



A SOCIOLEGAL STUDY OF MARRIAGE WITHOUT
GUARDIAN (*WALĪ*) IN SELANGOR AND FEDERAL
TERRITORY

BY

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ABSTRACT

Marriage is an act of *Ibadah* and should be solemnized accordingly by fulfilling all the pillars of marriage which are stipulated by Islamic law (*Shariah*). *Walī* is one of the pillars of marriage according to the majority of Muslim jurists. However, according to Hanafi school of law, *walī* is a mere condition for execution of marriage contract. The study deals with socio-legal study of marriage without *walī* in Selangor and Federal Territory to represent the whole scenario of marriage solemnized in the absence of *walī* in Malaysia. The study among others examines the provision of marriage without *walī* in Malaysia and in particulars Selangor and Federal Territory. Examination extends to practice of marriage without *walī* in several Muslim countries. The study will further examine the views and position of the Muslim scholars on the issue of marriage without *walī*. In addition, some case studies related to this issue will be discovered and analysed. These include reported and unreported cases specifically in Selangor and Federal Territory. The research is basically a qualitative research through collection of data and interviews with Shari'e Judges in Selangor and Federal Territory. Malpractices of marriage which are unauthorized are rampantly practised recently in Malaysia. Such as, marriage syndicate, express marriage and some cases involving marriage in Southern Thailand. All these types of marriages share one similarity that is they are solemnized without the consent from *walī*. Therefore, this study aims at examining the law and the status of marriage solemnized in the absence of women's *walī*. It is believed that it is right time to conduct the research in line with the increase of cases on marriage without *walī* in Malaysia. This study is also relevant and beneficial to become one of the mechanisms in educating the public on the effect of solemnization of marriage without *walī*. This study will be a useful reference to legislators, judges, legal practitioners, academicians, students and public as a whole. From the interviews conducted, the practice of marriage without *walī* had been rampantly practice due to lack of Islamic knowledges.

خلاصة البحث

يعتبر الزواج عبادة من العبادات، ويجب أن يتم وفق الأركان التي نص عليها القانون الإسلامي (الشريعة). اعتبار "الولي" أحد أركان الزواج هو قول جمهور الفقهاء، إلا أن الحنفية لم يعتبروا "الولي" ركناً من أركان الزواج وإنما مجرد شرط لتنفيذ عقد الزواج. يدرس هذا البحث قضية اجتماعية و قانونية والتي تتمثل في الزواج من دون ولي، حيث يقوم بعرض السيناريو الكامل لهذا النوع من الزواج في منطقة سيلانجور و الإقليم الاتحادي. كما أن هذا البحث لا يقتصر على دراسة ظاهرة الزواج من دون ولي في ماليزيا فحسب بل يتوسع ليشمل العديد من الدول الإسلامية. ستقوم هذه الدراسة بعرض وجهات نظر ومواقف العلماء المسلمين من قضية الزواج بدون ولي، وبالإضافة إلى ذلك، سيتم كشف وتحليل بعض القضايا المتعلقة بمسألة الزواج المبلغ عنه وغير المبلغ عنه -، وذلك في ولاية سيلانجور و الإقليم الاتحادي. هذا البحث هو في الأساس بحث نوعي يعتمد على جمع البيانات وإجراء المقابلات مع القضاة الشرعيين في ولاية سيلانجور و الإقليم الاتحادي. يلاحظ في الآونة الأخيرة الزيجات المرفوضة وغير مسموح بها، كالزواج النقابي، والزواج السريع، وبعض الحالات الأخرى التي تشمل الزواج في تايلاند. تتداخل هذه الزيجات في كونها تتم من دون الحصول على موافقة من الولي. فبناء على ذلك، فإن هذه الدراسة تهدف إلى دراسة القانون ووضع الزواج الذي يتم في غياب ولي للمرأة. كما أن هذه الدراسة مناسبة ومفيدة لتصبح واحدة من الآليات التي يعتمد عليها في تثقيف الجمهور حول آثار الزواج دون ولي. وستكون مرجعا مفيدا للمشرعين والقضاة والخبراء القانونيين والأكاديميين والطلاب و الجمهور ككل لأن خلال المقابلات التي أُجريت، يمكن القول إن ممارسة الزواج من دون ولي عرفت انتشارا واسعا وذلك لغياب الوعي بالأحكام الإسلامية.

APPROVAL PAGE

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DECLARATION

I hereby declare that this dissertation is the result of my own investigation, except where otherwise stated. I also declare that it has not been previously or currently submitted as a whole for any other degrees at IIUM or other institutions.

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To my both parents

Abdul Razak Bin Mohamad & Fazhimah Binti Haji Ahmad

For love and unconditional support

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UNREPORTED CASES

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Filza bt. Zainal Abidin and Ahmad Firdaus b. Zainal Abidin. Case no. 14008-052-0471-2013
Lylysysnti bt Abd Razak v Abd Razak b. Abu Samah. Summon no 10007-052-0742-2013
*Nur' Athika bt Zainal abadin v Zainal abadin b. Mat .*Summon no.10007-052-0771-2013
Nurul Hidayah bt Hassan v Apam b. Ampakal. Summon no. 10007-052-0613
*Sholiati bt Basri and Basri bin Ahmad.*Case no. 14001-052-0319-2012
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LIST OF STATUTES

Islamic Family Law (Federal Territories) Act 1984
Islamic Family Law (State of Selangor), 2003 (Selangor Enactment No, 2/2003)
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TABLE OF TRANSLITERATION

Table of system of transliteration of Arabic words and name used by the International Islamic University Malaysia

ء	،	خ	Kh	ش	Sh	غ	Gh	ن	N
ب	B	د	D	ص	ṣ	ف	F	هـ	H
ت	T	ذ	Dh	ض	ḍ	ق	Q	و	W
ث	Th	ر	R	ط	ṭ	ك	K	ي	Y
ج	J	ز	Z	ظ	ẓ	ل	L		
ح	ḥ	س	S	ع	ʿ	م	M		

Short Vowels	
ـِ	A
ـِ	i
ـُ	U

Long Vowels	
ا+ـِ	Ā
آ+ـِ	Ī
أ+ـُ	Ū

CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND OF STUDY

Marriage is a sacred institution. Muslim jurists have interpreted that in the holy Quran, marriage conveys religious duties and consequently institutionalizes as a moral gatekeeper as well as a part of social necessities. Basically, marriage has two main functions which are firstly to regulate relations between normal sexes of male and female; and secondly as a channel where the relationship of child or children to the community is determined.¹ There are various significance of marriage in Islam. Firstly, it is regarded as an act of piety to the creator of humankind i.e. Allah the Exalted. Islam considers marriage institution as a tool to satisfy emotional and sexual gratification, legitimize procreation or offspring and also as a strong bridge in connecting interfamily alliance and group solidarity.²

Generally, both of sexes i.e. male and female or men and women are accepted as the joint heirs of the grace of life. Through marriage, the unity of companionship and intimacy between men and women can be achieved and legalized. It is mentioned in the Quran to the effect:

It is He who created you from a single person, and made His mate of like nature, In order that He might dwell with Her (in love). When they are united, she bears a light burden and carries it about (unnoticed). When she grows heavy, they both pray to Allah their Lord, (Saying): “If Thou givest us a goodly child, we vow we shall (ever) be grateful.”³

¹ Muhammad Iqbal Siddiqi, *The Family Laws of Islam*, (New Delhi: Adam Publishers & Distributors, 2010), 53.

² Hammudah ‘Abd Al’ Ali, *The Family Structure In Islam*, (U.S.A: American Trust Publication, 1977), 54.

³ Surah Al-Araf, 189.

This verse of Quran touches the basic core of the concept of marriage in Islam which is embeded with spiritual and moral designs that is a must necessity in elevating status of matrimonial alliance in individual and social life. In Islam, the union of the sexes has been purified and the joy of the married relationship is secured by the absolute prohibition of any kind of extra matrimonial intercourse beyond the marriage ties. The relationship between husband and wife is portrayed as the relationship between clothes and body. Just as they are close to and fit into each other, nothing can intervene between them without any necessary reason. At the same way, husband and wife are closely related to each other and are a source of mutual support, protection and comfort to each other. In a matter of definition, marriage is a relationship between a man and a woman which is recognized by custom, religion and law that abide of specific rights and duties. Islam recognizes marriage as an institution and accepts it as the basis foundation of human society.⁴

Marriage is treated under the Islamic law as a civil contract concluded between husband and wife. But, being an act as recommended by the teachings of Islam, it is also a religious sacrament. Marriage may be constituted without any luxurious ceremony and without special rites. Accordingly, marriage can be concluded legally by a declaration made by one contracting party followed by a corresponding acceptance from the other one.⁵ The holy Qur'an prescribes in so many verses and points out variety of purposes in having a marriage institution. It is mentioned in the Quran to the effect:

And among His Sign is this, that He has created for you mates from among yourselves, that you might find quiet of mind in them, and He has puts love and mercy between your hearts.⁶

⁴Muhammad Iqbal Siddiqi, 54.

⁵Ahmad Ibrahim, *Family Law in Malaysia*, 3rd ed. (Kuala Lumpur: Malayan Law Journal, 1997), 175.

⁶ 30: 21.

Reflected from this verse, marriage is a union of two souls which are one in essence. Their separate existences are unnatural state of their being which changes into the natural state when they are united through marriage and thus they are brought close to each other physically, mentally and emotionally based on the guidance of Allah the Exalted.⁷ Allah creates men and women as companies for each other, so they can procreate and live in peace and tranquility according to the commandments of Allah based on the directions of his messenger, Muhammad (s.a.w). It is mentioned in the Quran to the effect:

And among His Sign is this, that He has created for you mates from among yourselves, that you might find quiet of mind in them, and He has puts love and mercy between your hearts.⁸

In this verse, Sayyid Qutb in his explanation (*tafsir*) discusses the divine wisdom in creating each of the two sexes in such a way that is complementary to one another, while providing fulfillment for natural needs such as psychological, mental or physical. Thus, naturally, both of the sexes are inclined towards each other and find comfort and stability through love and compassionate. This is so because Allah the Exalted has made the physical and mental constitutions of each of the sexes naturally inclined to fulfill the needs of the opposite gender.⁹

These verses of the Noble Qur'an clearly show that in contrast to other religions like Christianity, Buddhism and Judaism which consider celibacy or monasticism as a great virtue and a mean of salvation, Islam considers marriage as one of the most virtuous and approved institutions.¹⁰ According to *Shafi'i* school of thought, there are certain essential elements of valid marriage that need to be fulfilled.

⁷Ibid, 54.

⁸ 30: 21.

⁹Sayyid Qutb, *In The Shade of The Quran Fi Zilal al-Quran*, trans. and ed by Adil Salahi (United Kingdom: The Islamic Foundation & Islamonline. Net, 2001), vol. XIII, 371.

¹⁰Abdur Rahman I. Doi, *Women in Sharia'ah*, (Kuala Lumpur: A.S. Nordeen, 5th ed., 2006), 31.

Such elements of valid marriage consist of: (a) a male party, (b) a female party, (c) a *walī*, (d) two witnesses and (e) the pronouncement of *ijab* and *qabul*.¹¹ Based on this view, it can be said that the requirement of guardian (*walī*) is essential. Besides making compulsory element of a valid marriage, *walī* is essentially needed for marriage of women, instead of men. If this condition does not exist, the marriage could be considered as invalid.

Marriage is an institution created for the protection of society. Through marriage, humans can remain chaste and unpolluted from unnecessary desires or illegal relationships. The primary base of any civilized society is when two people of different sexes are united in a perfectly lawful way.¹² It celebrates the nature of human being and recognizes their feelings of to love, be loved and to live in a tranquility manner of life. Marriage is the best solution that guarantees happiness in the right way.

The importance of the institution of marriage can be traced back since the time of Prophet Muhammad (s.a.w.). Even the last Prophet Muhammad (s.a.w) entered into marriage contracts with his wives and he said that marriage is part of his *Sunnah*. The *Sunnah* allows the practice of seeing a woman when one proposes to marry, even without her knowing it. Such practice of seeing the woman can be carried out several times, even before the man demands her in marriage; but the suitor must not see any other parts of the woman's body except her face and hands. The practice is also applied to women. From this practice, it indicates that Islam celebrates both parties (husband or wife) the rights in selecting their spouse(s).¹³

¹¹Ibid.

¹² Zeenat Shaukat Ali, *Marriage And Divorce In Islam: An Appraisal*, (India: Jaico Publishing House, 1987), 63.

¹³ Asghar Ali Engineer, *The Rights of Women in Islam*, (Malaysia: IBS Buku Sdn Bhd, 1992), 99.

Islam recognizes the roles of guardians in building up a marriage institution. Generally, the existence of guardian or *walī* in marriage is vital according to *Shafi'ī* legal school of thought whilst there are certain exceptions to this general rule. *Walī* plays the role of an advisor in marriage, especially in order to protect the interest of brides. Additionally, *walī* holds the position of a protector for wife or husband in building up the marriage foundation. However, the priority of having a *walī* is more emphasized on the brides, instead of the bridegrooms due to the soft nature of the brides.¹⁴

Guardianship in marriage basically refers to the power or authority to manage or arrange the marriage of a person in particular the woman. *Walī* refers to the person who solemnizes a marriage contract. *Walī* is one of the pillars of marriage according to majority of Muslim jurists. Guardianship (*wilayah*) is the legal authority invested in a person fully qualified and competent to safeguard the interests and rights of another who is incapable of doing so independently which is someone who has limited or no legal capacity. It is the authority of the father or nearest male relative over minors, or insane or inexperienced persons who need protection and guardianship.¹⁵

Guardian is one of the pillars of marriage. However, nowadays, there are several cases of marriage without *walī* that reflects the wards as seen to deny the right of *walī* in her marriage. For example, in Malaysia there are many cases involving marriage without *walī*. Such as, syndicate marriage¹⁶, run away marriage, cowboy marriage¹⁷ and marriage without authorization in Thailand¹⁸. It has been reported in

¹⁴Mustafa Al-Khin, Mustafa Al-Bugha & Ali Asy-Syarbaji, *Al-Fiqh Al- Manhaji Mazhab Al-Syafie*, (Kuala Lumpur: Jakim, Vol 2, 2011), 45.

¹⁵ Ibid.

¹⁶ Intan Nadia Ghulam Khan & others, *Nikah Sindiket di Malaysia*, (Negeri Sembilan: Penerbit USIM, 2013), 2-15.

¹⁷ "Pelajar IPT Nikah Kobo", *Harian Metro*, 30 April 2014, via <http://www2.hmetro.com.my/>.

¹⁸ "Bilangan Nikah di Selatan Thailand Meningkatkan", via <http://www.mstar.com.my>.

News Straits Times that normally about 100 Muslim couples from Malaysia would tie the knot at the council every month. However, the number has dropped since the escalation of anti-government protest rallies. The ongoing crisis in Bangkok has caused fear among Malaysians, especially with the killing of innocent children and women. However, this number has decreased to 50 cases of marriage per month.¹⁹

The Sun Daily reported that a grandmother's marriages to second husband was illegal. This is because it was solemnized by an unauthorized marriage official at Thailand and it was illegal because it did not conform to Islamic law. Syariah Judge, Justice Shaikh Ahmad Ismail who heard this case considered such marriage was sinful because it did not comply with the Islamic marriage conditions and principles. According to a witness, during the marriage solemnization, Siti Fatimah did not answer when the imam asked whether or not she consented to her marriage to Wan Yusof. Instead she only nodded her head while according to Islamic law, a married woman has to utter her consent to the marriage clearly.²⁰

Sinar Harian Online also reported that marriage in Thailand will cause a lot of problem and normally such type of marriage involves substantial amount of money. This is because most of the marriages were conducted by the syndicate which is unauthorized. Chief *Shari'ah* Judge Kelantan told that they had cases where most of the couples who solemnized their marriages in Thailand were invalid and were not recognized by Malaysian authority.²¹

It has been reported by Kosmo Online that the father of the so-called "married girl" asked his daughter to separate from his husband because it did not fulfill the

¹⁹Sharifah Mahsinah Abdullah, "Fewer Couples Elope To Thailand", *News Straits Times*, 22 February 2014.

²⁰ "Court rules grandmother's marriage to second husband illegal", *The Sun Daily*, 6th November 2008 via <http://www.thesundaily.my>.

²¹"Marriage in Thailand Cause Problems", *Sinar Harian*, 9th March 2014 via <http://www.sinar-harian-online.com>.

pillars of marriage and also it was a cowboy marriage. The father also mentioned that the *qadi*’ also considered the marriage as not valid according to *hukum syarak*’ because it did not fulfill pillars of marriage.²²

There is a case reported in the newspaper involving an Indonesian man who took the girl he admired to Lombok without the knowledge of their parents. This is clearly in contradiction with the *Shari’ah* principle and Malay custom. It was reported in *Harian Metro*, a mother fainted after receiving a phone call from her daughter who was already married in Lombok. Though the Indonesian claimed that this is considered as one of their cultures but it still cannot legalize such act. Consequently, it denies the right of the *wali* of the women.²³

It has been reported in *Kosmo Online*, there is an increase in term of statistic of marriage solemnized in Thailand year by year. According to the report, in 2006 there were 845 cases of marriage in Thailand and 1944 cases in 2007. Then, 2342 cases of marriage in Thailand had been reported. In most cases, they choose to solemnize the marriage in Thailand due to the fact that the requirement of *wali* is not necessary there.²⁴

From all these newspapers reports, it is crystal clear there are rampant cases involving marriage without *wali* especially in Southern Thailand. Thus, this research is very significant to examine the requirements of *wali* in marriage of women by referring to juristic views.

This study is focusing on the issue of marriage without *wali* that happens in Malaysia specifically in Selangor and Wilayah Persekutuan.

²²Ahmad Syakir Sazili, “Saya nak Pisahkan Mereka”, *Kosmo Online*, 17th October 2008 via <http://www.kosmo.com.my/>.

²³“Mother Fainted got Phone call from Lombok”, *Mymetro*, 24 February 2011 via <http://www.hmetro.com.my/>.

²⁴“Nikah Putih Nikah di Siam”, *Kosmo Online*, 4th July 2010 via <http://www.kosmo.com.my/>.

1.2 STATEMENT OF PROBLEM

This research is undertaken based on the premise that marriage without *walī* is not recognized in Malaysia with special reference to Wilayah Persekutuan and Selangor. Such a practice is against the view of the majority of *fuqaha*, even though under the Hanafi school of legal thought, there is a compromise to a certain extent. This research wishes to examine the real position of marriage without *walī* under Islamic law based on the Qur'an and the *Sunnah* of the Prophet (s.a.w) as well as the view of the *fuqaha*. As the practice of marriage without *walī* is quite rampant in Malaysia nowadays, this research is really significant and beneficial to become one of the mechanisms in educating the public and to be the source of references to those people who are directly or indirectly involved in the practice of marriage without *walī* or relevant in the area of Islamic Family Law.

1.3 OBJECTIVES OF THE DISSERTATION

The objectives of the proposed dissertation are:

1. To examine the role of *walī* and the impacts on marriage which was solemnized without *walī*.
2. To analyze the views of four major legal school of thought (which are *Shafi'ī Hanafi, Hanbali and Maliki*) on marriage which was solemnized without *walī*;
3. To investigate the law and the practices of guardianship of marriage in Malaysia and several Muslim countries;
4. To provide recommendation for the improvement of the law governing Muslim marriage in Malaysia in particulars in Selangor and Wilayah Persekutuan (if any).

1.4 HYPOTHESIS

This research is undertaken based on the hypothesis that guardian is an important person in the marriage of a women. This is emphasized by all Muslim jurists including the *Hanafis* and is further proven based on the practice of the Muslim community in many Muslim countries. At the same time, there is a balanced approach undertaken by Islamic law in order to safeguard the daughter's rights in her marriage. Therefore, such rights of the *walī* and that of his daughter are balanced.

1.5 LITERATURES REVIEW

There are a number of the literature review available that arise on topic of marriage and *walī* be it classical or modern from books, articles, journals, papers and so forth. It includes either primary sources or secondary sources.

Mustafa Al-Khin, Mustafa Al-Bugha & Ali Asy-Syarbaji²⁵ (2011) in their book of *Al-Fiqh Al- Manhaji Mazhab Al-Syafie* wrote on wisdom of having a *walī* in marriage such as to protect and safeguard the interest of the daughter. Among others, the authors also discuss on the effect of marriage without *walī*, list of *walī* and types of *walī*. However, they did not discuss on current approach on marriage without *walī* and case studies in this context.

Mahiudin Abu Zakaria Yahya Ibn Sharif En Nawawi²⁶ (1977) in his book, *Minhaj Et Talibin* wrote on *Shafi'e* view that generally a woman cannot give herself in marriage, even though her guardian should authorize her to do so. This is because the requirement of *walī* is vital in marriage of women. In addition, he also discussed the right of widowers to enter into marriage and the element of equality in marriage. In

²⁵Mustafa Al-Khin, Mustafa Al-Bugha & Ali Asy-Syarbaji, 445.

²⁶Mahiudin Abu Zakaria Yahya Ibn Sharif En Nawawi, *Minhaj Et Talibin, A Manual of Muhammadan Law, According to the School of Shafii*, (Pakistan: Law Publishing Company, 1977), 284.