

Marriage in the Absence of *Wali Nasab*: Procedural Difficulties in Obtaining Consent from a *Wali Raja*

Abas, A.^{1*}, Mohd, A.¹ and Mohd Yusof, N.²

¹*Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia, Jalan Gombak, 53100 Kuala Lumpur, Malaysia*

²*Faculty of Law and International Relations, Universiti Sultan Zainal Abidin, Gong Badak Campus, 21300 Kuala Terengganu, Terengganu, Malaysia*

ABSTRACT

Marriage in Islam is a sacred institution. It is a form of ritual submission to Almighty God. For a marriage to be valid, one of the pre-requisites is that it must be entered into in the presence of the female party's guardian (*wali nasab*), who must be a blood relative or she must at least have obtained his consent. In the absence of this guardian or without his consent e.g. through deputed power, the marriage is rendered invalid unless it is solemnised by the head of state or his deputy (*wali raja*) i.e. the *wali* who generally has authority over Muslims in the territory. Nevertheless, there is contention that marriages in need of solemnisation by a *wali raja* are prolonged most probably due to procedural difficulties that arise in the process of application for *wali raja* or other factors. This paper seeks to examine whether this contention is true and what are the procedural difficulties in obtaining such consent of the *wali raja* and what are the ways to overcome those difficulties if any. The research conducted for this paper was basically qualitative, where analysis was based on written procedures and practices outlined by the law. It is hoped that this research will be beneficial to all researchers, academicians, the legal fraternity and the public as a whole.

Keywords: Marriage, guardian/wali, procedural difficulties, wali nasab, wali raja

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E-mail addresses:

afriidah@iiu.edu.my (Abas, A.),

azizahmohd@iiu.edu.my (Mohd, A.),

naziree@unisza.edu.my (Mohd Yusof, N.)

* Corresponding author

INTRODUCTION

A marriage contract requires either the presence or the consent of a guardian (*wali*). The absence of a guardian renders the marriage void and invalid (Al-Ramli, 1993; Al-Zuhaily, 2001; Al-Khin *et al.*, 2009). Therefore, under Islamic law, the

guardian is a very important person for the bride. As a marriage is to guarantee enjoyment, happiness, comfort and success for the husband, the wife and the families, Islamic law assigns a guardian to safeguard the interest and welfare of his ward. Being a male, a guardian knows the character of a man better than a woman. Being a guardian, he should understand and know what is best for his daughter or ward. In view of this role, the bride requires supervision even though her father or guardian may be absent or declines to solemnise her marriage. The father or guardian might be absent due to the distance between his and the bride's residence or between his residence and the marriage venue or due to other reasons such as that he may be performing the *hajj* or *umrah* or is missing or is of a different religion (Re Kyra Mitchell, [2009] 2 ShLR 199). The consanguine guardian might also decline to solemnise the marriage of his ward due to certain reasons such as non-equality of status, enmity, young age, black magic (Marlia Akmar binti Ramli lwn Ramli bin Abdul Rahman (2010) JH 30(2)) etc. In these circumstances, the guardianship shall be replaced by a *wali 'am* (the head of state) or *wali raja* whose power is deputed by the head of state. In Malaysia, there are many marriages of this nature. A bride who has no *wali* from *nasab* and wishes to have her marriage solemnised must proceed with an application for the marriage to be solemnised by the *wali raja* (Islamic Family Law (Federal Territories) Act 1984, s. 13b). She must comply with certain

procedural aspects before her application can be successful and her marriage is solemnised. This procedure of application for a *wali 'am* can result in the delay of the marriage solemnisation. This defeats the purpose of marriage as a ritual to legalise a relationship. In addition, the parties involved might resort to other solutions such as indulging in cross-border marriage or solemnising the marriage without a *wali*.

AN OVERVIEW OF THE CONCEPT OF GUARDIANSHIP (*AL-WILAYAH*) OF MARRIAGE UNDER ISLAMIC LAW

Guardianship in Arabic language is *al-wilayah*. *Al-wilayah* literally means power or authority and help or assistance (Ibn Manzur, n.d.). Terminologically, only one definition has been given by the Hanafi jurists, who defined *wilayah* as the exercise of power by words over another person whether the latter wishes it or not (al-Haskafi, 1966; Badruddin Hj Ibrahim, 2006). Nevertheless, no definition has been given by prominent Sunni jurists from the Malikis, the Shafi'is and the Hanbalis. On the other hand, contemporary Muslim scholars have expounded various definitions of guardianship (*al-wilayah*) (al-Namr, 1409h). For example, Mustafa al-Zarqa', a contemporary Muslim scholar, defines *al-wilayah* as the management of a minor's affairs by a mature person knowledgeable of personal and financial matters (Al-Zarqa, 1968). Shalabi, another contemporary Muslim scholar, defined *al-wilayah* as legal authority enabling

a person to create and carry out various dispositions and contracts. (Muhammad Mustafa Shalabi, 1403/1983). The above definition encompasses all kinds of *al-wilayah*, including guardianship over persons and guardianship over property. Guardianship of marriage is a kind of guardianship over persons. According to Muhammad Abu Zahrah, guardianship (*al-wilayah*) of marriage refers to authority or power that gives rise to a marriage contract (Muhammad Abu Zahrah, n.d.). Guardianship of marriage is further divided into two: limited guardianship (*al-wilayah al-qasirah*) and extended guardianship (*al-wilayah al-muta'addiyah*). Limited guardianship refers to legal authority that a person has to solemnise his own marriage, while extended guardianship refers to legal authority of a person to solemnise the marriage of another person (Sha'aban, 1993). The person who has this legal authority is known as the guardian.

It follows that the word "guardian" in the Arabic language is *wali*. According to the Hans Wehr dictionary, apart from "guardian", *wali* can be literally defined among others as "helper" or "protector" or "sponsor" or "patron" (Wehr, H. n.d.). Based on the definition of guardianship, guardian (*wali*) in marriage refers to the person who is authorised to give rise to a marriage contract. According to al-Zuhaily, *wali* is a person who leads a marriage contract (Al-Zuhaily, 2001). Guardianship over marriage of a woman falls under extended guardianship, where a guardian has authority to solemnise the marriage of a woman. There are four

causes of extended guardianship: (1) blood relationship (*qarabah*) such as legal authority of a father over his daughter (2) ownership (*milk*) such as legal authority of a person over his slave; (3) *wala'* or the right of successor by contract; (4) Muslim rulership (*imamah*) i.e. legal authority of the ruler over the ruled (al-Haskafi, 1966). However, blood relationship and rulership are the most common and relevant nowadays. Therefore, it is common that guardianship of marriage of a woman can be either guardianship due to blood relationship or guardianship due to rulership. (Al-Zuhaily, 2001). Guardians from blood relationships are those relatives of the woman from the groom's side based on priority. They include the groom's father, germane brothers, consanguine brothers, germane nephews, consanguine nephews, paternal uncles and so forth. The *wali* is duty bound to safeguard the welfare and interests of his ward and to make sure that she is married to a man who is equal to her in status. Furthermore, marriage is not only confined to the relationship between husband and wife but also between their families. (Zaydan, 352-353). This also reflects that the decision to marry is not an individual decision but a collective one. Where there is no *wali* who has blood relationship with the bride due to reasons such as that the *wali nasab* may have died or refuses to consent or he is missing, the *wali* shall transfer to the head of state (rulership) or his deputy. This is based on the *hadith* of the Prophet (pbuh): "The Sultan is the wali for those who have no wali" (al-Shawkani, 1998).

WALI AS ONE OF THE ESSENTIAL REQUIREMENTS (RUKN) OF MARRIAGE IN THE SHAFI'I SCHOOL

It is a well-accepted fact that most Malaysian Muslims follow the Shafi'i school of law. Under the Shafi'i school of law, the *wali* is an essential requirement (*rukun*) of marriage apart from the two parties intending to marry, the two male witnesses and the *sighah* (offer and acceptance) (Al-Ramli, 1993; Al-Khin *et al.*, 2009). Such requirements must be fulfilled to determine the validity of the marriage. Validity of marriage is important as it guarantees further rights to the couple such as the husband's right to obedience, the wife's right to *mahr*; the wife and children's rights to *nafaqah* and the children's rights to lineage (*nasab*) and custody. On the other hand, the absence of a *wali* will invalidate the marriage, and an invalid or void marriage provides no rights and obligations. (Al-Khin *et al.*, 2009).

There are two types of *wali*, and first priority in solemnising a marriage goes to the *wali nasab*, who is closer in degree of blood relationship to the woman (*wali aqrab*). To be a qualified *wali*, he must fulfil all conditions, which include being a Muslim, being sane, being an adult man, being *'adil* (has never committed a major sin and does not continue to commit minor sins), is not *fasiq*, is a free person and is not absent due to *ihram* (performing the *hajj* or *umrah*). Where the *wali nasab* is not qualified, for example if he is dead, insane, senile or a minor, the guardianship transfers to a distant *wali* in blood (*wali ab'ad*).

Where the *ab'ad wali* is not qualified, or something prevents the *wali aqrab* from solemnising the marriage, guardianship shall transfer to the head of state (*sultan*) based on the *hadith* of the Prophet i.e. "The sultan is the guardian for those who have no guardian" (Al-Shawkani, 1998). Al-Shawkani explained that this *wali*, according to the majority of *fuqaha*, refers to kinship (*qarabah*) from the male agnatic group (*'asabah*) of the same parenthood (*nasab*). Thus, if the *wali* is absent or does not exist at all, the matter is transferred to the *sultan* because he is the guardian for those who have no guardian (Al-Shawkani, 1998).

Shafi'i jurists have discussed several situations that result in the transfer of guardianship from the *wali aqrab* (*wali nasab*) to the head of state (*sultan*) or his deputy (*wali raja*). These circumstances have been identified as firstly, when the woman has no *wali* from *nasab* at all; secondly, when the *wali aqrab* cannot be found (*ghaib*); thirdly, when the *wali aqrab* is away beyond a distance of 96 kilometres or two *marhalah* away; fourthly, when the *wali aqrab* is missing; fifthly, when the *wali aqrab* declines (*'udhul*) to solemnise the marriage of his ward; and finally, when the *wali nasab* is marrying his ward and there is no *wali ab'ad* who is at the same rank as he (Al-Ramli, 1993; Al-Shirazi, 1994).

Where the *aqrab wali* is qualified and capable of solemnising the marriage of his ward, he may execute this right and power to solemnise the marriage in several ways,

namely, either by being present on the day of the marriage and acting as the *wali* or by giving his consent for the marriage to be solemnised by a *wali raja*. He might also delegate his power to a qualified person, for instance from among his relatives or friends, or *juru nikah* as practised today in Malaysia. The absence of a *wali* or his deputy or *wali 'am* will render the marriage invalid or void (Al-Shirazi, 1994; Islamic Family Law (Federal Territories) Act 1984 s. 7, 13).

Muslim jurists do not seem to have discussed in detail the procedure to be adopted when the *wali* declines to solemnise his ward's marriage. Nevertheless, the *sultan* or his deputy (*wali raja*) is allowed to take the place of the *wali aqrab* upon fulfilment of several conditions, namely, if the *wali* declines to solemnise the marriage and the man who is marrying his daughter or ward is equal in status (*kufu*) with her. (Al-Shirazi, 1994).

The Law in Malaysia

Islamic law relating to the personal law of Muslims in Malaysia is governed by the Islamic Law Act and Enactments of every state. This paper will mainly refer to the Islamic Family Law (Federal Territories) Act 1984 (Act 303) (herein after referred to as IFLA) as this Act is considered the pioneer Act relating to Islamic rules governing marriage, divorce and related matters. The laws in the IFLA are quite similar to the provisions of the other 12 states in Malaysia i.e. Selangor (e.g. the Islamic Family Law (Selangor) Enactment

2003), Negeri Sembilan, Malacca, Johor, Perak, Pulau Pinang, Kedah, Perlis, Pahang, Kelantan, Terengganu, Sabah and Sarawak.

The IFLA does not define a *wali*. However it defines the *wali Mujbir* as being the father or paternal grandfather (Islamic Family Law (Federal Territories) Act 1984, s. 2). The IFLA also defines a *wali Raja* as the *wali* authorised by the Yang di-Pertuan Agong in the case of the Federal Territories, Malacca, Penang, Sabah and Sarawak or by the Ruler, in the case of other States as the person who gives away in marriage a woman who has no *wali* from *nasab* (the Islamic Family Law (Federal Territories) Act 1984, s. 2).

With regards to the requirement of a *wali* in marriage, the IFLA provides for both the *wali* and the woman's consent in marriage. The IFLA states that:

- a) A marriage shall not be recognised and shall not be registered under this Act unless both parties to the marriage have consented thereto, and either-
- b) the *wali* of the woman has consented thereto in accordance with Hukum Syarak; or the Syariah Judge having jurisdiction in the place where the woman resides or any person generally or specially authorised in that behalf by the Syariah Judge has, after due inquiry in the presence of all parties concerned, granted his consent to the *wali raja* to solemnise the marriage in accordance with Hukum Syarak; such consent may be given wherever there is no *wali* by *nasab* in accordance with

Hukum Syarak available to act or if the *wali* cannot be found or where the *wali* refuses his consent without sufficient reason (Islamic Family Law (Federal Territories) Act 1984, s. 2).

The above provisions indicate that when a woman has no *wali* from *nasab* or because the *wali nasab* cannot be found or refuses to solemnise the marriage, the woman may apply for the marriage to be solemnised by a *wali Raja*.

Apart from consent, the IFLA also provides for procedure of marriage solemnisation in relation to both *wali nasab* and *wali raja*. The IFLA states, among other things, that a marriage in the Federal Territories shall be solemnised by either the *wali* in the presence of the Registrar or by the representative of the *wali* in the presence of and with permission from the Registrar or by the Registrar as the representative of the *wali* (Islamic Family Law (Federal Territories) Act 1984, s. 7 (1(a-c))). Where the marriage involves a woman who has no *wali* from *nasab*, the marriage will be solemnised by the *wali raja* (Islamic Family Law (Federal Territories) Act 1984, s. 7(2)).

There are several cases related to application for *wali raja* in the Syariah Court based on several grounds. In the case of Azizah binti Mat v Mat bin Salleh (1976 2 JH 251), the father declined to solemnise the marriage of his daughter as he wanted his daughter to get a job first before she got married. He had previously allowed her to become engaged to the man she wished to marry but after two years, he changed

his mind. The court held that in this case the father had declined to solemnise the marriage of his daughter without sufficient reason, and therefore, the court allowed the application for a *wali raja*. In the case of Sharifah Hanim v Syed Hussein bin Syed Salim (Civil Case no. 10005-052-1065-2004), the daughter made an application to solemnise her marriage through the *wali hakim* as her father declined to be her *wali* because, among other reasons, he believed the prospective groom to be of bad character. The court allowed the application as the court found that the father had refused without sufficient reason. In the quite recent case of Marlia Akmar binti Ramli lwn Ramli bin Abdul Rahman (2010 JH 30(2)), the daughter applied for a *wali hakim* as her father declined to solemnise her marriage. The court allowed her application as the reason for declining to solemnise the marriage as given by the father was insufficient and the man was equal in status with the daughter. An appeal that was filed by the father later was also dismissed by the court (Ramli bin Abdul Rahman lwn Marlia Akmar binti Ramli (2010) JH 30(2) 199).

There was also an application for a *wali hakim* by a new convert. In the case of Re Kyra Mitchell [2009] 2 ShLR 199, the applicant applied for a *wali raja* as she had no *wali* from *nasab*. The court allowed her application. In this case, the court also held that a son could not be the *wali* for his mother because of his relationship to her as son.

The provisions of the IFLA and the above four cases do not seem to reflect any

difficulty in procedure of application for a marriage to be solemnised by a *wali hakim* or *wali raja* even though in practice there may be a contention by one or both of the parties involved that they faced difficulties and tension while awaiting the court's decision in granting the marriage to be solemnised by a *wali hakim* or *wali raja*. (Interview with applicant, 18 March 2011). One case involved the marriage of a woman whose father was missing and whose whereabouts were unknown. However, so far, there has been no reported cases related to the application for a *wali raja* where the *wali nasab* was missing. As this paper studies only recorded cases dealing with procedural difficulties, we will examine further procedure for application for a *wali hakim/raja*.

Procedure for Application for a Wali Raja

Generally, under Islamic family law enforceable in all states in Malaysia, permission to marry is applied from the Office of the Registrar for Marriage, Divorce and *Ruju*' where the wife-to-be resides (section 16 of the Islamic Family Law (Federal Territories) Act 1998). However, there are cases that the Registrar must refer to the Syariah Subordinate Court before approval to marry can be given. The cases concern:

- a) application to marry by a man below 18;
- b) application to marry by a woman divorced before consummation
- c) application for a *wali hakim* for these reasons:
 1. no *wali* from *nasab*

2. missing *wali*
 3. convert *Muslim*
 4. illegitimate daughter
 5. *wali* refuses to be a *wali*
 6. *wali* is away performing the *hajj* or *umrah*
 7. *wali* cannot be contacted because of a situation of emergency
- d) application for polygamous marriage

The procedure for application of a *wali hakim* depends on whether the application is made on the grounds of conversion, the bride being an illegitimate daughter, there being no *wali* from *nasab*, the *wali* is missing or the *wali* refuses to give permission. For an application on the grounds of either conversion, there being no *wali nasab* or the *wali* is missing, the applicant should submit the relevant documents to the Registrar of Marriage, Divorce and *Ruju*, after which an interview with the Registrar will be scheduled. The Registrar will further investigate the matter, and if satisfied with the reasons given, will submit a report to the Syariah Court. The applicant will then make an application to the Syariah Subordinate Court that is supported by an affidavit (Syariah Court Civil Procedure (Federal Territories) Act 1998 s. 7(2), Second Schedule of SCCP (FT) Act 1998, Form MS 3, MS 26). It is to be noted that according to the Practice Direction issued by JKSM, priority will be given to an application for *wali hakim* in case of conversion whereby the application will be heard and determined on the same date of application if all the documents and particulars are complete. For an

application for *wali hakim* on the grounds of the case involving an adopted daughter, a missing *wali* or an illegitimate daughter, the application will be heard on the date that will be fixed (Practice Direction No 8 2012). After the Syariah Subordinate Court grants permission to marry in the presence of a *wali hakim*, the applicant will submit the order to the Registrar of Marriage, Divorce and *Ruju'* and proceed to make the stipulated payment. The Registrar will then issue a letter of permission for marriage.

When a *wali* refuses to be the *wali*, the applicant must get permission to proceed with the marriage from the Syariah Subordinate Court by filing an application that is supported with an affidavit. At this stage, the court may order the party to try to settle the case by way of *sulh* first. The date will be fixed by the Court and in the hearing, the Court will call the father to explain his reasons for refusing to be the *wali*. If the Court finds the reason to be unreasonable, it will instruct the father to be the *wali* in the marriage. However, if the *wali* refuses after being instructed by the court twice, the right of being the *wali* will be transferred to the *wali ab'ad*, not the *wali raja* (Practice Direction No 5 2008). The court may also grant permission to solemnise the marriage by a *wali raja* (Azizah binti Mat lwn Mat bin Salleh (1976) 2 JH 25; Marlia Akmar binti Ramli lwn Ramli bin Abdul Rahman (2010 JH 30(2)).

Procedural Difficulties

It can be seen that the law does describe the procedure for application to marry in the presence of a *wali raja*. If the *wali* refuses

to give his consent and the daughter files an application for *wali raja*, the *wali* will be summoned by the Syariah Subordinate Court to explain why he refused to give consent. The summons needs to be served in person as provided for in Section 41 of the Syariah Court Civil Procedure (Federal Territories) Act 1998. The person summoned is given a copy of the summons bearing the seal of the Court. A problem may occur if the *wali* refuses to receive the summons, in which case, the summons server may leave the summons near the person being served and direct his attention to it (SCCP 1998 s 42). In the affidavit of service, the summon server must state the manner in which the summons was served. Another problem may occur if the *wali* refuses to attend the court proceedings after the summons has been served. In this case, the Syariah Court may issue a warrant of arrest to compel the appearance of the *wali* (SCCP 1998 s. 51). If the court is satisfied that summons has been duly served, the bride-to-be must produce witnesses to testify that the *wali* is missing and then take the *yamin istizhar*. A problem may occur if the bride-to-be fails to produce witnesses who can testify to the status of the father and support her application. This may delay the proceedings. However, if the plaintiff can prove her case, the court will then grant her application (SCCP 1998 s. 121(1)(b)).

Delay in obtaining permission from the *wali* or permission to marry in the presence of a *wali raja* can compel the couple to elope to a jurisdiction that is more than 2

marhalah away in order to justify marriage with no *wali*. Popular places for this are Narathiwat, Yala, Pattani, Songkla, Sattun and Betong, where the marriage may be solemnised in the presence of a *wali raja/hakim* appointed and recognised by the government.

CONCLUSION

It is undeniable that a successful marriage begins with a good husband and wife. Due to the understanding that a woman lacks knowledge and experience of man's behaviour, Islamic law provides for assistance in choosing a man for marriage. Islam considers the *wali* as being an important person in monitoring the marriage of a woman. The *wali* must ensure that the woman has made the right choice. Due to the significance of the *wali* in the marriage of a woman, Islam rules that where the *wali* from blood relationship is absent, he should be replaced by the sultan or his deputy to ensure the protection of the woman's welfare. The procedural aspect of application for a *wali raja* under Islamic law in Malaysia seeks to achieve the same purpose i.e. to safeguard the welfare of the woman. Such procedure is not to cause difficulties but to make sure that the marriage of a woman is based on approval, knowledge or consent of a *wali* who performs this important function in the marriage of a woman. The above discussion also reflects that the procedure that is outlined by the law will not cause any difficulty to the applicant if she can prove her claim during the trial. Problems or

difficulties may arise only in remote cases where the application is made for a *wali raja* due to a missing *wali aqrab* (interview with the applicant, 2011). Such problems and difficulties are mainly due to the delay in serving the summons as the *wali* might not be able to be reached. To overcome these difficulties, perhaps the law should provide a clear rule for a minimum period for the *wali* to turn up. For example, where a *wali* does not turn up after advertisement in the newspapers for one month, then the ward may testify and take the prescribed oath and her application be duly considered and granted. The procedure needs to be eased in order to prevent the couple from eloping and opting for a runaway marriage that may lead to another set of problems.

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