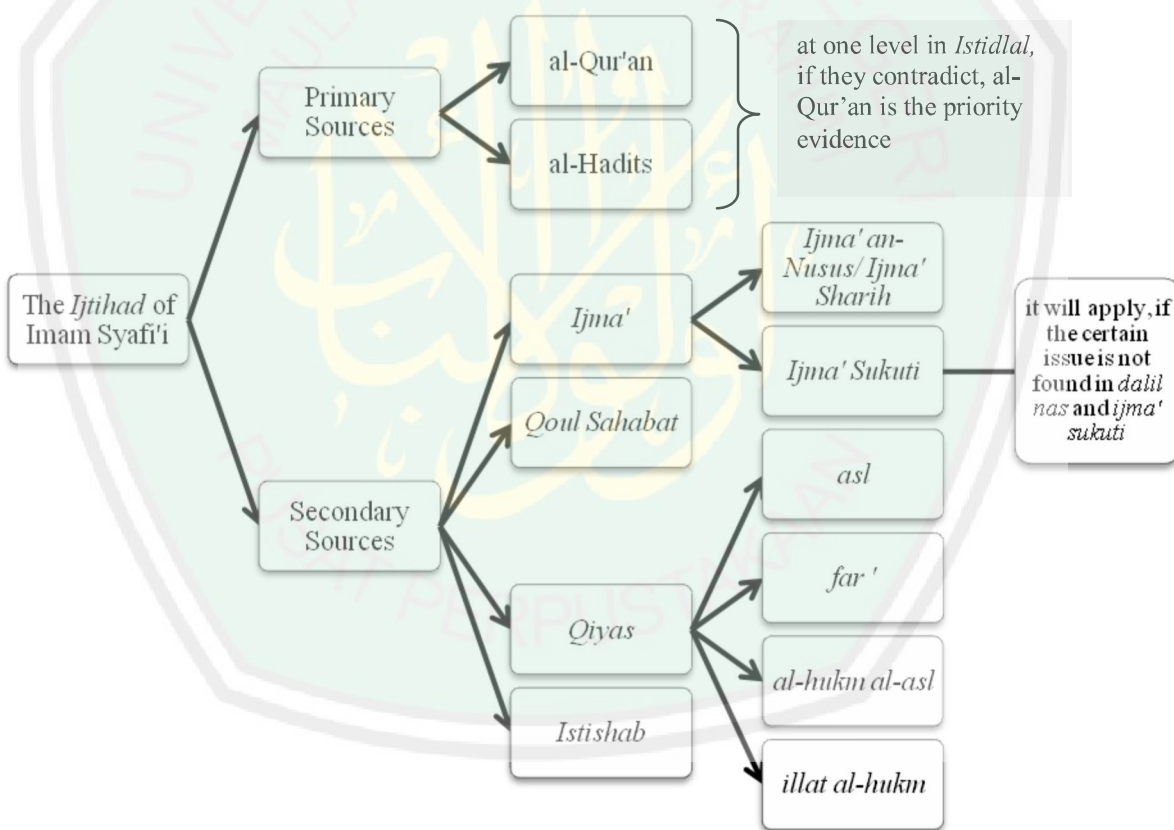


Chart 3.1
The *Ijtihad* of Imam Syafi'i

¹⁵³ Abdul Mughits, *Kritik ...*, 81

The chart above shows the existence of *Istidlal* method of Islamic law codified by Imam Syafi'i. From this method, the religious elite of the experts of fiqh was emerged and the disciples of Imam Syafi'i are spread all over the world, especially in Asia. All of them are called as the followers of Imam Syafi'i/Syafi'ites.

B. Wali Mujbir on Syafi'i Madhhab

Before discussing *wali mujbir*, we should know that in Syafi'i *madhhab*, wali is one of marriage pillars that must be fulfilled. It is based on the source:

وَإِذَا طَلَّقْتُمُ النِّسَاءَ فَبَلَغْنَ أَجَلَهُنَّ فَلَا تَعْضُلُوهُنَّ أَنْ يَنْكِحْنَ أَزْوَاجَهُنَّ...¹⁵⁴

“And when you have divorced women and they have fulfilled the term of their prescribed period, do not prevent them from marrying their (former) husband”¹⁵⁵

The next source taken by Imam Syafi'i is the words of Allah in Surah an-Nisa'

الرِّجَالُ قَوَّامُونَ عَلَى النِّسَاءِ...¹⁵⁶

“Men are the protectors and maintainers of women”¹⁵⁷

...فَأَنْكِحُوهُنَّ بِإِذْنِ أَهْلِهِنَّ...¹⁵⁸

“Wed them with the permission of their own folk (guardian, Auliya', or masters)”¹⁵⁹

¹⁵⁴Q.S al-Baqarah (2): 232

¹⁵⁵ Muhammad Taqi-ud-Dîn Al-Hilâlî and Muhammad Muhsin Khân, *Translation of the meanings of The Noble Qur'an in the English Language*, (Madinah: King Fahd Complex, 1404 H), 51

¹⁵⁶Q.S an-Nisa' (4): 34

¹⁵⁷ Muhammad Taqi-ud-Dîn, *Translation of...*, 113

¹⁵⁸Q.S an-Nisa' (4): 25

¹⁵⁹ Muhammad Taqi-ud-Dîn, *Translation of...*, 111

In the *al-Umm*, Syafi'i explained that some scholars who understand the Quran argue that Ma'qil bin Yasar married off his sister to his uncle's son, then his uncle's son divorced her. Then his uncle's son was about to remarry her again after his *iddah*. However, Ma'qil refused it by saying, "I have married you off and placed you above others, but you did divorce her. I will not marry you off again with her forever." Then, came the verse *وَإِذَا طَلَّقْتُمُ النِّسَاءَ فَبَلَغْنَ أَجَلَهُنَّ*, "And when you have divorced women and they have fulfilled the term of their prescribed period" that is the end of their *iddah*, *فَلَا تَعْضُلُوهُنَّ*, "do not prevent them," means the wali cannot prevent them, *أَنْ يَنْكِحْنَ أَزْوَاجَهُنَّ* "from remarrying their (former) husbands," i.e they had previously divorced their wives but did not do the *talak ba'in*.¹⁶⁰

According to Imam Syafi'i, the meaning of the verse expressed by the expert of the Quran is the closest of the truth because this verse does not contain the possibility of other meaning. In this case, the *wali* is told not to prevent women who want to marry because the marriage will be perfect with the *wali*'s presence. If a husband has divorced his wife and his *iddah* is over, then the *wali* should not prevent him if he wishes to remarry her. It is clearly mentioned in the Quran that *wali* and the woman have the rights of marriage, but wali should not prevent her when she acquiesces in the marriage by the good way (*ma'ruf*).¹⁶¹

¹⁶⁰Muhammad bin Idris al-Syafi'i, *al-Umm*, trans. Misbah, Vol. IX (Jakarta: Pustaka Azzam), 66

¹⁶¹al-Syafi'i, *al-Umm*, trans. Misbah, 67

In addition, Imam Syafi'i also took the evidence from Sunnah as mentioned below:

أَخْبَرَنَا مُسْلِمٌ وَسَعِيدٌ وَعَبْدُ الْمَجِيدِ عَنْ ابْنِ جُرَيْجٍ عَنْ سُلَيْمَانَ بْنِ مُوسَى عَنْ ابْنِ شَهَابٍ عَنْ عُرْوَةَ بْنِ الزُّبَيْرِ عَنْ عَائِشَةَ - رَضِيَ اللَّهُ تَعَالَى عَنْهَا - أَنَّ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - قَالَ: أَيْمًا امْرَأَةً نَكَحَتْ بِغَيْرِ إِذْنٍ وَلِيِّهَا فَنِكَاحُهَا بَاطِلٌ فَنِكَاحُهَا بَاطِلٌ فَنِكَاحُهَا بَاطِلٌ فَإِنْ أَصَابَهَا فَلَهَا الصَّدَاقُ بِمَا اسْتَحْلَلَتْ مِنْ فَرْجِهَا.¹⁶²

Muslim, Sa'id and Abdul Majid told us, from Ibn Juraij, from Sulaiman bin Musa, from Ibn Shihab, from Urwah bin az-Zubair, it was narrated from 'Aisyah r.a, that the Messenger of Allah Saw said: "Any woman who marries without the permission of her wali – then her marriage is void," (he repeated it) three times, and he added: "So if he consummated the marriage with her, she is entitled to the dowry because of what he has attained from her."¹⁶³

The importance of wali as a requirement of marriage is debated by different schools of thought (*madhhabs*). The majority of scholars, who argued that wali is a requirement of marriage, said: "The women should not get married by themselves." Their reason based on the hadith narrated by Aisha. The strongest reason used by them is *sababun-nuzul* Surah al-Baqarah in verse 232 (the verse i.e: then do not prevent them) and this verse is very clear that the presence of wali is the obligation in marriage. If the woman can get married by herself, she does not need her brother.¹⁶⁴

¹⁶²Muhammad bin Idris al-Syafi'i, *al-Umm*, Juz VI, 1st ed, (Mansoura: Dâr al-Wafâ, 2001), 33: Abu Dawud, *Sunan Abu Dawud*, Bab fi al waliy (2083) juz. II, (Beirut:al-Maktabah al-'Ashriyah, t.t.), 229

¹⁶³al-Syafi'i, *al-Umm*, Ind. trans. by Misbah, 68

¹⁶⁴Abdul Halim Abu Syuqqah, *Tahrir al-Mar'ah fi 'Ashri ar-Risalah*, trans. As'ad Yasin, *Kebebasan Wanita*, Vol. 5, 2nd ed, (Jakarta: Gema Insani Press, 1999), 110

Al-Imrani said in al-Bayan, quoted by Imam al-Muthi'i that the hadith narrated by Aisha is the evidence that denies whoever disqualifies the opinion of Syafi'ites.¹⁶⁵

أَخْبَرَنَا ابْنُ عُيَيْنَةَ عَمْرُو بْنُ دِينَارٍ عَنْ عَبْدِ الرَّحْمَنِ بْنِ مَعْبُدِ بْنِ عُمَيْرٍ أَنَّ عُمَرَ -
رَضِيَ اللَّهُ عَنْهُ - رَدَّ نِكَاحَ امْرَأَةٍ نَكَحَتْ بِغَيْرِ وِلِيِّ¹⁶⁶

Ibn Uyainah and Amr bin Dinar told us, narrated from Abdurrahman bin Ma'bad bin Umair, that Umar declared the marriage of woman without the wali is invalid.

The *atsar* explained, the woman should not get married by herself. She should get married with the presence of *wali*. A narration from Imam Malik, if the woman was not from the Syarifah (the respectable woman), she might need to get married by herself.¹⁶⁷ Imam Syafi'i also explained in *atsar*, a woman who was get married by herself is a slut. Therefore, with the presence of *wali*, the bad assumption of the society against a woman who will get married will not happen.¹⁶⁸ Here is the explanation of *atsar* from Imam Syafi'i:

أَخْبَرَنَا ابْنُ عُيَيْنَةَ عَنْ هِشَامِ بْنِ حَسَّانَ عَنْ ابْنِ سِيرِينَ عَنْ أَبِي هُرَيْرَةَ قَالَ لَا تُنْكَحُ
الْمَرْأَةُ الْمَرْأَةَ فَإِنَّ الْبَغِيَّ إِذَا تُنْكَحَ نَفْسَهَا.¹⁶⁹

Ibn Uyainah told us, it was narrated from Hisyam bin Hasan, from Muhammad bin Sirrin, narrated from Abu Hurairah that the Messenger of Allah (Saw.) said: No woman should arrange the marriage of another woman. The adulteress is the one who arranges her own marriage."

¹⁶⁵ Al-Imâm Al-Nawawiy, *al-Majmû' Sharh al-Muhadzdzab*, Vol. XVII, (Jeddah: Maktabah al-Irsyad, tt), 245.

¹⁶⁶ al-Syafi'i, *al-Umm*, Juz VI, 34

¹⁶⁷ Abdul Halim trans. As'ad Yasin, *Kebebasan Wanita*, 111

¹⁶⁸ al-Syafi'i, *al-Umm*, Juz VI, 51

¹⁶⁹ al-Syafi'i, *al-Umm*, Juz VI, 34

Imam Abu Hanifah argued that wali was not required in marriage. The woman may get married by herself even without the consent of wali if she will get married with the equal man (*kafa'ah*). Imam Abu Hanifah analogized the marriage with buying and selling, that the woman is free in doing a transaction of buying and selling. He interpreted the *hadith* of the requirement of wali is only for a little girl. This analogy is general and allowed in *ushul fiqh*, i.e applying the analogy from the general matter to the specific matter. However, the *hadith* about Ma'qil rejected this analogy. A reason for requiring *wali* in marriage is to defend woman against disability in choosing an equal groom (*kafaah*). In the other hand, some scholars of Auza'i *madhhab* did not apply the *hadith* of requiring *wali* in marriage. They did not prohibit the woman for getting married by herself. In this case, they argue that the legal of *wali* is allowed (*jaiz*), as they said about buying and selling. Abu Tsaur also argued that, but he said, "The consent of *wali* is required, if the woman will get married by herself."¹⁷⁰ Imam Syafi'i required the presence of *wali* in marriage based on this *atsar*:

أَخْبَرَنَا مُسْلِمٌ وَعَبْدُ الْمُجِيدِ عَنِ ابْنِ جُرَيْجٍ قَالَ قَالَ عَمْرُو بْنُ دِينَارٍ نَكَحَتْ امْرَأَةً
 مِنْ بَنِي بَكْرِ بْنِ كِنَانَةَ يُقَالُ لَهَا بِنْتُ أَبِي ثُمَامَةَ عُمَرُ بْنُ عَبْدِ اللَّهِ بْنِ مُضَرِّسٍ فَكَتَبَ
 عَلْقَمَةُ بْنُ عَلْقَمَةَ الْعُنُورِيُّ إِلَى عُمَرَ بْنِ عَبْدِ الْعَزِيزِ وَهُوَ بِالْمَدِينَةِ إِنِّي وَلِيُّهَا وَإِنَّهَا
 نَكَحَتْ بِعَيْرِ أَمْرِي فَرَدَّهُ عُمَرُ وَقَدْ أَصَابَهَا¹⁷¹

Muslim bin Abdul Majid told us, from Ibn Juraij, he said: Amr bin Dinar said, "a woman from Bani Bakar bin Kinanah named Bintu Abi Tsumamah married with Umar bin Abdullah bin Mudharris.

¹⁷⁰Abdul Halim trans. As'ad Yasin, *Kebebasan Wanita*, 111

¹⁷¹al-Syafi'i, *al-Umm*, Juz VI, 35

Then, Alqamah bin Alqamah al-Utwari wrote a letter to Umar bin Abdul Aziz, who was in Medina, 'Truly I am as the wali and she married without my permission', so Umar had canceled the marriage whereas the husband has been consummated the marriage with her.

Thus, according to Imam Syafi', if the woman will get married without the consent of *wali*, the marriage will be invalid. If the husband has been consummated the marriage with her, she deserves the dowry of *mitsl*, as determined by the Prophet.¹⁷² If the father's permission over his daughter is disputed as obligation and recommendation, then the daughter needs to consult her parent as her devotion.¹⁷³

The obligation or recommendation of the consent of *wali* increases the protection both of the youth -the young man and the young woman- when they will form the new little family. This protection does not ignore the will of the young man and woman to decide their choice, but it means just giving the guidance and the consideration. In Fathul Bari', quoted by Abdul Halim, Imam Syafi'i said, "The true meaning of requiring the wali in marriage is the woman does not entrust herself to the unsuitable person."¹⁷⁴ There are five pillars of marriage in Syafi'i *madhhab*, namely:¹⁷⁵

- a. Mutual agreement (*sighot*), i.e offer and acceptance. The offer must be from the bride's side (*wali*) and the acceptance from the groom.
- b. The bride
- c. The groom

¹⁷²al-Syafi'i, *al-Umm*, trans. Misbah, 73

¹⁷³Abdul Halim trans. As'ad Yasin, *Kebebasan Wanita*, 111

¹⁷⁴Abdul Halim trans. As'ad Yasin, *Kebebasan Wanita*, 111

¹⁷⁵Musthofa Al-Khin, Musthofa Bugho, and Ali Asy-Syurbaji, *al Fiqh al Manhajy 'ala Madzhab al-Imam al-Syafi'i*, Vol. IV, 3rd ed, (Damaskus: Dar al-Qalam, 1992), 55

- d. The *wali*
- e. Two witnesses, the presence of at least two male witnesses (*shahidain*), or one male and two female witnesses who hear and clearly understand the offer and acceptance

Then, in determining *wali*, the Syafi'ites scholars provided very strict requirements:

1. Islam, non-Muslim can be the *wali* for non-Muslims only.
2. *Wali* should have good character ('*Adalah*- includes piety, attitude, conduct, etc) as opposed to being corrupt such as urinating on the street, and others.¹⁷⁶ He is not also a sinner (*fasiq*) either *wali mujbir* or not.¹⁷⁷
3. He should be an adult (*baligh*), children should not be *wali*.
4. The *wali* is an intelligent person, the crazy person should not be one.¹⁷⁸
5. He should be free.
6. He should be male¹⁷⁹
7. He should have a healthy mind. A person whose mind is not in a good condition caused by his old age or his feeling of dizzy cannot act as *wali* since it will not give any positive elements for the marriage such as incompetency in choosing the equality of the groom (*kufu'*).
8. He is not categorized as *mahjur 'alaih* (a person who is in the ability of the other person).
9. He should not do pilgrimage ritual¹⁸⁰

¹⁷⁶Musthofa Al-Khin, *al Fiqh al Manhajy*, 64

¹⁷⁷Syamsuddin Muhammad al-Syarbany, *al-Iqna' fi Halli Alfadhi Abi Syuja'*, Vol. II, 3rd ed, (Beirut: Dâr al-Kutub al-'Ilmiyah, 2004), 242

¹⁷⁸Musthofa Al-Khin, *al Fiqh al Manhajy*, 64-65

¹⁷⁹Syamsuddin, *al-Iqna'*, 241

Wali mujbir is the *wali* who has the authority to marry off the daughter even without her consent. For Syafi'ites scholars, the person who has the authority as *wali mujbir* is only father or grandfather (if the bride has no father), except them, other persons could not be a *wali mujbir*.¹⁸¹ However, asking permission to the daughter is recommended for both of them. In guardianship, *wali*'s power of compulsion, *ijbar*, can not absolutely be used forever. There are several requirements that must be fulfilled in applying the right of *ijbar*:¹⁸²

1. There is no hostile between the father (as *wali mujbir*) and his daughter.
2. The groom is at least her social equal (*kafaah*)
3. There is no hostile between the groom and bride.
4. He can find the means for her dowry (*mahar*) and maintenance
5. The dowry is equal to or greater than fair dowry (*mahr al-mitsl*)
6. The dowry is calculated with reference to her female relatives as well as the standards of her premarital place of residence, and adjusted upward or downward to account for her personal qualities.
7. Submission of dowry must be direct

Looking at the criteria above, Syafi'ites scholars actually consider the women's rights. The object of *wali mujbir* in Syafi'i *madhhab* is the woman who is virgin (*al-bikr*), whether she was reaching puberty or not. In Syafi'i *madhhab*, the reason of law (*'illat al-hukm*) related to the validity of *ijbar* is a virgin female (*al-bikr*) who is under the authority of the father. While the widow, she was not a

¹⁸⁰Musthofa Al-Khin, *al Fiqh al Manhajy*, 65

¹⁸¹Musthofa Al-Khin, *al Fiqh al Manhajy*, 66

¹⁸²Abdullah bin Ahmad Bâsaudan, *Zaitûnah al-Ilqah Syarh Mandhûmah Dlou'i al-Mishbâh*, (Beirut: Dâr al-Minhâj, 2011), 106

virgin female (*ghoir al-bikr/ al-ayyim/ al-tsayyib*).¹⁸³ This matter is based on the hadith of the Prophet:

أَخْبَرَنَا مَالِكٌ عَنْ عَبْدِ اللَّهِ بْنِ الْفَضْلِ عَنْ نَافِعِ بْنِ جُبَيْرٍ عَنِ ابْنِ عَبَّاسٍ أَنَّ رَسُولَ اللَّهِ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - قَالَ: الْأَيُّمُ أَحَقُّ بِنَفْسِهَا مِنْ وَلِيِّهَا وَالْبِكْرُ تُسْتَأْذَنُ فِي نَفْسِهَا وَإِذْنُهَا صُمَاتُهَا¹⁸⁴

*Malik told us, it was narrated from Abdullah bin Al-Fadhl, from Nafi' bin Jubair, from Ibn Abbas, that the Prophet Saw said: "The previously-married woman has more right concerning herself than her guardian does, and the virgin should be asked for permission, and her permission is her silence"*¹⁸⁵

If the *wali* of the daughter –either widow or virgin– marry her off without her permission, the marriage is void except for the father of a virgin daughter. The Syafi'i's opinion is based on the hadith of the Prophet, who annulled the marriage of Khansa -the daughter of Khidam- when the father marry her off but she disliked it.¹⁸⁶

Imam Nawawi also agreed with this opinion. The father may marry off his daughter whether she is minor or major even without her permission, but with her pleasure.¹⁸⁷ In *al-Umm*, Syafi'i explained that nobody is permitted to marry off the little girl –either a virgin or widow and with her permission or not– except her father.¹⁸⁸ According to Imam Syafi'i, the decision of father in compelling his

¹⁸³Musthofa Al-Khin, *al Fiqh al Manhajy*, 66

¹⁸⁴al-Syafi'i, *al-Umm*, Vol. VI, 46; Abul Hussain Muslim Ibn al-Hajjaj, *Shahih Muslim*, Vol.II (Beirut: Dar Ihya' al-Turats, tt), 1037

¹⁸⁵Imam Abul Hussain Muslim Ibn al-Hajjaj, *Shahih muslim*, vol.IV, English translated by Nasiruddin al-Khattab, (Riyadh: Maktaba Dar-us-Salam, 2007), 44

¹⁸⁶al-Syafi'i, *al-Umm*, trans. Misbah, 99

¹⁸⁷Muhyiddin Abi Zakaria an-Nawawi, *Minhaj at-Thalibin wa 'Umdah al-Mufi'in*, 1st ed, (Jeddah: Dâr al-Minhâj, 2005), 375

¹⁸⁸al-Syafi'i, *al-Umm*, Vol. VI, 48; al-Syafi'i. *al-Umm*, trans. Misbah, 103

daughter for marriage is permitted as long as the marriage gives a goodness and benefit for her or does not give the deficiency of marriage. However, the decision of the father is not permitted if it will create harm (*mudhorot*) for the daughter.¹⁸⁹

أَخْبَرَنَا مَالِكٌ عَنْ عَبْدِ الرَّحْمَنِ بْنِ الْقَاسِمِ عَنْ أَبِيهِ عَنْ عَبْدِ الرَّحْمَنِ وَمُجَمِّعِ ابْنِ زَيْدٍ
 بْنِ جَارِيَةَ عَنْ خَنْسَاءَ بِنْتِ خِدَامٍ أَنَّ أَبَاهَا زَوَّجَهَا وَهِيَ نَيْبٌ وَهِيَ كَارِهَةٌ فَأَتَتْ
 النَّبِيَّ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - فَرَدَّ نِكَاحَهَا¹⁹⁰

*Malik told us, it was narrated from Abdurrahman bin Al-Qasim, from his father, from Abdurrahman and Mujammi' bin Zaid bin Jariyah, from Khansa' binti Khidam, that her father gave her in marriage when she was a matron and she disliked that marriage. So she went to Allah's Messenger Saw and he declared that marriage invalid.*¹⁹¹

Imam Syafi'i said in his *Qaul Qadim*, quoted by Imam al-Muthi'i: "Recommended for the father to not marry off his daughter until she reaches puberty (*baligh*), so she can be asked for her permission."¹⁹² The permission of the daughter has the power of law when she reaches puberty because the age of puberty is the time when a person can do and take the responsibility for his/her own decision and independence from the approval of other transactions.¹⁹³ The age of puberty, according to Imam Syafi'i, is 15 years old based on the Sunnah of the Prophet. It indicated that *jihad* prevails over the limit of this age in involving

¹⁸⁹al-Syafi'i, *al-Umm*, Vol. VI, 49; al-Syafi'i, *al-Umm*, trans. Misbah, 104

¹⁹⁰al-Syafi'i, *al-Umm*, Vol. VI, 46; Muhammad bin Ismail Abu Abdillah al-Bukhari, *Shahih Bukhari*, Vol. VII, (1st ed.; Mesir: Dar Thouq an-Najah, 1422 H), 17

¹⁹¹al-Syafi'i, *al-Umm*, Ind. trans. by Misbah, 99; al-Bukhari, *Shahih Bukhari*, vol. VII, in English translated by Dr. Muhammad Muhsin Khan, (Riyadh: Maktaba Dar-us-Salam, 1997), 59

¹⁹²Imam al-Nawawiy, *al-Majmû' Sharh al-Muhadzdzab*, trans. Ali Murtadho, Fahrizal, 1st ed, (Jakarta: Pustaka Azzam), 265.

¹⁹³Zaenul Mahmudi, *Sosiologi Fikih*, 117

prescribed (*hadd*) punishment.¹⁹⁴ The words of Allah show that the female should be old enough to be married off is:

وَابْتَلُوا الْيَتَامَىٰ حَتَّىٰ إِذَا بَلَغُوا النِّكَاحَ فَإِنْ آنَسْتُمْ مِنْهُمْ رُشْدًا فَادْفَعُوا إِلَيْهِمْ أَمْوَالَهُمْ...¹⁹⁵

“And try orphans (as regards their intelligence) until they reach the age of marriage; if then you find sound judgment in them, release their property to them.”¹⁹⁶

Thus, to avoid undesired things, Imam Syafi'i rejected the father to marry off his daughter who did reach puberty because she did not the responsibility for herself.¹⁹⁷ If the daughter reaches puberty and she is a virgin, she has more right to herself in marriage than her father. Moreover, the father could not compel her, but he must get the permission before marrying her off.¹⁹⁸ Any marriage performed by other *wali* except the father over the little girl who does not reach puberty –according to Imam Syafi'i – is invalid marriage. Both spouses –the husband and the wife– cannot inherit each other when one of them is died, then the marriage is void (*al-nikah al-fasid*). And yet, if the father marries off his widowed daughter without her knowledge –even she likes it or not– the marriage is void.¹⁹⁹

A virgin woman (*al-bikr*) is the woman who never consummated (*jima'*), even although she lost her virginity because of accident, fall, or illness.²⁰⁰ Thus, if the woman got married then she was left by her husband before consummated, she

¹⁹⁴ al-Syafi'i, *al-Umm*, trans. Misbah, 96

¹⁹⁵ Q.S an-Nisa (4): 6

¹⁹⁶ Muhammad Taqi-ud-Dîn, *Translation of...*, 107

¹⁹⁷ Zaenul Mahmudi, *Sosiologi Fikih*, 118

¹⁹⁸ al-Syafi'i, *al-Umm*, trans. Misbah, 97

¹⁹⁹ Zaenul Mahmudi, *Sosiologi Fikih*, 118

²⁰⁰ Abdullah bin Ahmad Bâsaudan, *Zaitûnah al-Ilqah Syarh Mandhûmah Dlou'i al-Mishbâh*, (Beirut: Dâr al-Minhâj, 2011), 105

is still a virgin woman and being a female who is under the authority of her *wali*. While a little widow is an independent woman who was non-virgin because she has consummated, so that she could not be forced into marriage as same as an adult widow.²⁰¹

Imam al-Muthi'i explained that a girl's consent should be orally spoken by herself because everyone who will marry her off and need her permission it must be with her spoken if she is able to speak. A widow is not an exception. This is the prevailing opinion in Syafi'i *madhhab*. If the *wali* asked her permission but she was silent, her silence is her permission because she was ashamed to give permission with her spoken words, unlike the widow.²⁰²

Al-'Imrani said in al-Bayan, quoted by Imam al-Muthi'i, "Our companion, the last generation of Syafi'ites scholars said if the *wali* asked her permission for marriage either with the minimal dowry of *mitsl* or standard of money then she was silent, this silence did not indicate her permission. It is the same case when *wali* asked her permission to sell her property then she was silent. This matter is different with marriage."²⁰³ Therefore, the real purpose of marriage does not merely for treasure, but it makes both spouses can commingle nicely in their marriage and live quietly and affectionately, as explained by Allah in these words:

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²⁰¹Imam al-Nawawiy, *al-Majmû' Sharh al-Muhadzdzab*, trans. Ali Murtadho, Fahrizal, 1st ed, (Jakarta: Pustaka Azzam), 269.

²⁰²al-Nawawiy, *al-Majmû' Sharh* trans. Ali Murtadho, 267-268.

²⁰³al-Nawawiy, *al-Majmû' Sharh* trans. Ali Murtadho, 268.

²⁰⁴al-Nawawiy, *al-Majmû' Sharh* trans. Ali Murtadho, 183.

وَمِنْ آيَاتِهِ أَنْ خَلَقَ لَكُمْ مِنْ أَنْفُسِكُمْ أَزْوَاجًا لِتَسْكُنُوا إِلَيْهَا وَجَعَلَ بَيْنَكُمْ مَوَدَّةً
وَرَحْمَةً إِنَّ فِي ذَلِكَ لَآيَاتٍ لِقَوْمٍ يَتَفَكَّرُونَ²⁰⁵

*And among His Signs is this, that He created for you wives from among yourselves, that you may find repose in them, and He has put between you affection and mercy. Verily, in that are indeed signs for a people who reflect.*²⁰⁶

Imam Syafi'i command any fathers, who will marry off the virgin-daughter to invite the nearest family to consult about her marriage.²⁰⁷ Inviting the virgin daughter to consult is the command of the Prophet (*tusta'mar al-bikr*). The consulting of marriage, according to Imam Syafi'i, aims to ask the permission of the girl. It is also assumed as psychological medicine, which is unknown by other except the girl. The importance of consulting the marriage is to keep carefulness. It is better to do for the girl's soul and is categorized as the good behavior.²⁰⁸ Consulting marriage is based on the words of Allah the Exalted:

... وَشَاوِرْهُمْ فِي الْأَمْرِ...²⁰⁹
“...and consult them in the affairs...”²¹⁰

The father should not marry off her daughter unless she has been informed about whom her groom will be. Furthermore, if the father knows her displeasure to the groom, marrying her off is not recommended (*makruh*) to do.²¹¹

²⁰⁵Q.S ar-Ruum (30): 21

²⁰⁶ Muhammad Taqi-ud-Dîn, *Translation of...*, 542

²⁰⁷ al-Syafi'i, *al-Umm*, trans. Misbah, 101

²⁰⁸ Zaenul Mahmudi, *Sosiologi Fikih Perempuan: Formulasi Dialektis Fikih Perempuan dengan Kondisi Sosial dalam Pandangan Imam Syafi'i*, 1st ed, (Malang: UIN-Malang Press, 2009), 118

²⁰⁹Q.S Ali Imran (3): 159

²¹⁰ Muhammad Taqi-ud-Dîn, *Translation of...*, 97

²¹¹ al-Syafi'i, *al-Umm*, trans. Misbah, 101

C. The Role of *Wali Mujbir* on Syafi'i *Madhhab* in the Perspective of Jasser Auda's Maqasid Sharia

In the classic and middle century, the fundamental of Islamic law (*ushul fiqh*) was developed brightly by producing the books of fundamental of Islamic law providing its methods and types. However, it is still tied in *Bayani* method which is bound to language norms, so the fundamental of Islamic law does not cut out from the reasoning and the development of philosophy. For instance, the concept of *maslahah* of Najm ad-Din at-Tufi al-Hanbali that is well-known as the liberal concept which is still limited to the *qath'i* proposition and the *ubudiyah* areas. Both areas are the forbidden areas to be intervened by the reasoning of *maslahah*.²¹²

Therefore, Abdul Mughits stated that the science of the fundamental of Islamic law in the modern century is developed and criticized by a contemporary jurist, including the outsiders of the West. The discourse has reached the level of "reconstruction" of *ushul fiqh* with various theoretical framework and methodologies, sometimes it is still in partial topics. The example theories about the reconstruction of *ushul fiqh* are: the limitation theory of Muhammad Syahrur, the new concept of Naskh by Mahmud Muhammad Thaha which is a redefinition of *qath'i-dhanny* in the understanding partial legal-specific values,²¹³ a new concept of Maqasid Sharia used the system approach of Islamic law by Jasser Auda, and others.²¹⁴

²¹² Abdul Mughits, *Kritik Nalar*, 69

²¹³ Abdul Mughits, *Kritik Nalar*, 70

²¹⁴ Jasser Auda, *Membumikan Hukum Islam Melalui Maqasid Sharia*, trans. Rosidin and 'Alî 'Abd el-Mun'im, 1st ed, (Bandung: PT Mizan Pustaka.2015)

As quoted by Amin Abdullah, Jasser Auda stated that in developing *ijtihad*, the *mujtahid* should have openness view. It can be learned that he should be openness person and ready to accept comments from other sciences, and even he must be able to renew, repair, and correct himself (self-renewal). Then, to develop *ijtihad*, multidimensionality thinking is needed. Multidimensional thinking is a substitute of biner opposition (style of thinking with *black-white*, *infidel-Muslim*, *heaven-hell*, *qath'i-zhanny*, considering a problem to simply). Amin Abdullah stated that one of postmodernist thinking styles is its multidimensionality; considering various dimensions surrounding the discussed case. In addition, the results of *ijtihad* have to be always open to receive new better things in human life.²¹⁵ The interpretations of *maqashid* to *wali mujbir* which agree with system approach will be explained here:

1. *Wali Mujbir* and Woman's Rights

The role of *wali mujbir* is the most important thing in marriage. Moreover, *ijbar* right is an affection of the father to his daughter. Through *wali mujbir*, woman rights will be completed:

a. Woman's Right in Choosing a Husband

Islam provides right for the woman to receive her choice and reject the man in the marriage process. Islam prohibited *wali* to marrying off the daughter with the man whom the girl dislike. Islam states that enforcement in choosing husband is cruel because it broke woman right and will be cause enmity and

²¹⁵Amin Abdullah, *Fikih dan Kalam Sosial Era Kontemporer*, dalam buku *Islam Nusantara*, 3rd ed, (Bandung: PT Mizan Pustaka, 2016), 80-81

disunity for both families when discrepancy is found in marriage.²¹⁶ The woman's right in choosing her couple agrees with the hadith below:

أَخْبَرَنَا مَالِكٌ عَنْ عَبْدِ اللَّهِ بْنِ الْفَضْلِ عَنْ نَافِعِ بْنِ جُبَيْرٍ عَنِ ابْنِ عَبَّاسٍ أَنَّ رَسُولَ اللَّهِ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - قَالَ: الْأَمُّ أَحَقُّ بِنَفْسِهَا مِنْ وَلِيِّهَا وَالْبِكْرُ تُسْتَأْذَنُ فِي نَفْسِهَا وَإِذْنُهَا صُمَاتُهَا²¹⁷

*Malik told us, it was narrated from Abdullah bin Al-Fadhl, from Nafi' bin Jubair, from Ibn Abbas, that the Prophet Saw said: "The previously-married woman has more right concerning herself than her guardian does, and the virgin should be asked for permission, and her permission is her silence"*²¹⁸

Rasulullah Saw. gave a freedom to Fatimah fully. He never put her right up to choose her husband. When 'Ali bin Abi Talib r.a was coming to Rasulullah Saw and proposing the marriage, Rasulullah Saw said, "Some men came to me to propose az-Zahra, but with the expression of her face showing dislike she refused them. Now, I will convey your proposal to her." Then, Rasulullah Saw met her and conveyed 'Ali's proposal. Fatimah did not shake her head as the sign for refusing, and by her silence, it was a sign for her acceptance. Rasulullah Saw. came out by saying *Allahu Akbar*.²¹⁹ The right for choosing the couple is also found in the hadith that explaining the marriage of Khansa' binti Khidam.

²¹⁶Huzaemah Tahido Yanggo, *Fikih Perempuan Kontemporer*, 1st ed, (Jakarta: Ghalia Indonesia, 2010), 119

²¹⁷al-Syafi'i, *al-Umm*, Vol. VI, 46; Muslim, *Shahih Muslim*, ...1037

²¹⁸al-Syafi'i, *al-Umm*, Ind. trans. by Misbah, 98; Muslim, *Shahih Muslim*, vol.IV, English translated by Nasiruddin al-Khattab,, 44

²¹⁹Murtadha Muthahhari, *The Rights of Women in Islam*, Teheran: World Organization for Islamic Services (WOFIS), 1981. trans. M.Hashem, *Hak-hak Wanita dalam Islam*, 6th ed, (Jakarta: PT Lentera Baristama, 2000), 39

أَخْبَرَنَا مَالِكٌ عَنْ عَبْدِ الرَّحْمَنِ بْنِ الْقَاسِمِ عَنْ أَبِيهِ عَنْ عَبْدِ الرَّحْمَنِ وَمُجَمِّعِ ابْنِ زَيْدٍ
 بْنِ جَارِيَةَ عَنْ خُنُسَاءَ بِنْتِ خِدَامٍ أَنَّ أَبَاهَا زَوَّجَهَا وَهِيَ تَيْبٌ وَهِيَ كَارِهَةٌ فَأَتَتْ
 النَّبِيَّ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - فَرَدَّ نِكَاحَهَا²²⁰

*Malik told us, it was narrated from Abdurrahman bin Al-Qasim, from his father, from Abdurrahman and Mujammi' bin Zaid bin Jariyah, from Khansa' binti Khidam, that her father gave her in marriage when she was a matron and she disliked that marriage. So she went to Allah's Messenger Saw and he declared that marriage invalid.*²²¹

Rasulullah Saw also gave the rights for the girl who will be married off by her father with the man whom she dislikes:

حَدَّثَنَا حُسَيْنٌ، حَدَّثَنَا جَرِيرٌ، عَنْ أَيُّوبَ، عَنْ عِكْرِمَةَ، عَنْ ابْنِ عَبَّاسٍ: " أَنَّ جَارِيَةَ
 بَكَرًا أَتَتْ النَّبِيَّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ، فَذَكَرَتْ أَنَّ أَبَاهَا زَوَّجَهَا وَهِيَ كَارِهَةٌ فَخَيَّرَهَا
 النَّبِيُّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ²²²

*"Husain told us, Jarir told us, it was narrated from Ayyub, from Ikrimah, from Ibn Abbas that a virgin girl came to the Prophet Saw and told him that her father had arranged a marriage that she did not like, and the Prophet Saw. gave her the choice."*²²³

The wisdom of the existence of *wali* is to complete marriage, with the willingness from others' totality. In addition, it not only intends to protect her with her husband's affection but also to protect her with family's affection because

²²⁰al-Syafi'i, *al-Umm*, Vol. VI, 46; al-Bukhari, *Shahih Bukhari*, ..., 17

²²¹al-Syafi'i, *al-Umm*, Ind. trans. by Misbah, 99; al-Bukhari, *Shahih Bukhari*, in English translated, ...59

²²²Abu Abdillah Ahmad bin Muhammad bin Hanbal, *Musnad Ahmad*, Juz IV, 1st ed, (tt: Muassasah ar-Risalah, 2001 M/ 1421 H), 275; Abu Daud Sulaiman, *Sunan Abu Daud*, Vol. 2 (Beirut: al-Maktabah al-'Ashriyyah, tt), 232; Ibn Majah, *Sunan Ibn Majah*, Vol. III, 74

²²³Ibnu Majah, *Sunan Ibnu Majah* (1875), vol. III, English translated by Nasiruddin al-Khattab. (Riyadh:Maktaba Dar-us-Salam, 2007), 75

commonly, the woman who gets married without the permission of *wali*, does not get affection and attention from her family. However, when the judge considered the validity of marriage, the marriage is valid. There is no one who can cancel the marriage as said Ibn Qudaamah in al-Mughni cited by Qardhawi.²²⁴

b. Woman's Right in Receiving the Dowry (*Mahr*)

One of the peculiarities of Islamic rules of protection and reverence to the women is the bride price in marriage which must be completed by the man before they build household.²²⁵ Al-Qur'an explained about the woman's right to receive the dowry:

وَأْتُوا النِّسَاءَ صَدُقَاتِهِنَّ نِحْلَةً فَإِنْ طِبْنَ لَكُمْ عَنْ شَيْءٍ مِنْهُ نَفْسًا فَكُلُوهُ هَنِيئًا مَرِيئًا²²⁶

*And give to the women (whom you marry) their Mahr (obligatory bridal-money given by the husband to his wife at the time of marriage) with a good heart; but if they, of their own good pleasure, remit any part of it to you, take it, and enjoy it without fear of any harm (as Allah has made it lawful).*²²⁷

The right for the woman to receive the dowry is in line with the requirement of *wali mujbir* determined by Syafi'ites scholars, i.e the groom prepared or presented by *wali mujbir* has to give the dowry and it must be paid directly. This aim none other to make *wali mujbir* helps fulfilling the rights of the daughter.

²²⁴Yusuf Qaradhawi, *Hadyul Islam Fatawi Mu'ashirah*. Ind. trans. As'ad Yasin, *Fatwa-fatwa Kontemporer 2*. 1st ed. (Jakarta: Gema Insani, 1995), 476

²²⁵Huzaemah, *Fikih Perempuan*, 119

²²⁶Q.S an-Nisa (4): 4

²²⁷ Muhammad Taqi-ud-Din, *Translation of...*, 106

c. Woman's Right in Receiving Good Treatment

One of woman's rights in marriage is receiving good treatment from the husband in household life. The good treatment of the husband includes behavior and politeness to the wife.²²⁸ The role of *wali mujbir* for this matter is very important because he prepared the groom who does not have the hostility with his daughter (look again at the requirements of *ijbar* rights) certainly with her consent. By this condition, the woman right in receiving good treatment from the husband will be complete. It was said in al-Qur'an Surah an-Nisa':

يَا أَيُّهَا الَّذِينَ آمَنُوا لَا يَحِلُّ لَكُمْ أَنْ تَرِثُوا النِّسَاءَ كَرِهًا وَلَا تَعْضُلُوهُنَّ لِتَذْهَبُوا بِبَعْضِ مَا
آتَيْتُمُوهُنَّ إِلَّا أَنْ يَأْتِيَنَّ بِفَاحِشَةٍ مُبَيَّنَةٍ وَعَاشِرُوهُنَّ بِالْمَعْرُوفِ فَإِنْ كَرِهْتُمُوهُنَّ فَعَسَى أَنْ
تَكْرَهُوا شَيْئًا وَيَجْعَلَ اللَّهُ فِيهِ خَيْرًا كَثِيرًا²²⁹

*O you who believe! You are forbidden to inherit women against their will; and you should not treat them with harshness, that you may take away part of the Mahr you have given them, unless they commit open illegal sexual intercourse; and live with them honorably. If you dislike them, it may be that you dislike a thing and Allah brings through it a great deal of good.*²³⁰

Good interaction between husband and wife to nurture household is the requirement of marriage to reach the intention and the wisdom of marriage. The man, as the leader of the woman, has to conduct his responsibility for teaching her in order to conduct her duties and invest the respect in herself by giving woman rights without complicating her. Based on natural instinct, human always respects educated people and who knows what is right and what is obligation without

²²⁸Huzaemah, *Fikih Perempuan*, 121

²²⁹Q.S an-Nisa' (4): 19

²³⁰ Muhammad Taqi-ud-Din, *Translation of...*, 109-110

disparaging her. Therefore, if the rights of women have not been completed, it means that the man has closed a good way that will be given by her wife.²³¹

d. Woman's Right as The Independent Individual

The individual right of man or woman, according to Rahmat Djatnika is divided into two categories:

- 1) *Thabi'i* right, the human right agree with their origin (*fitrah*) –this condition must be on the human, like the right to life and independent. The life right is the human right based on their origin given by Allah SWT as well as their ability and it has been determined. That is why the human to protect and respect others.²³² *Wali mujbir*, in essence, is the obligation of the father in maintaining and protecting the daughter so she will get her right for living decently by doing the marriage. Allah Swt stated in al-Qur'an:

الرِّجَالُ قَوَّامُونَ عَلَى النِّسَاءِ بِمَا فَضَّلَ اللَّهُ بَعْضَهُمْ عَلَى بَعْضٍ...²³³

*Men are the protectors and maintainers of women because Allah has made one of them to excel the other.*²³⁴

The next discussion is independent right which includes the origin of the human. Everyone does not allow disturbing the independence of other. Since human was born into the world, she/he has to get their independence right. No one is allowed for enslaving or breaking out their independence and even everyone has to respect each other. One's independence means freedom of thought, talking, willing, and others in determining limitations of norm and

²³¹ Huzaemah, *Fikih Perempuan*, 121-122

²³² Huzaemah, *Fikih Perempuan*, 68

²³³ Q.S an-Nisa (4): 34

²³⁴ Muhammad Taqi-ud-Din, *Translation of...*, 113

life. These principles have been determined by Allah SWT and the prophet in which it means that everyone has to respect and is limited by independence through fulfilling rights for others so that the independence will be not interpreted as absolut independence.²³⁵ In the concept of *mujbir* guardianship, the permission of woman is her independence right; right for thinking, talking, and willing. As the result, Imam Syaf'i, in this case, said that marriage is not valid without permission of the daughter. It agrees with the hadith of the Prophet Saw:

حَدَّثَنَا مُعَاذُ بْنُ فَضَالَةَ، حَدَّثَنَا هِشَامٌ، عَنْ يَحْيَى، عَنْ أَبِي سَلَمَةَ، أَنَّ أَبَا هُرَيْرَةَ،
حَدَّثَهُمْ: أَنَّ النَّبِيَّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ : لَا تُنْكَحُ الْأَيِّمُ حَتَّى تُسْتَأْمَرَ، وَلَا
تُنْكَحُ الْبِكْرُ حَتَّى تُسْتَأْذَنَ قَالُوا: كَيْفَ إِذْنُهَا؟ قَالَ: أَنْ تَسْكُتَ²³⁶

*Muadz bin Fadlolah told us, Hisyam told us, it was narrated from Yahya, from Abu Salamah, from Abu Hurairah, he said that the Prophet Saw said: "A matron should not be given in marriage except after consulting her, and a virgin should not be given in marriage except after her permission." The people asked, "O Allah's Messenger! How can we know her permission?" He said, "Her silence (indicates her permission)."*²³⁷

In this hadith, Qardhawi explained that the word *al-idzn* is intended for the virgin-woman while the word *al amr* is intended for the widow. The permission of the virgin is indicated by her silence and the spoken words for the widow. These are differences used by the Prophet Muhammad Saw to distinguish between the virgin and the widow. He did not distinguish

²³⁵Huzaemah, *Fikih Perempuan*, 68

²³⁶Muhammad bin Ismail Abu Abdillah al-Bukhari, *Shahih Bukhari*, Vol. VII, 1st ed, (Mesir: Dar Thouq an-Najah, 1422 H), 17

²³⁷Muhammad bin Ismail Abu Abdillah al-Bukhari, *Shahih Bukhari*, vol. VII, in English translated by Dr. Muhammad Muhsin Khan, (Riyadh: Maktaba Dar-us-Salam, 1997), 58

between compelling marriage or not. This is caused by the situation where virgin is still shy to talk about her marriage. Therefore, the marriage proposal is indirectly intended to her but it is intended to her *wali*, and then her *wali* asks her to give him an acceptance. It can be learned that the virgin does not ask the *wali* to marry her off but she only gives an approval when *wali* asks her.²³⁸

In contrast, the marriage proposal for widow is directly given to her because she was not shy to talk about the marriage, so she asks the *wali* to marry her off with the man. It can be inferred that she is *Amirah* (the asker) to *wali* and *wali* has to follow her request to marry her off with the man who is at least her socially equal (*kafa'ah*) when she asked him to do it. We can classify that the *wali* is asked by the widow to marry her off while for the virgin the *wali* asks her to marry her off. This is what is meant by the hadith.²³⁹

Imam Syafi'i command any fathers to consult about the marriage of the daughter. Consulting marriage is based on the word of Exalted:

... وَشَاوِرْهُمْ فِي الْأَمْرِ ...²⁴⁰

“...and consult them in the affairs...”²⁴¹

The importance of consulting the marriage is to keep carefulness. It is better to do for the girl's soul and is categorized as good behavior.²⁴² The father should not marry off her daughter unless she has been informed about

²³⁸Yusuf Qaradhawi, *Fatwa-fatwa* , 474

²³⁹Yusuf Qaradhawi, *Fatwa-fatwa* , 475

²⁴⁰Q.S Ali Imran (3): 159

²⁴¹ Muhammad Taqi-ud-Dîn, *Translation of...*, 97

²⁴²Zaenul Mahmudi, *Sosiologi Fikih...*, 118

who will be her groom. Furthermore, if the father knows her displeasure to the groom, marrying her off is not recommended (*makruh*) to do.²⁴³

- 2) The right given by the law or the rule is based on the right ensured by the law made by the human. It is determined by the compiler of the rules which must be practiced by the people who are submissive on his power.²⁴⁴ In Indonesia, the right regulated in 1945 Constitution of the Republic of Indonesia (*Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*), especially in Chapter XA about Human Right for instance article 28A; “everyone has the right to live and maintain the life.” Then, article 28B verse (1) stated that everyone has the right to build the family and continue the decline through the valid marriage. Article 28B verse (2) stated that every child has the right to live, grow, and develop, and also to get the protection from the violence and discrimination.²⁴⁵ From the article above, we can conclude that in truth, the role of *wali mujbir* is very important to realize the rights of the child as the person protected by the state.

2. The *Wali* of Marriage as the Islamic Universality and Local Wisdom Intention

Let us know that there are number of opposing narration about the guardianship, which were classified as ‘in opposition’. The opposing narration that addresses matters related to custom, that is *al-‘urf*, i.e the two narrations, are both attributed to Aishah, one of which forbids ‘any woman’ from marriage

²⁴³ al-Syafi‘i, *al-Umm*, trans. Misbah, 101

²⁴⁴ Huzaemah, *Fikih Perempuan*, 68

²⁴⁵ Chapter XA about Human Right article 28A and 28B of Undang-Undang Dasar Negara Republik Indonesia Tahun 1945

without the consent of *wali*, as applied in Syafi'i and Maliki *madhhab*, while the other allows previously married woman (a widow) to make their own independent choices on marriage. It is also narrated, that Aisha, the narrator of the two narrations, herself did not apply the 'condition' of consent in some cases. The follower of Hanafi explained that, the (Arabic) custom goes that a woman who gets married without her *wali*'s consent is shameless.²⁴⁶

Moreover, the contemporary of jurists, like Syahrur, explained that the presence of a *wali* for women is one of the Arabic cultures that have turned into the Sunnah of the Prophet. Then, in engagement or covenant (*al-mithaq*), the parents (*wali, asil*) or the trustee of *wali* are not involved. A female and a male take *al-mithaq* by themselves respectively. The understanding of the guardianship and the trusteeship as a historical culture will have been waived and ignored.²⁴⁷

The opposing narration addresses matters related to custom about the guardianship, according to Jasser Auda, these narrations could be interpreted through the *Maqsid* of the universality of the law. In other words, differences are found in the customs for which the various narrations attempted to show consideration, rather than contradiction.²⁴⁸ Understanding both narrations in the context of considering customs based on the law's universality resolves the contradiction and provides flexibility in carrying out marriage ceremonies according to different customs in different place and time. This approach allows Muslim to embrace, if they wish, the 'normal' traditions of their societies in such

²⁴⁶Jasser Auda, *Maqasid al-Shari'ah a Beginners Guide*, trans. Ali 'Abdelmon'im, *Al-Maqasid Untuk Pemula*, 1st ed, (Yogyakarta: SUKA-Press, 2013), 72

²⁴⁷Muhammad Syahrur, *Nahw Usûl Jâdidah li al-Fiqh al-Islâmi*, trans. Sahiron Syamsuddin and Burhanudin, *Metodologi Fiqih Islam Kontemporer*, 1st ed, (Yogyakarta: Elsaq Press, 2004), 439

²⁴⁸Jasser Auda, *Maqasid* trans. Ali 'Abdelmon'im, 71

ceremonial areas, and contributes to a culture of tolerance and understanding in multicultural societies.²⁴⁹

3. *Wali Mujbir* and the Intent of Prophet of Teaching High Ideal

The function of *wali* is to protect the importance of his child who will get married (*reaching maslahat*) and to organize everything related to marriage, so the rights of the child will be preserved.²⁵⁰ As has been stated by Qardhawi, the purpose of *wali* in marriage is to reach completed marriage with the willingness of family totally. In addition, it is also intended to get affection from the family besides she gets affection from her husband because commonly the woman who gets married without the permission of her family will not get attention.²⁵¹

The presence of *wali* in marriage, according to Syafi'i's thought, is an obligation although it contradicts to the logic arguing that who gets married is the woman, not the *wali*. In this case, Dahlan Tamrin stated that the philosophy and the wisdom of it are physical proof of woman, whom has been consummated by the man, because she will be pregnant after doing sexual intercourse. It is right that the father, *wali*, has to know and allows the man who will be her husband. The father may be embarrassed to the neighbors if suddenly the daughter got the pregnant without his knowing. It is different with the man, who does not need permission from the *wali* because he will not get pregnant.²⁵²

The hadith narrated by Aisyah as the basis of Syafi'ites scholars regarding the requiring *wali* in the marriage, should be understood that the Prophet means to

²⁴⁹Jasser Auda, *Maqasid* trans. Ali 'Abdelmon'im, 72

²⁵⁰Musthofa Al-Khin, *al Fiqh al Manhajy*, 61

²⁵¹Yusuf Qaradhawi, *Fatwa-fatwa*, 476

²⁵²Dahlan Tamrin, *Filsafat Hukum Islam*, (Malang: UIN Press, 2007), 153-154

‘teach the high ideals’ without placing any obligation on his followers. Finally, especially *wali mujbir* can preserve rights of the daughter in order to make society acknowledges her, who will get married.

4. Wali Mujbir as ‘A Means’ of Realizing the Objective of Marriage

Jasser Auda asserts, in realizing the renewal of Islamic law, it needs to differentiate between means (*al-wasail*) and ends (*al-ahdaf*) as differentiated by Muhammad al-Ghazali. Al-Ghazali mentioned the system of spoils of war, despite the fact that it is mentioned explicitly in the Qur’an, as an example of these ‘changeable means’.²⁵³

Similarly, Yusuf Qardhawi and Faisal Mawlawi elaborated the importance of the ‘differentiation between means and ends’ during the deliberations of the European Council for Fatwa and Research. Jasser Auda explained that, they, both, applied the same concept to the visual citation of *hilal* (Ramadan new moon) being mere means for knowing the start of the month rather than an end in its own right. Hence, they concluded that pure calculations shall be today’s means of defining the start and the end of the month of Ramadan, which is a fatwa that solves a number of practical problems for Muslim minorities.²⁵⁴

According to Jasser Auda, principally, the aim of *ijbar* right is different with the aim of marriage.²⁵⁵ The aim of *ijbar* right is to protect woman’s rights

²⁵³Jasser Auda, *Maqasid* trans. Ali ‘Abdelmon’im, 75

²⁵⁴Jasser Auda, *Maqasid* trans. Ali ‘Abdelmon’im, 76

²⁵⁵Jasser Auda, *Khulashoh Bidâyah al-Mujtaid wa Nihâyah al-Muqtashid*, 1st ed, (Shuruq International, 2011), 218

while the aim of marriage is to pass life quietly and affectionately, as has been stated by Allah SWT:²⁵⁶

وَمِنْ آيَاتِهِ أَنْ خَلَقَ لَكُمْ مِنْ أَنْفُسِكُمْ أَزْوَاجًا لِتَسْكُنُوا إِلَيْهَا وَجَعَلَ بَيْنَكُمْ مَوَدَّةً

وَرَحْمَةً إِنَّ فِي ذَلِكَ لَآيَاتٍ لِقَوْمٍ يَتَفَكَّرُونَ²⁵⁷

*And among His Signs is this, that He created for you wives from among yourselves, that you may find repose in them, and He has put between you affection and mercy. Verily, in that are indeed signs for a people who reflect.*²⁵⁸

Therefore, the role of *wali mujbir* is very important as a means to an end or as a practical way to realizing the objective of marriage. The attendance of *wali*, beside to determine the confession of the family towards marriage, is to clarify that the marriage is not only about affection between both spouses but it is also the strong relationship between two families. As well as the presence of woman's *wali*, Abu Syuqqah suggested that the man's *wali* has to attend along with the family member of bride and groom so that the marriage is assumed as beginning to bond the two families strongly..²⁵⁹

Rasulullah Saw has shown this way when he was marrying with Khadijah binti Khuwailid. Majmu' book explains that Rasulullah Saw got married with Khadijah before he is chosen as the Prophet. Waraqah bin Naufal, Khadijah's uncle, married them off while Abu Talib, prophet's uncle, proposed him.²⁶⁰ By this way, the objective of marriage will be realized easily because *wali* will be the guardian for them to lead and to advice in order to build the dreamed household.

²⁵⁶ al-Nawawiy, *al-Majmû' Sharh* trans. Ali Murtadho, 183.

²⁵⁷ Q.S ar-Ruum (30): 21

²⁵⁸ Muhammad Taqi-ud-Dîn, *Translation of...*, 542

²⁵⁹ Abdul Halim trans. As'ad Yasin, *Kebebasan Wanita*, 114

²⁶⁰ al-Nawawiy, *al-Majmû' Sharh* trans. Ali Murtadho, 132.

The concept of *wali mujbir* on Syafi'i *madhhab* and its interpretation in the perspective of Maqasid can be concluded in Table 3.1 as follows:

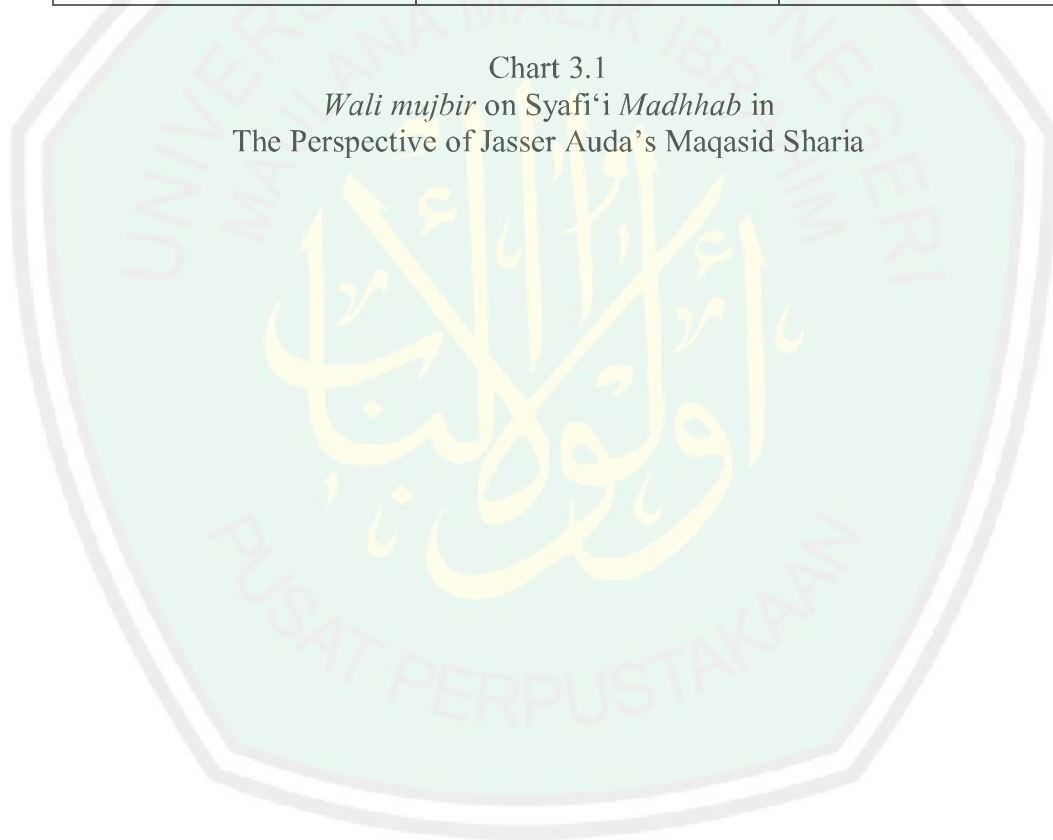
Dalil naqli	<i>Wali Mujbir</i> on Syafi'i <i>Madhhab</i>	<i>Wali Mujbir</i> in the Pespective of Maqasid Sharia
<p>- الأَيْمُ أَحَقُّ بِنَفْسِهَا مِنْ وَلِيِّهَا وَالْبِكْرُ تُسْتَأْذَنُ فِي نَفْسِهَا وَإِذْنُهَا صُمَاتُهَا ... وَشَاوِرُهُمْ فِي الْأَمْرِ..</p>	<p>1. <i>Wali Mujbir</i>: a <i>wali</i> who has the authority to marry off his virgin-daughter without her permission or with her permission for her benefit, then the priority is her willingness (<i>ridho</i>) to his decision as her <i>wali</i> (grandfather if the father has died) with several conditions that must be fulfilled, these are:</p> <ol style="list-style-type: none"> There is no hostile between the father (as <i>wali mujbir</i>) and his daughter. The groom is at least her social equal (<i>kafaah</i>) There is no hostile between the groom and bride. He can find the means for her dowry (<i>mahar</i>) and maintenance The dowry is equal to or greater than fair dowry (<i>mahr al-mitsl</i>) The dowry is calculated with reference to her female relatives as well as the standards of her premarital place of 	<p>1. <i>Wali Mujbir</i>: a <i>wali</i> who has the authority to marry off his virgin-daughter for the purpose of protecting her rights, which are:</p> <ol style="list-style-type: none"> Woman right in choosing a husband Woman right in receiving the dowry from the husband (<i>Mahr</i>) (an-Nisa (4):4) Woman right in receiving good treatment (an-Nisa (4):19) Woman right as the independent individual

	<p>residence and adjusted upward or downward to account for her personal qualities.</p> <p>g. Submission of dowry must be direct</p> <p>It would be advisable for the father as <i>wali mujbir</i> to consult before marrying off the daughter.</p>	
<p>- وَإِذَا طَلَّقْتُمُ النِّسَاءَ فَبَلَغْنَ أَجَلَهُنَّ فَلَا تَعْضُلُوهُنَّ أَنْ يَنْكِحْنَ أَزْوَاجَهُنَّ</p> <p>- الرِّجَالُ قَوَّامُونَ عَلَى النِّسَاءِ</p> <p>- ... فَأَنْكِحُوهُنَّ بِإِذْنِ أَهْلِهِنَّ ...</p>	<p>2. For Syafi'ites, they determined the <i>wali</i> as one of marriage pillars. Unlike some schools of thoughts (<i>madhhabs</i>), they held the permission of <i>wali</i> is enough.</p>	<p>2. The presence of <i>wali</i>, especially for <i>wali mujbir</i>, can be interpreted as the intent of Islamic Universality and local wisdom, that his existence as a pillar of marriage is not binding but it is in accordance with the customary rules of each region.</p>
<p>- أَيُّمَا امْرَأَةٍ نَكَحَتْ بِغَيْرِ إِذْنٍ وَلِيِّهَا فَنِكَاحُهَا بَاطِلٌ</p> <p>- فَنِكَاحُهَا بَاطِلٌ فَنِكَاحُهَا بَاطِلٌ فَإِنْ أَصَابَهَا فَلَهَا الصَّدَاقُ بِمَا اسْتَحَلَّ مِنْ فَرَجِهَا.</p> <p>- لَا تُنْكَحُ الْمَرْأَةُ الْمَرْأَةَ فَإِنَّ الْبَغِيَّ إِنَّمَا تُنْكَحُ نَفْسَهَا</p>	<p>3. No woman should arrange her own marriage, either virgin or widow, she needs a man as a <i>wali</i>, he is her father for the purpose to avoid the bad assumption from the society.</p>	<p>3. The presence of <i>wali</i> in the marriage should be understood that the Prophet mean to 'teach the high ideals' in the society, it means the society would not give the bad assumption to any woman who will get married</p>
<p>- ... وَشَاوَرَهُمْ فِي الْأَمْرِ..</p> <p>- وَمِنْ آيَاتِهِ أَنْ خَلَقَ لَكُمْ مِنْ أَنْفُسِكُمْ أَزْوَاجًا لِتَسْكُنُوا إِلَيْهَا وَجَعَلَ</p>	<p>4. The silence of virgin does not show her permission if the <i>wali</i> asks her permission with the minimal dowry of <i>mitsl</i>, because the real</p>	<p>4. <i>Wali mujbir</i> as "a means" in "realizing the purpose of marriage", that makes both spouses can commingle in their marriage and live</p>

<p>بَيْنَكُمْ مَوَدَّةً وَرَحْمَةً إِنَّ فِي ذَلِكَ لَآيَاتٍ لِّقَوْمٍ يَتَفَكَّرُونَ</p>	<p>purpose of marriage does not for treasure merely, but it makes both spouses can commingle in their marriage and live quietly and affectionately. It would be advisable for the father as a <i>wali</i> to consult before marrying off the daughter either virgin or widow.</p>	<p>quietly and affectionately.</p>
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Chart 3.1

Wali mujbir on Syafi'i Madhhab in
The Perspective of Jasser Auda's Maqasid Sharia



CHAPTER IV

CLOSING

A. Conclusions

Based on the discussion at the previous chapter, the conclusions that can be submitted are follows:

1. Syafi'i *madhhab* makes the guardian of marriage (*wali*) as pillars in marriage because women cannot get married by themselves. *Wali Mujbir* is a *wali* who has the right to marry off his virgin daughter without her permission or with her permission for her benefit, then the priority is her willingness (*ridho*) to his decision as her *wali* (grandfather, if she has no father) with several conditions that must be fulfilled, if the requirements are not fulfilled, then the marriage can be annulled.
2. The concept of *wali mujbir* in Syafi'i *madhhab* can be interpreted into the Maqasid as follows: a) *wali mujbir* is a *wali* in marriage who has a significant role in protecting women's rights, b) *wali mujbir* as *wali* in marriage can be interpreted as the intention of Islamic universality and local

wisdom that his existence as a requirement of marriage is not binding but it is in accordance with the customary rules of each region, c) wali mujbir can be interpreted as the purpose of the Prophet to 'teach the high ideals' in society, it means the society would not give the bad assumption to any woman who will get married d) wali mujbir as 'a means' for realizing the objective of marriage, that makes both spouses commingle nicely in their marriage and live quietly and affectionately.

B. Suggestions

Based on the results of the research, the suggestions that can be submitted are follows:

1. For parents and *walis*, should consult before marrying the children and never force their will, because the compulsion in marriage is an act that hinders the purpose of marriage.
3. For Islamic academics and the elite of religious community, to understand the Sharia law in humanist and *maslahah* for Islamic society especially for women who will get married. Make a research about *wali mujbir* based on the concept of Maqasid Sharia of Jasser Auda as a major consideration, so the Islamic law can be implemented inclusively and comprehensively.

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MADHHAB IN THE PERSPECTIVE OF JASSER
AUDA'S MAQASID SHARIA**

No	Day/ Date	Subject	Signature
1	Wednesday, November 23 th , 2017	Proposal	
2	Wednesday, March 15 th , 2017	Chapter I,II, and III	
3	Wednesday, March 22 th , 2017	Review of Chapter I, II, and III	
4	Wednesday, April 05 th , 2017	Review of Chapter III	
5	Thursday, May 04 th , 2017	Chapter IV and Abstract	
6	Wednesday, June 07 th , 2017	ACC	

Malang, June 7th, 2017

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