



The Position of *Ijbar* Rights in Perspective Islamic Law and Human Rights

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Abstract

This article aims to illustrate the concept of *ijbar* according to Islamic religious law based on the opinion of jurists about the right to force a girl (*ijbar* right) to marry owned by her guardian even without her consent because a guardian is considered to be the one who knows best about what is best because women are considered not proficient in formulating things that are best for her, Therefore, consent is not a priority that ultimately monopolizes women's interests and has the potential to cause violence against women, therefore this article tries to describe *ijbar* rights according to the perspective of Islamic Law and Human Rights.

Keywords: *Ijbar* Rights, Islamic Law, Human Rights

Abstrak

*Artikel ini bertujuan untuk memberikan gambaran tentang konsep *ijbar* menurut hukum agama Islam berdasarkan pendapat para fuqaha tentang hak memaksa seorang anak perempuan (*ijbar* hak) untuk menikah yang dimiliki oleh walinya walaupun tanpa persetujuannya karena wali dianggap sebagai orangnya. siapa yang paling tahu tentang apa yang terbaik karena perempuan dianggap belum mahir dalam merumuskan hal-hal yang terbaik bagi dirinya, Oleh karena itu, persetujuan bukanlah sebuah prioritas yang pada akhirnya memonopoli kepentingan perempuan dan berpotensi menimbulkan kekerasan terhadap perempuan, oleh karena itu artikel ini mencoba menguraikan hak *ijbar* menurut perspektif Hukum Islam dan Hak Asasi Manusia.*

Katakunci: Hak Ijbar, Hukum Islam, Hak Asasi Manusia

Introduction

Marriage is an Islamic law that is used as a legal means for men and women to form families. In addition to seeking the pleasure of Allah, marriage also aims to channel sexual desires, continue offspring, and achieve happiness in life.¹ Various ways are done to achieve this goal, one of which is to choose a good partner. Basically, every human being is given the authority and freedom to choose a partner. Sociologically, mate selection will pay attention to physical appearance, heredity, and finances. In other words, before carrying out marriage, one must consider the seeds, bets, and weights of the potential spouse.² Nevertheless, the Holy Prophetsa emphasized that the religious aspect is the main key to choosing a life partner in order to achieve true happiness

Marriage is a sacred thing in Islam both for the couple and in the family to make it happen, marriage is also one way to meet biological and non-biological needs. In general, a marriage or marriage contract is between a contract and a bond that becomes a family relationship following local norms and is carried out deliberately to establish bilateral relations. creating a happy home and family.

Craving a partner is human nature as a social being, which carries the nature of dependence on the other party. Indeed, from time to time people can feel happy in solitude, but not forever. People have noticed that deep and intimate relationships with others, especially the opposite sex, help them harness their strengths and be better able to deal with challenges.

Choosing a mate is one of the principles of marriage, often clashing with the ijbar rights owned by the guardian. This is then highlighted, that in Islam the right of women to determine a partner is the full right of parents and has no right to determine the choice of a partner or mate. Basically, ijbar rights are seen as a form of parental protection and affection for girls. However, in practice, it is not uncommon for ijbar rights to be interpreted by forcing the will on girls at the time of choosing a partner.³

With this ijbar right, female guardians have the authority to marry off their daughters without obtaining their consent. This kind of model is known as "forced marriage". The phenomenon of coercion in certain traditions of society has been deeply rooted. Moreover, their arguments are based on the views of the ulama' madzhab shafi'i who justify the practice of ijbar rights. Imam Shafi'i's understanding of the right to ijbar is based on a hadith narrating the marriage of 'Aisha with the Holy Prophetsa.⁴

¹ Ahmad Atabik and Khoridatul Mudhiiah, 'Marriage and the Wisdom of Islamic Legal Perspectives', *YUDISIA: Journal of Legal Thought and Islamic Law*, 2 (2014).

² Safrudin Aziz, 'Javanese Traditional Wedding Tradition of Keraton Forms Sakinah Family', *IBDA: Journal of Islamic and Cultural Studies*, 15 (2017).

³ Muhammad Lutfi Hakim, 'Reconstruction of the Rights of Ijbar Wali (Application of Ibn al-Qayyim al-Jawziyyah's theory of legal and social change)', *Al-Manahij: Journal of Islamic Legal Studies*, 8 (2014).

⁴ Syaiful Hidayat, 'The Right of Ijbar Wali Nikah in the Historical Study of Fiqh Shâfi'i', *Tafâquh: Journal of Islamic Research and Studies*, 3 (2015).

"Forced" marriages, in general, are usually the result of the family's own decisions, forced marriage is one of the problems of human rights. Regarding human rights violations with established government decisions and various problems, a good solution is needed from the legal aspects of norms and religion. When viewed from the law in Law No. 39 of 1999 regulates family rights and rights for girls. In the State Minister of Women's Empowerment Regulation number 2 it is stated that:

"Discrimination against women is any distinction and exclusion or restriction made on the basis of sex which has the effect or purpose of diminishing or diminishing the recognition, enjoyment or exercise of human rights and fundamental freedoms in the political, economic, social, cultural, civil or other spheres by women, regardless of their marital status, on the basis of equality between men and women".⁵

Ijbar became a kind of power for guardians, where women became objects of marriage, not subjects of law. This kind of practice, with all the possible harm it causes, to ijbar rights has been going on for too long, so it is necessary to reconsider the relevance of the concept. Her teachings, especially justice for women. Based on the statements described above, this article attempts to describe ijbar rights according to the perspective of Islamic Law and Human Rights.

The Right of Ijbar in Islamic Law According to the Imam of the School

In Islamic treasures, ijbar rights have actually become polemic in themselves. Fiqh experts differ in responding to it, in giving their interpretation certainly cannot be separated from the different socio-historical and socio-political backgrounds from one scholar to another. Similarly, their interpretation is also in harmony with the place and time in which they live.

Syafi'i School

According to the Syafi'i school, the presence of a guardian becomes one of the pillars of marriage, which means without the presence of a guardian the marriage contract becomes invalid. Along with this, Imam Syafi'i, also argued that the guardian was forbidden to complicate the marriage of a woman under her guardianship as long as the woman had a *sekufu partner*. The Dasae used by Imam Shafi'i are suras Al-Baqarah (2): 232, An-Nisa (4): 25 and 34, as well as some hadiths of the Prophet (PBUH).⁶

The freedom and consent of women in marriage, by Imam Syafi'i is classified into 3 groups, namely (1) immature girls. The age limit has not yet reached 15 years or menstrual blood has not come out. In this case, a father may marry the girl even without his consent, provided that it is beneficial and not detrimental to the child; (2) adult girls. Here there is a balance between the father (guardian) and his daughter

⁵ Republic of Indonesia, 'President of the Republic of Indonesia', 1999.

⁶ Muhammad Lutfi Hakim, 'Reconstruction of the Rights of Ijbar Wali (Application of Ibn al-Qayyim al-Jawziyyah's theory of legal and social change)', *Al-Manahij: Journal of Islamic Legal Studies*, 8 (2014).

and (3) the widow. As for the marriage of the widow, there must be express permission from her.⁷ Imam Syafi'i also said that the marriage of a small boy and a girl is delegated to the father and grandfather of the child on the father's side and nothing else. While the contract of a *safih* (idiot) person is not considered valid except with the permission of his guardian.⁸

The basis for establishing the right of *ijbar*, according to Imam Syafi'i is the act of the prophet who married 'Aisha when she was six years old. Abu Bakr's act of marrying off his immature child, coupled with the excuse that all minor children's affairs were the responsibility of his father, was used by Imam Syafi'i as the basis for establishing the right of *ijbar* to immature children, provided that girls had the right to choose to continue the marriage or divorce when they were adults.⁹

Maliki School

According to Imam Malik, founder of the Maliki School, a father has the right to force his daughter (*hak ijbar*) to marry, and this belongs only to a father. It states that the only person who can force a woman to marry is a father to a girl and a little man, a master to his servant (who is not yet an adult), and a guardian to an orphan. Guardians outside the father may only marry if there is consent from the girl concerned.¹⁰

Imam Malik requires permission from a guardian or a respected representative of the family or a judge for a marriage contract. However, it is not explicitly clear whether the guardian must be present at the marriage contract or simply his permission, although Imam Malik did not allow women to marry themselves, either girls or widows.

Regarding the consent of women to be married, Imam Malik distinguishes between girls and widows. For widows, there must first be explicit consent before the marriage contract. As for girls or widows who have not been interfered with by their husbands, the father as a guardian has the right to marry his child. As for the guardian outside the father, he does not have *ijbar rights*. Given the higher power of guardians in terms of consent to the marriage of his daughters, Imam Malik based on a hadith "*al-ayyimu abaqubi nafsaha min waliyiha*". This conclusion is drawn from the opposite understanding of the statement that widows are much more entitled to give consent to their marriages. Therefore the law of seeking a girl's consent in marriage is Sunnah not obligatory.¹¹

⁷ Khoiruddin Nasution, *Marriage Law: Complemented by a Comparison of Muslim State Laws Content* (Yogyakarta: ACAdEMIA + TAZZAFa, 2005).

⁸ Muhammad Jawad Mughniyah, 'Fiqh of the Five Schools', in *Fiqh of the Five Schools*, 2007, p. 345.

⁹ Khoiruddin Nasution, *Marriage Law: Complemented by a Comparison of Muslim State Laws Content* (Yogyakarta: ACAdEMIA + TAZZAFa, 2005)

¹⁰ Arini Robbi Izzati, 'The Power of *Ijbar* Rights on Girls from Fiqh and Human Rights Perspectives', *Al-Mawarid*, 11.2 (2011), p. 8.

¹¹ Khoiruddin Nasution, *Marriage Law: Complemented by a Comparison of Muslim State Laws Content* (Yogyakarta: ACAdEMIA + TAZZAFa, 2005)

Hambali School

Ibn Qudamah of the Hambali school claims that scholars agree on the right of guardian inbar to marry an immature girl, whether the woman concerned is happy or not, on condition that it is *sekufu*. Even Ibn Qudamat himself argued that a father has the right to force his daughter, whether adult or not, to marry a *sekufu* man even if the woman is not happy. Still in the same way, the basis for marrying an immature girl is al-Talaq (65):4. In this verse it principally speaks of the period of 'iddah of a woman who has not yet menstruated or a woman who has broken her period. The simple logic is that 'iddah arises because of talaq, and talaq arises because of marriage. Implicitly, this verse indicates the permissibility of a woman who has not yet menstruated (immature) to marry. While the basis of the hadith permissible marriage of immature women according to Ibn Qudamah is the act of the Prophet marrying 'Aisha when she was seven years old and having sexual relations after nine months old.¹²

Unlike Ibn Qudamah, according to Ibn Qayyim al-Jauziyah, the group's opinion that a girl's consent is not required for her marriage is based on the opposite of the hadith "a widow is more entitled to herself than a guardian". This opinion is rejected by Ibn Qayyim al Jauziyah by saying that direct demonstration of this hadith should take precedence over taking the opposite meaning. Because the determination of the law of a particular case does not necessarily establish the opposite law, it may be that another case has its own legal basis. And the reason palimh strongly rejected the opinion of the group was the hadith of the Prophet who asked for approval for the marriage of a girl.¹³

Hanafi School

Abu Haneefa said that a woman who is a toddler and has a good mind can choose her own husband and both also performs her own marriage contract, whether she is a virgin or a widow. No one has authority over him or opposes his choice on condition that the person he chooses is *sekufu* (commensurate) with him and his dowry is no less than an expensive missile. However, if she chooses a man who is not *in the same way* as her, then her guardian may oppose her, and ask the Qadi to cancel her marriage contract. If the woman marries another man with a dowry less than the dowry, the *Qadi may be asked to cancel his contract if the dowry is not fulfilled*.¹⁴

The basis for determining the consent of a girl in marriage is first, the case of the Prophet who stated that the Prophet refused the marriage of a girl married by his father because the candidate did not approve is the case of al-Khansa'a. In this case al-Khansa'a went to the Prophet and reported the case against him, where he was married by his father to the son of his father's brother whom he did not like, the

¹²Arini Robbi Izzati, 'The Power of Ijbar Rights on Girls from Fiqh and Human Rights Perspectives', *Al-Mawarid*, 11.2 (2011).

¹³Nasution. Khoiruddin, *Marriage Law: Complemented by a Comparison of Muslim State Laws Content* (Yogyakarta: ACAdeMIA + TAZZAFa, 2005)

¹⁴Mughniyah.

Prophet asked again "are you asked for permission (consent)?" replied al-Khansa'a "I am not happy with my father's choice". The Prophet then told her to leave and declared her marriage invalid, saying "marry the person you please". Al-Khansa'a commented "I could have accepted the father's choice, but I wanted women to know that a father has no right to impose his will to marry off his daughter and the Prophet agreed". Added by al-Khansa'a is that the Prophet did not ask whether she was a girl or a widow.¹⁵ From the case of al-Khansa'a it is one reference that there is no distinction between a girl or a widow about the need for the consent of the person concerned in marriage.

Right of Ijbar in the Perspective of Islamic Law

The concept of *ijbar* proposed by the imams of madhhab (Syafi'i, Hanbali, Hanafi, and Maliki) as mentioned above is the concept of *ijbar* based on responsibility not based on *ikrah*. This can be proven by knowing the guardian who was given *ijbar rights*. According to Islamic law (the context of *fiqh*), the granting of *ijbar rights* is only given to the father or grandfather of the daughter under his guardianship. In addition, the reason for granting *ijbar rights* is based on affection for girls under their guardianship who are considered unable or unable to act and have experience in marriage. This is also a form of responsibility from a father to his daughter.

From the opinion of the Imam of the School about the right of *ijbar* it can be implied that the consent of a girl is not a priority in a marriage, and this is actually contrary to the rights of women over her. The right of *ijbar* shackles a girl to the exclusion of her consent and regards a girl as an incapable being. The power of *ijbar rights* instead plunges a girl into a circle of violence, as we still often encounter, namely marriage at an early age. Of course, this will create new problems for women, because entering the marriage level without being based on physical or psychological readiness will have a negative impact on the woman herself. In addition, the abuse of *ijbar rights* is very possible, by using a shield as a guardian can be a marriage is a new mode of contract marriage.

In forced marriages, women (as children) are the most disadvantaged and suffer the most. His right to choose a mate, which is one of the principles of marriage, often clashes with the *ijbar rights* owned by his guardian. This is then highlighted, that in Islam the right of women to determine a partner is the full right of their parents and does not have the right to determine the choice of a partner or mate. The discourse that has developed until now is that *wali mujbir* is a parent who forces his child to marry by his parents' choice or better known as "forced marriage".

The concept of forced marriage that occurs in society is generally more towards *ikrah*. Though the concept of *ikrah* is different from the concept of *ijbar*. *Ikrah* is an act that is irresponsible, violates human rights, and is sometimes accompanied by threats. This coercion is carried out by people whose responsibility

¹⁵ Nasution. Khoiruddin, *Marriage Law: Complemented by a Comparison of Muslim State Laws Content* (Yogyakarta: ACAdeMIA + TAZZAFA, 2005)

is doubtful towards the girl. While *ijbar* is an act to perform marriage for his daughter on the basis of responsibilities that can only be done by the father or grandfather. *Ijbar* is intended as a form of protection or responsibility of a father towards his child. Because of the state of his child who is considered not yet or does not have the ability or friend to act.¹⁶

Based on the description of the concepts of *ijbar* and *ikrah* mentioned above, *the practice of marriage with ijbar rights can be said to be in accordance with what has been regulated in Islamic law, as long as the practice of marriage with ijbar rights is carried out by the wali mujbir on the basis of responsibility and fulfilling predetermined conditions. However, if the practice of marriage with ijbar rights is carried out not only by wali mujbir and is not based on a sense of responsibility and the conditions that have been determined are not fulfilled, it can be said that the practice of marriage with ijbar rights is not in accordance with what has been regulated in Islamic law. This is as it develops in today's society.*

Ijbar Rights in Human Rights Perspective

Human Rights abbreviated as HAM is a translation of human *rights*, which means the basic rights inherent in each and all human beings to be treated in accordance with their human nature if these rights are not implemented completely, human existence becomes incomplete. Article 1 of Law Number 39 of 1999 defines it as a set of rights inherent in the essence and existence of man as a creature of God Almighty and is His gift that must be respected, upheld and protected by the state, law, government and everyone for the honor and protection of human dignity and dignity.¹⁷ These fundamental rights are based on equality in all forms of treatment before the law without regard to discrimination of race, color, sex, language, religion, or political and other views.

The man was created by God with a male and female relationship through marriage as a guarantee of maintaining the human population. There is a hidden stahwat impulse in man, so he will think about marriage. Men and women are bound by God with the bond of love and affection, so the flow of life will continue from generation to generation.

Marriage is carried out in a good way, without any coercion, either from parents or other parties. Islam provides rules, including marriage can be carried out if it gets approval, consideration or willingness from the bride and groom and there is no coercion.

Advances in technology and science have had many changes in the social life of the community, especially women. If in the past the role of women was limited to the kitchen, well, and mattress, as well as patriarchal culture or culture that considers men are superior to women, has been deeply rooted in society, now along with the changing times and the rapid development of communication tools and information windows, women have gone out of the home a lot to study, work, organize, career,

¹⁶ Hussein Muhammad, *Women's Fiqh*, 1st edn (Yogyakarta: IRCiSoD, 2019).

¹⁷ *Law of the Republic of Indonesia Number 39 of 1999* (Republic of Indonesia, 1999).

and shows its existence in the real world. Not infrequently important posts in society and strategic positions in government are occupied by women. As a result, they met, acquainted, and interacted with men. From the intensity of the meeting, often emerge seeds of love that can blossom if nurtured and watered, and are very difficult to contain or avoid. Love is something natural and cannot be forced. If love is forced then it usually won't last long and doesn't end happily.¹⁸

Human Rights perspective on forced marriage by wali mujibi, in the Universal Declaration of Human Rights Article 16 which reads:

1. *Adult men and women, without limitation of nationality, nationality, or religion, have the right to marry and to form families. They have equal rights in matters of marriage, during marriage, and at the time of divorce.*
2. *Marriage can only be performed based on the free choice and full consent of the bride and groom.*
3. *The family is a natural and fundamental unity of society and is entitled to the protection of society and the State.*¹⁹

Human Rights (HAM) are human principles that must not be violated in order to put human status in its true position. Forced marriage is something that is very impossible to carry out regardless of its basis, when looking at the law that in principle does not recognize the right of ijbar wali. In government regulations, marriage must be through the consent of the bride and groom, if the bride and groom do not agree with the marriage, then the marriage contract cannot be implemented. A marriage contract that is executed by force can be canceled. Forced marriage itself has many impacts, one of which is disharmony in the household, the emergence of conflicts against the families of forced marriage partners, divorce, infidelity due to the discomfort of forced marriage.

Conclusion

From the opinion of the Imam of the School about the right of ijbar it can be implied that the consent of a girl is not a priority in a marriage, and this is actually contrary to the rights of women over her. The right of ijbar shackles a girl to the exclusion of her consent and regards a girl as an incapable being. The power of ijbar rights instead plunges a girl into a circle of violence, as we still often encounter, namely marriage at an early age. Of course, this will create new problems for women, because entering the marriage level without being based on physical or psychological readiness will have a negative impact on the woman herself. In addition, the abuse of ijbar rights is very possible, by using a shield as a guardian can be a marriage is a new mode of contract marriage.

¹⁸ Husnul Haq, 'Reformulation of Ijbar Fiqhi Rights in the Challenge of Contemporary Gender Issues', *PALASTREN*, 8.1 (2015), p. 197–224.

¹⁹ United Nations General Assembly, 'Universal Declaration Of Human Rights', iii, 1948, p. 1–6.

The perspective of Islamic law can imply that a girl's consent is not a priority in a marriage, and this is contrary to a woman's rights. The right of *ijbar* shackles a girl to the exclusion of her consent and regards a girl as an incapable being. The power of *ijbar* rights instead plunges a girl into a circle of violence, as we still often encounter, namely marriage at an early age. Of course, this will create new problems for women, because entering the marriage level without being based on physical or psychological readiness will have a negative impact on the woman herself. In addition, the abuse of *ijbar* rights is very possible, by using a shield as a guardian can be a marriage is a new mode of contract marriage.

Viewed from the perspective of human rights law, it can be concluded that the practice of marriage with *ijbar* rights or forced marriage is not in accordance with what has been regulated in human rights law. This is because the practice of marriage with *ijbar* rights or forced marriage is contrary to human rights, especially the human right of women to marry with free will and to choose their life partners. Unlike the case when the bride-to-be, especially the bride-to-be, approves the marriage without any intervention or coercion from anyone, then it does not contradict and does not violate the woman's human rights because she has given her consent.

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