

## Existence of Wali Mujbir Syafi'i Fiqh from the Perspective of Law No. 12 of 2022 on Sexual Violence Crimes

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**History:**

Submitted: 22-05-2024;

Accepted: 13-11-2024

**Keywords:**

Forced Marriage; *Maqasid Syari'ah*; Wali Mujbir



<http://dx.doi.org/10.30641/dejure.2024.V24.279-294>



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**How to Cite:**

Wafa, Zaein. Azmi, Miftahudin. "Existence of Wali Mujbir Syafi'i Fiqh from the Perspective of Law No.12 of 2022 on Sexual Violence Crimes". *Jurnal Penelitian Hukum De Jure*. Volume 24 Number 3, November 2024, 279-294. DOI. 10.30641/dejure.2024.v24.279-294

### ABSTRACT

Forced marriage by guardians is recorded as a form of sexual violence in Indonesia. Government regulation Article 10 of Law No. 12 of 2022 explains that forced marriage is divided into 3, namely child marriage, in the name of culture, and rape victims. The background of this research is due to the problem of the great authority held by the guardian of the mujbir as the guardian of the marriage of children or grandchildren. This great authority is in the form of forced marriage carried out by the guardian of the mujbir without the consent of the bride. The concept of the guardian of the mujbir is a concept contained in the views of the Imam Syafi'i school of thought, as one of the schools of thought widely used in Indonesia. The practice of the guardian of the mujbir in Indonesia certainly raises problems when associated with the provisions of Article 10 of Law Number 12 of 2022, which states that forced marriage is a criminal act of sexual violence. So there are two legal problems. First, is it possible for the view of the Imam Syafi'i school of thought on wali mujbir to be applied in Indonesia second, how is the legitimacy of the authority to force marriage held by the wali mujbir reviewed from the objectives of Islamic law maqashid sharia By using the normative legal research method with a conceptual approach and literature study method, the results obtained are that the concept of wali mujbir is contrary to Law Number 12 of 2022 because it causes forced marriage which is a criminal act of sexual violence so that the view on the concept of wali mujbir cannot be implemented in Indonesia. Viewed from the perspective of its benefits, the concept of wali mujbir is not more beneficial. It causes more forced marriage practices and does not protect women and their rights.

### 1. Introduction

Marriage in Islam is a legal means that allows a man and woman to build a household. The main goal is to seek the humility of Allah. Apart from that, marriage also functions as a halal channel to fulfill sexual needs, continue the lineage, and achieve happiness in life so that they become a sakinah mawaddah warahmah family.<sup>1</sup> Various methods are used to achieve marriage goals, including choosing the right partner. Every individual has the right and freedom to choose their partner. From a sociological perspective, partner selection often considers physical aspects, family background, and financial conditions. In other words, before getting married, one must consider the elements of the future husband's seeds, burdens, and weight.<sup>2</sup>

1 Nirwan Nazaruddin, "Sakinah, Mawaddah Wa Rahmah Sebagai Tujuan Pernikahan: Tinjauan Dalil Dan Perbandingannya Dengan Tujuan Lainnya Berdasarkan Hadits Shahih," *Jurnal Asy-Syukriyyah* 21, no. 02 (2020): 164–74.

2 Rafida Ramelan, "Sekufu Dalam Konteks Hukum Keluarga Modern," *Jurnal Peradaban Dan Hukum Islam* 4, no. 1 (2021). 118

However, Rasulullah saw. Emphasizes that religion is the main factor in choosing a life partner to achieve true happiness.<sup>3</sup>

In practice, the freedom to choose a partner is often limited by the right of *ijbar* held by the parents or guardians of the prospective bride. Fundamentally, the right to *ijbar* is seen as a form of protection and love for parents towards their daughters. However, in reality, the right of *ijbar* is often interpreted as imposing parents' will on their daughters when choosing a partner.<sup>4</sup> With the right of *ijbar*, the guardian of the prospective bride has the authority to marry off his daughter without the child's consent. This practice is known as "forced marriage."<sup>5</sup> This phenomenon of coercion has become part of the tradition in several societies.<sup>6</sup> Their arguments are often based on the views of the Shafi'i sect of scholars who justify the practice of the right of *ijbar*. Imam Syafi'i's understanding of the right of *ijbar* is related to the hadith, which tells about the marriage of 'Aisyah to the Prophet.<sup>7</sup>

The tradition of forced marriage can damage household stability. Often, marriages based on coercion end in divorce. In Indonesia, the divorce rate continues to increase every year. In 2017, religious courts throughout Indonesia decided 380,723 divorce cases; in 2018, the number increased to 443,645 cases.<sup>8</sup> This number is rising, and there was a spike during the COVID-19 pandemic, showing that one of the factors driving divorce is forced marriage, so it is categorized as one of 15 types of sexual violence.<sup>9</sup> The goal of marriage, namely creating a happy and lasting family, is often not achieved. This situation can hurt the mental health of husbands, wives, and even children.

Forced marriage is categorized as a criminal act of sexual violence as stated in Article 10, paragraph 1 of Law No. 12 of 2022 concerning the Crime of Sexual Violence, which explains that forced marriage, which includes sexual violence, is forced marriage against children.<sup>10</sup> Not only is it motivated by child marriage, but also by cultural practices and victims of rape, a criminal sentence of 9 years and a fine of up to Rp. 200,000,000.<sup>11</sup>

As mentioned in the data, cases of forced marriage in Indonesia have indeed become widespread in recent years. The 2020 National Commission on Violence Against Women report still shows various forms of violence against women that occurred throughout 2019. The most prominent type of violence was still the same as in the previous year, namely domestic violence. Domestic violence reached 75% (11,105 cases). Of the total, there were 2,807 cases (25%) of sexual violence directed against girls, intimate partners (girlfriends), and wives. For example, in 2022, in one area in Indonesia, there was a Kiai's son who married a female student who was pregnant with him, and based on information from *KOMNAS Perempuan*, the marriage was carried out by forced marriage, even in marriage practices in several tribes in Indonesia, such as Lily marriage in East Nusa Tenggara, blind Chinese marriage in Aceh Province, elopement in the Sasak tribe of West Nusa Tenggara and grebeg/maghrib marriage in Aceh Province.<sup>12</sup>

After looking at the various explanations above, it shows that forced marriage, or what is called the right of *ijbar wali* according to the view of the Syafi'i School, is permitted to benefit the girl's child, whereas Law No. 12 of 2022 concerning the Crime of Sexual Violence it is stated that coercion in marriage children is a criminal act of

3 Nani Regina dan Winning Son Ashari, "Adab Ta'aruf dan Kriteria Memilih Pasangan," *SANGAJI: Jurnal Pemikiran Syariah dan Hukum* 8, no. 1 (2024): 93–109.

4 Cahya Ma'rifatul Yahya and Inna Fauziatal Ngazizah, "The Practice of Ijbar Rights in Marriage, a Review of the Compilation of Islamic Law (Case Study in Sambung Village, Gajah Subdistrict, Demak Regency)," *QURU': Journal of Family Law and Culture* 2, no. 1 (2024): 1–26.

5 Anwar Hafidzi and Rina Septiani, "Legal Protection of Women Forced to Married In Islamic Law and Human Rights Perspective," *Madania: Jurnal Ilmu-Ilmu Keislaman* 10, no. 1 (September 27, 2020): 18–28, <https://doi.org/10.24014/jiik.v10i1.10547>.

6 Naskah Akademik Rancangan Undang-undang No.12 Tahun 2022 tentang Tindak Pidana Kekerasan Seksual.

7 Musthafa Dib Al-Bugha, *Fikih Islam Lengkap Penjelasan Hukum- Hukum Islam Madzhab Syafi'i*, 19th ed. (Solo: Media Zikir, 2022). 22

8 Mahkamah Agung RI, Laporan Tahunan Mahkamah Agung Republik Indonesia Tahun 2017 (Jakarta: Mahkamah Agung, 2018). 55

9 Diana Yusyanti, "Perlindungan Hukum terhadap Anak Korban dari Pelaku Tindak Pidana Kekerasan Seksual," *Jurnal Penelitian Hukum De Jure* 20, no. 4 (December 10, 2020): 619–36, <https://doi.org/10.30641/dejure.2020.V20.619-636>.

10 Pasal 10 ayat 1 Undang-Undang No 12 Tahun 2022 Tentang Tindak Pidana Kekerasan Sosial.

11 Pemerintah RI, "Undang-Undang No. 22 Tahun 2022 Tindak Pidana Kekerasan Seksual" (2022).

12 Komisi Nasional Anti Kekerasan Terhadap Perempuan, Kekerasan Meningkatkan: Kebijakan Penghapusan Kekerasan Seksual Untuk Membangun Ruang Aman Bagi Perempuan dan Anak Perempuan, Catatan Kekerasan Terhadap Perempuan Tahun 2019, Komnas Perempuan, Jakarta, 6 Maret 2020. 1-2

sexual violence which hurts children and can be punished.

Previous research on the right of *ijbar* guardian has been widely conducted, one of which is the impact of forced marriage on family harmony written by Agus Mahfudin, who explains the negative impact of forced marriage in the household,<sup>13</sup> Similar research was also written by Mohsi, who analyzed forced marriage as a criminal act of sexual violence in the Law on the Elimination of Criminal Acts of Sexual Violence,<sup>14</sup> In addition to government regulations, there is also a comparative study of forced marriage law according to the Imam Syafi'i and Hambali schools of thought written by Nur Ilma Asnawi,<sup>15</sup> Previous research indicates that the polemic against forced marriage is increasing; this cannot be separated from developments over time with the presence of women's rights rising, so the novelty of this research will provide an analysis of the existence of *mujbir* guardians as marriage guardians in forced marriages according to Imam Syafi'i Fiqh and Law No. 12 of 2022 using the *Maqasid al-Syariah* analysis knife to measure the level of benefit from the presence of *mujbir* guardians.

The focus of this research is to find out first, how the Syafi'i School interprets *mujbir* guardians who carry out forced marriages in Indonesia. Second, what is *Maqasid al-Syariah*'s review of forced marriage by *mujbir* guardians from the perspective of the Shafi'i School and Law Number 12 of 2022 concerning Crimes of Sexual Violence.

Various polemics regarding the right of guardianship from the perspective of the Syafi'i School and Law No. 12 of 2022 concerning the Crime of Sexual Violence will be analyzed using the *Maqasid al-Syariah* method proposed by *Abu Ishaq Ibrahim Ibnu Musa Al-Gharnathi* and is better known as *Al-Syatibi*. The author deliberately uses the *Maqasid al-Syariah* theory because it is considered the most suitable analytical tool for the above phenomena. *Al-Syatibi* has the concepts of *daruriyyat*, *hajiyyat*, and *tahsiniyyat*, which are implemented in the aspects of preserving religion *hifdz ad-din*, preserving life *hifdz an-nafs*, preserving offspring *hifdz an-nasl*, preserving mind *hifdz al-aql*, preserving property *hifdz al-mal*.

## 2. Method

This type of research is qualitative research with a normative legal approach method because it is a legal research that is library-based in nature that takes and focuses on secondary data in the form of laws, supporting books, journals, and articles related to the research topic. Then, the analytical tool used in finding the benefits of forced marriage by the guardian *mujbir* is reviewed from the *Maqasid al-Syariah* of Imam Al-Syatibi by analyzing the polemics that exist in the concept of the guardian's *ijbar* rights of Imam Syafi'i with Law No. 12 of 2021 Criminal Acts of Sexual Violence.

## 3. Findings and Discussion

### 3.1 The Concept of Wali Mujbir

Wali *mujbir* is a loan word in fiqh from the word *ijbar*. Etymologically, the word *ijbar* comes from the word *jabara*, which comes from the pattern *af'ala*, which comes from *ajbara yujbiru ijabrun*. If we trace the meaning, it comes down to the meaning of *اجبره على الأمر* coercion, forcing to do something.<sup>16</sup> In terminology, *ijbar* is the authority given to fathers and grandfathers to marry off young girls without their permission. Furthermore, a guardian has the authority to make a contract for a woman for her daughter.<sup>17</sup> The meaning of *ijbar* is also found in the book *Fathu Al-Qadhir* by Imam Kamal Ibnu Al-Humam, which reads:

معن الإجبار أن يباشر العقد فينفذ عليها شاءت أو أبت

13 Agus Mahfudin and Siti Musyarrofah, "Dampak Kawin Paksa Terhadap Keharmonisan Keluarga," *Jurnal Hukum Keluarga Islam* 4, no. 1 (2019): 75–93.

14 Nur Ilma Asnawi and Muammar Bakry, "Kebebasan Perempuan Dalam Memilih Calon Suami; Studi Perbandingan Antara Mazhab Syafi'i Dan Hanafi," *Mazahibuna: Jurnal Perbandingan Mazhab*, December 17, 2020, 212–29, <https://doi.org/10.24252/mh.v2i2.17817>.

15 Nurhayati and Paryadi, "Dampak Nikah Paksa Karena Hak *Ijbar* (Studi Kasus di Kel. Teritip Balikpapan Timur)," *Ulumul Syar'i: Jurnal Ilmu-Ilmu Hukum dan Syariah* 11, no. 1 (2022): 53–65, <https://doi.org/10.52051/ulumulyari.v10i1>.

16 Ahmad Warson Al-Munawwir, "Kamus Al-Munawwir Arab-Indonesia Terlengkap" (Yogyakarta: Pustaka Progressif, 1997). 164

17 Syahrul Mubarak Subeitan, "Forced Marriage: Implementation of the Mandatory Provisions of the Bride's Consent in Indonesia," *JURIS (Jurnal Ilmiah Syariah)* 21, no. 1 (June 10, 2022): 77–87, <https://doi.org/10.31958/juris.v21i1.5581>.

*Ijbar Nikah* means a guardian who carries out a contractual marriage for a girl he trusts, likes, or does not like.<sup>18</sup>

The above definition can be concluded that a mujbir guardian is a guardian who is given the authority to marry off his daughter or granddaughter without permission from the child or the person to be married. The right of *ijbar* is given to a lineage guardian who has authority over a daughter or someone under his authority.<sup>19</sup>

The authority given to the father or grandfather is a form of affection from a guardian responsible for his daughter or granddaughter. This is inseparable from the stigma of child marriage with coercion because there is no prior permission; a father can marry his daughter who is still a virgin unless the child's status is a widow must have his prior permission.<sup>20</sup>

Wali mujbir is synonymous with forced marriage. Forced marriage, according to the Indonesian dictionary, means a marriage that is not based on the sincerity of one or both partners but is forced by a guardian or family.<sup>21</sup> Another definition of forced marriage is a marriage that is not carried out based on the will of the individual concerned or a marriage that occurs due to pressure or coercion from another party.

According to Mohsi, the term forced marriage has two interpretations and understandings, depending on the context of the marriage itself. First, forced marriage can mean forced sexual intercourse by a husband to his wife without mutual agreement. This forced sexual intercourse is based on the understanding that the wife is a 'field' for the husband, so it is the husband's right to use her as he wishes. This shows a strong textual understanding of religious texts that discuss this issue. Second, forced marriage can also refer to the actions of a guardian who forces his daughter to marry a man of the guardian's choice, where this coercion is absolute and mandatory to be followed.<sup>22</sup>

The guardian of the mujbir raises a polemic against forced marriages in the name of religion, where the right of *ijbar* is understood as the right to force marriage by another person, which in this case is done by the father. In simple terms, forced marriage can be interpreted as a marriage bond without the consent of one of the parties.<sup>23</sup>

Guardians entitled to receive the right of *ijbar* and become mujbir guardians, as mentioned by Imam Syafi'i, are divided into three classifications. First, the condition of women who have not reached the age of 15 or have not experienced puberty (menstruation) is considered immature. In this context, a father has the right to marry his daughter without consent as long as the action brings benefits and prevents harm. Second, Imam Syafi'i views that in the group of adult women, there is a balanced relationship between the father as guardian and his daughter. However, this view emphasizes that the father has a greater right to determine his daughter's marriage affairs. Third, Imam Syafi'i follows the provisions of the hadith, which states that a widow has greater rights over herself than her guardian. Conversely, a guardian must obtain absolute permission from the child under his guardianship before marrying her off.<sup>24</sup>

### 3.2 Forced Marriage By The Guardian From The Perspective Of The Shafi'i School Of Thought

Imam Shafi'i wrote the concept of wali *mujbir* in his book *Al-Umm*, explaining that fathers and grandfathers have the authority to marry off their daughters without their consent and permission first, as long as the marriage

18 Imam Kamal Ibn Humam, *Fathu Al-Qadir* jilid 3, (Beirut: Darul Kutub), 260

19 Ahmad Rasyidi Halim, M. Fahmi Al Amruzi, and Jalaluddin Jalaluddin, "Legal Formulation for Forced Marriage Prevention through the Decision of Wali Mujbir in Religious Courts and Its Relevance with Maqāsid Syari'ah and Human Rights," *Mazahib* 23, no. 1 (June 6, 2024): 79–116, <https://doi.org/10.21093/mj.v23i1.6189>.

20 Musda Asmara, "Concept of Wali Mujbir in Marriage (Legal Criticism of Counter Legal Draft Compilation of Islamic Law)," *Jurnal Ilmiah Mizani: Wacana Hukum, Ekonomi Dan Keagamaan* 8, no. 2 (April 1, 2024): 237–52, <https://doi.org/10.29300/mzn.v8i2.2798>. *Ekonomi Dan Keagamaan* 8, no. 2 (April 1, 2024)

21 Departemen Pendidikan dan Kebudayaan, *Kamus Besar Bahasa Indonesia*, (Jakarta: Balai Pustaka, 1998), 518.

22 M. Mohsi, "Analisis Perkawinan Paksa Sebagai Tindak Pidana Kekerasan Seksual Dalam Rancangan Undang-Undang Penghapusan Kekerasan Seksual PKS," *Al-Adalah: Jurnal Hukum Dan Politik Islam* 5, no. 1 (2020): 1–19. Hal. 12

23 Asmara, "Concept of Wali Mujbir in Marriage (Legal Criticism of Counter Legal Draft Compilation of Islamic Law)."the Counter Legal Draft Compilation of Islamic Law (CLD KHI

24 Muhammad Thahir and Ismail Nasution, "Analysis Of The Legal Status Of Forced Marriage (IJBAR) By Wali Mujbir In Marriage From The Perspective Of Islamic Law," *Riwayat: Educational Journal of History and Humanities* 6, no. 3 (August 31, 2023): 1390–99, <https://doi.org/10.24815/jr.v6i3.33897>.

that takes place meets the requirements and does not harm their daughters.<sup>25</sup> Wali *mujbir* is identified with fathers and grandfathers who are given the right to compel their virgin daughters, except widows, to express love and responsibility. This authority is written in his book Al-Umm:

قال الشافعي فأَي ولي امرأة ثيب أو بكر زوجها بغير إذنِها فالنكاح باطل إلا الأباة في الأباة والسادة في الممالك لأن النبي رد نكاح خنساء ابنة خدام حين زوجها أبوها كارهة ولم يقل إلا أن تشائي أن تبري أبك فتجيزي إنكاحه لو كانت أجازته إنكاحها تجيزه أشبه أن يأمرها أن تجيز إنكاح أبيها ولا يرد بقوته عليها

*Imam Shafi'i said that whoever becomes a guardian for a woman (widow or virgin) then marries her off without the woman's permission. Her marriage is null and void, except for a father who marries off his virgin daughter and a master who marries off his female slave. This is because the Prophet Muhammad refused the marriage of Khansa (daughter of Khudzam) when she was forced into marriage by her father. The Prophet did not react other than saying, "If you want to be dutiful to your father, that is, by approving the marriage he has arranged." Suppose his approval of the marriage is a form of permission for him. In that case, it is more appropriate to say that he ordered Al-Khansa to approve the marriage arranged by her father and not to refuse it because of the father's great authority over his daughter.*<sup>26</sup>

In contrast to the Imam Hanafi school of thought, as stated by Sheikh Abdurrahman Al-Jaziri as follows:

الحنفية - قالوا : لا ولي إلا المجرر فمعنى الولاية تنفيذ القول على الغير سواء رضي أو لم يرض

*Meaning: The Hanafiyah group believes that: "there is no guardian except the nmmujber guardian because the meaning of guardianship here is to decide the opinion of another person whether he is willing or not."*

Imam Shafi'i's statement above affirms that a marriage performed to a widow must have her permission; if there is no permission, the marriage is null and void, except for the authority of wali *mujbir*, intended for virgins. Wali *mujbir* has the authority to marry the father, grandfather, and master, who has power over his slave. A marriage forced by someone not a wali *mujbir* is null and void because someone who contracts must have the authority to contract, which is a right of ownership.<sup>27</sup>

Imam Shafi'i provides the concept of coercion based on the existence of supervision and a sense of benefit over the responsibility of a guardian's authority. He equates the position of the father with the grandfather as higher. Imam Shafi'i explains the validity of marriage is seen by the closest guardian first by the order, and if the blood guardian cannot be a guard, then the Wali Hakim is applied.<sup>28</sup>

Imam Shafi'i, in granting the authority of a wali *mujbir*, is not without reason, but to become a wali *mujbir*, one must meet the following conditions. First, the relationship between the father and the child does not have visible hostility. Second, the couple to be married have an equal position. Third, the marriage is carried out with a comparable dowry. Fourth, the dowry given is money owned by the state. Fifth, the husband who is to be married does not have difficulty providing a dowry. Sixth, the couple to be married are not experiencing problems in their lives such as blindness, deafness, and having diseases like older adults. Lastly, the woman should not be obliged to perform Hajj because it is feared that her husband will forbid her from going on Hajj. After all, hajj is a worship that has a long duration.<sup>29</sup>

25 Dea Salma Sallom and Kholil Syu'aib, "Matchmaking in Pesantren: The Role of Wali Mujbir in Matchmaking with Maqasid Sharia Perspectives," *Al-Risalah: Forum Kajian Hukum dan Sosial Kemasyarakatan* 22, no. 1 (June 30, 2022): 78–91, <https://doi.org/10.30631/alrisalah.v22i1.1073>.

26 Imam Al-Muzani, *Mukhtasar Al-Muzani ala Al-Umm*, 1st ed., Pertama 1 (Jakarta: Daar al- Kutub al-Ilmiyah, 2019). 259

27 Muhammad Khoiruddin, "Wali Mujbir Menurut Imam Syafi'i (Tinjauan Maqâshid Al-Syarî'ah)," *Al-Fikra : Jurnal Ilmiah Keislaman* 18, no. 2 (February 10, 2020): 257–84, <https://doi.org/10.24014/af.v18i2.8760>.

28 Abdul Basit Misbachul Fitri dan Abdul Hafidz Miftahuddin, "Kaidah-Kaidah Wali Dalam Pernikahan: Analisa Perpindahan Hak Wali Dalam Pernikahan," *USRATUNA: Jurnal Hukum Keluarga Islam* 6, no. 2 (20 Juni 2023): 52–69. \u0022KAIDAH-KAIDAH WALI DALAM PERNIKAHAN: Analisa Perpindahan Hak Wali Dalam Pernikahan,\u0022 \u0022USRATUNA: Jurnal Hukum Keluarga Islam\u0022 6, no. 2 (20 Juni 2023

29 Abdul Rohman Al Jaziri, *al-Fiqh Ala Madzahib al Arbaati al Jaziri* Juz 4, (Beirut: Dar al-Kutub al-ilmiyah, 2018) 24. Lihat : Mohsi, "Analisis Perkawinan Paksa Sebagai Tindak Pidana Kekerasan Seksual Dalam Rancangan Undang-Undang Penghapusan Kekerasan Seksual PKS." 34

Imam Shafi'i's statement, which gives fathers and grandfathers the authority to forcibly marry their daughters, is based on his words taken from a hadith narrated by Aisha:

دل إنكاح أبي بكر عائشة النبي ابنة ست و بناؤه بها ابنة تسع على أن الأب أحق بالبكر من نفسها ولو كانت إذا بلغت بكرًا كانت أحق بنفسها منه أشبه أن لا يجوز له عليها حتى تبلغ فيكون ذلك بإذنها

*The marriage of Aisha to Prophet Muhammad SAW by Abu Bakar r.a when she was only six years old and her cohabitation with the Prophet at the age of nine indicates that a father has more rights over his virgin daughter than she has over herself. This is because if a virgin girl who has reached adulthood had more rights over herself than her father, it would be the same as the father not being allowed to marry her until she reaches puberty, so her marriage could only be held with her permission.*

The above statement provides a basis for allowing the marriage of young girls; looking at Aisha, who was married to Prophet Muhammad SAW at 6 or 7 and consummated the marriage at 9. At that time, Abu Bakar married his daughter, who was not yet an adult; this became why a young girl was still under her father's authority.<sup>30</sup>

Imam Shafi'i provides the reason for the existence of a *wali mujbir* not from the marriage of a young girl but to a virgin woman because the purpose of marriage is not for the interests of young children but to make an indicator to realize what is needed in the marriage, it is not appropriate if the cause of the *wali mujbir* is emphasized to young children, but it is more suitable for a virgin woman.<sup>31</sup>

The concept of coercion towards virgin women among the majority of scholars has several differences. First, Imam Hanafi prohibits coercion against adult women. Second, Imam Shafi'i allows coercion against virgin women and prohibits coercion against widowed women, even though she is not yet of age. Third, Imam Maliki allows both virgin and widowed women to be forced. From this concept, it is not appropriate to refer to a small child as the cause of the *wali mujbir*, but the *wali mujbir* is determined for a virgin and adult daughter, to avoid the hardships that may occur in a marriage.<sup>32</sup> Imam Shafi'i's pattern of thought is also inseparable from the historical conditions of the people of Mecca and Medina as the initial place of revelation and hadith, which are used as the basis of law, greatly influence the results of his *ijtihad*. Imam Shafi'i's *ijbar* guardianship is an authority given to fathers and grandfathers who may marry their daughters without obtaining permission from her, except for a widow, whether she is an adult or still minor, and the status of virginity determines the cause of *bar* guardianship.<sup>33</sup>

According to Imam Shafi'i, virginity is a woman who has never had sexual intercourse, even though she was born without a hymen. So, a woman whose hymen is damaged due to an accident, illness, or other things is still said to be a virgin. In contrast, what can damage virginity is the existence of sexual intercourse between men and women even though the relationship is based on adultery.<sup>34</sup> In addition, the concept of virginity in Imam Shafi'i's School is based on the customs and traditions of the place where he grew up. At that time, most Egyptian women married early, so in this case, the role of the guardian is very much needed to determine the marriage of his child so as not to choose the wrong partner for the sake of the child's welfare.<sup>35</sup>

In his thinking, Imam Shafi'i also made *number* guardianship a way to form a family for the sake of Sakinah, Mawaddah, and Warahmah's marriage. A father knows more and has experience in marriage to make good choices and think about the aspects of welfare in determining his law because, at that time, Egyptian women were timid and still underage; in selecting something for themselves, she was very hesitant, so the figure of a

30 Imam Syafi'i Abu Abdullah Muhammad, *Mukhtasar Kitab Al-Umm Fi Al-Fiqh*, 1st ed. (Jakarta Selatan: Pustaka Azzam, n.d.). 277

31 Vreede Intang Chaosa dan Nina Agus Hariati, "Studi Komparasi Pemikiran Imam Syafi'i Dan Imam Hanafi Tentang Wali Mujbir," *AS-SAKINAH* 1, no. 01 (2023). 46-57

32 Muhammad Ngizzul Muttaqin and Nur Fadhilah, "Hak Ijbar Wali Tinjauan Maqashid Syari'ah Dan Antropologi Hukum Islam," *De Jure: Jurnal Hukum Dan Syar'iah* 12, no. 1 (June 30, 2020): 102–19, <https://doi.org/10.18860/j-fsh.v12i1.7923>.

33 Wahbah Az-Zuhaili, "Fiqh Islam Wa Adillatuhu, Terj," *Abdul Hayyie Al-Kattani, Dkk, Jakarta: Gema Insani*, 2011. 461

34 Moch Aufal Hadliq Kmw and Ridwan Yunus, "Relevansi Hak Ijbar Wali Nikah ( Study Pemikiran Wahbah Az-Zuhaili Dalam Fiqh Islam Wa Adillatuhu) Dan Kompilasi Hukum Islam (KHI)," *Mabahits : Jurnal Hukum Keluarga Islam* 3, no. 2 (November 16, 2022): 109–23, <https://doi.org/10.36835/mabahits.v3i2.1058>.

35 Ahmad Zubadul Afiq Afiq, "Kontroversi Hak Ijbar Wali Terhadap Mempelai Wanita Dalam Pernikahan Dan Dampaknya Terhadap Ekonomi Keluarga," *Jurnal Ekonomi Dan Bisnis Islam (JEBI)* 1, no. 2 (September 29, 2021): 135–48, <https://doi.org/10.56013/jebi.v1i2.1069>. 140

father was needed as someone who is closest to his daughter and has the most power over her.<sup>36</sup>

The imams of the schools of thought (Shafi'i, Hanbali, Hanafi, and Maliki) proposed the concept of *ijbar* based on responsibility, not coercion. In Islamic law (*fiqh*), the right of *ijbar* is given to the father or grandfather of a daughter under his guardianship. This right is given because of their affection and responsibility for the daughter, who is considered incapable or inexperienced in marriage matters. This reflects the responsibility of a father towards his daughter.<sup>37</sup>

The practice of marriage with the right of *ijbar* is considered to be by Islamic law if it is carried out by the *mujbir* guardian based on responsibility and fulfills the specified conditions. However, if the right of *ijbar* is used by parties other than the *mujbir* guardian or without fulfilling the specified conditions, this practice is not by Islamic law. This reflects the situation that is developing in society today.<sup>38</sup>

### 3.3 Forced Marriage according to Law No. 12 of 2022 on Sexual Violence Crimes.

The identification of forced marriage as an act of forced marriage is stipulated in Article 10, paragraph 1 of Law No. 12 of 2022 on Sexual Violence Crimes, explaining that forced marriages that include sexual violence are forced marriages against children, marriages based on the name of culture and marriages forced on perpetrators of rape.<sup>39</sup>

Law No.12 of 2022 regarding Sexual Violence Crimes is a Law on the Prevention of all forms of Sexual Violence Crimes that regulates the Handling, Protection, and Restoration of Victims' Rights. This regulation is the result of coordination between the Central Government, Regional Government, and International cooperation so that the prevention and handling of sexual violence victims can be carried out effectively. In addition, it also regulates the involvement of the Community in the prevention and recovery of victims to create an environment free from sexual violence.<sup>40</sup> The protection of victims of sexual violence contained in Law No.12 of 2022 regarding Sexual Violence Crimes includes a discussion of procedural law that regulates sexual violence from the stages of investigation, prosecution, and examination in court while upholding human rights and respecting each other without intimidation.<sup>41</sup>

Law No.12 of 2022 regarding Sexual Violence Crimes was enacted on May 9, 2022, with the hope of protecting women and children to obtain sexual protection rights. In the last five years (2016-2021), based on data from the Online Information System for Women and Child Protection (SIMFONI PPPA) of the Ministry of PPPA, it was revealed that in 2021 there were 25,210 cases of violence against women and children, originating from 27,127 reporters.<sup>42</sup> Furthermore, according to the Annual Record (CATAHU) of the National Women's Commission 2022, over ten years, recorded in 2021, there was an increase and the highest percentage of sexual violence cases, with 16,162 cases, an increase of 50% from the previous year.<sup>43</sup>

Based on the above cases, sexual violence is an urgent matter to be given special regulations, so Article 1 of Law No.12 of 2022 concerning Sexual Violence Crimes regulates all elements of actions that lead to sexual

36 Ary Darma Prastio and Fauziah Lubis, "Differences in the Application of the Right of *Ijbar* Based on *Fiqh* and Law No. 39/1999 on Human Rights," *Law Development Journal* 5, no. 4 (January 27, 2024): 674–86, <https://doi.org/10.30659/ldj.5.4.674-686>.

37 Misbachul Munir and Siti Zumrotun, "The Position of *Ijbar* Rights in Perspective Islamic Law and Human Rights," *El-Usrah: Jurnal Hukum Keluarga* 6, no. 1 (July 1, 2023): 206–14, <https://doi.org/10.22373/ujhk.v6i1.17374>.

38 Toha Andiko, Zurifah Nurdin, and Ahmed Abdul Malik, "Reactualization of *Wali Mujbir* in the Modern Era: Maqasid Sharia Analysis of Imam Shafi'i's Concept Regarding *Wali's Ijbar* Right," *Al-Risalah: Forum Kajian Hukum Dan Sosial Kemasyarakatan* 23, no. 2 (December 31, 2023): 274–91, <https://doi.org/10.30631/alrisalah.v23i2.1403>.

39 Pasal 10 ayat 1 Undang-undang No 12 Tahun 2022 Tentang Tindak Pidana Kekerasan Sosial.

40 "UU No. 12 Tahun 2022 Tentang Tindak Pidana Kekerasan Seksual [JDIH BPK RI]," accessed March 3, 2023, <https://peraturan.bpk.go.id/Home/Details/207944/uu-no-12-tahun-2022>.

41 Efren Nova and Edita Elda, "Implikasi Yuridis Undang-Undang Nomor 12 Tahun 2022 Tentang Tindak Pidana Kekerasan Seksual Terhadap Korban Dalam Sistem Peradilan Pidana Terpadu Yang Berkeadilan Gender," *UNES Law Review* 5, no. 2 (December 23, 2022): 564–79, <https://doi.org/10.31933/unesrev.v5i2.361>.

42 Misbahul Munir et al., "Sistem Informasi Pendugaan Kekerasan Terhadap Perempuan Dan Anak Menggunakan Metode Small Area Estimation," *Jurnal Media Informatika Budidarma* 6, no. 4 (2022): 2469–78.

43 Nazaruddin Lathif et al., "Reformasi Kebijakan Penanganan Tindak Pidana Kekerasan Seksual Menurut Undang-Undang TPKS Untuk Mencapai Masyarakat Indonesia Yang Madani," *PALAR (Pakuan Law Review)* 8, no. 4 (2022): 91–105.

violence as explained in the contents of the Law with the existence of investigation, prosecution, and examination in court.<sup>44</sup>

The identification of forced marriage as an act of forced marriage is located in Article 10, paragraph 1 of Law No. 12 of 2022 concerning Criminal Acts of Sexual Violence, which explains that forced marriage which is included in sexual violence, is forced marriage against children, marriage based on culture and marriage forced on perpetrators of rape.<sup>45</sup>

Marriage based on culture According to the RUUTPKS, this cultural practice is formulated as sexual violence based on research by the National Commission on Violence Against Women; the cultural practice of East Nusa Tenggara, there is a practice called Kawin Lily. If a husband dies, the wife is usually encouraged or even forced to marry the brother of the deceased husband. This obligation applies to women whose dowry has been paid in full. In many cases, women cannot refuse, even though the man may already have another wife, because women whose dowry has been paid in full are considered the “property” of the husband’s family. Rejection can trigger other forms of sexual violence, such as rape by one of the brothers from the husband’s family who wants to marry her. This rape is considered normal and not a violation of customary law. This practice is often called “*main belak*.”<sup>46</sup>

In Java, a tradition called Turun Ranjang when a wife dies. In this tradition, the husband usually marries the deceased wife’s biological sister, especially her younger sister, to maintain the marital property. However, this tradition can potentially be a form of forced marriage, especially if the younger sister who is married feels forced to marry even though she does not love her brother-in-law.<sup>47</sup>

Lamurukung Village and Bone Regency is a custom carried out by parents. They marry off their children without allowing them to choose their life partners. The children cannot openly state their choice in choosing a life partner. If they do, they are considered as women who can bring shame to their families. The community still holds the principle that a good woman is obedient.<sup>48</sup>

Law No. 12 of 2022 concerning Criminal Acts of Sexual Violence states that the existence of these regulations is to protect human rights, especially sexual violence that can happen to anyone; in the renewal of the law, of course, there is a purpose in its creation, so Law No. 12 of 2022 concerning Criminal Acts of Sexual Violence has the following objectives. First, preventing various acts of sexual violence; Second, handling, protecting, and providing restoration of victims’ rights; third, enforcing existing laws to rehabilitate perpetrators of sexual violence Fourth, creating a safe environment without any acts of sexual violence, Fifth, ensuring peace and comfort so that acts of sexual violence are not repeated.<sup>49</sup>

Forced marriage also argues that the married child has not reached the age set by law to enter into marriage. This is contrary to the permission for marriage dispensation offered in Marriage Law Number 1 of 1974 in Indonesia as amended by Law Number 16 of 2019 concerning the determination of the age of marriage while allowing marriage dispensation that the guardian’s parents must submit by considering age and culture.<sup>50</sup>

Furthermore, Law No.12 of 2022 concerning Sexual Violence Crimes states that the existence of these regulations is to protect human rights, especially sexual violence that can happen to anyone; in the renewal of this law, of course, there is a purpose in its making, so Law No.12 of 2022 About Sexual Violence Crimes has the purpose of First, preventing various behaviors of sexual violence; Second; Second; handling, protecting,

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44 “Pasal 1 UU No. 12 Tahun 2022 tentang Tindak Pidana Kekerasan Seksual [JDIH BPK RI].”

45 Pasal 10 ayat 1 Undang-undang No 12 Tahun 2022 Tentang Tindak Pidana Kekerasan Sosial.

46 Naskah Akademi Rancangan Undang- Undang Tindak Pidana Keketasan Seksual Hal.49

47 Haerudin Soyan Pratama and S. H. Natangsa Surbakti, “Urgensi Pengesahan Dan Penegakan Undang-Undang Nomor 12 Tahun 2022 Tentang Tindak Pidana Kekerasan Seksual (UU TPKS) Di Indonesia” (PhD Thesis, Universitas Muhammadiyah Surakarta, 2023).

48 Muhammad Agil Al Hadif, “Nikah Paksa Dalam Prespektif Hak Asasi Manusia: Dampak Negatif Dan Konsekuensinya,” *Jurnal Socia Logica* 3, no. 4 (2023): 10–20.

49 Efren Nova dan Edita Elda, “Implikasi Yuridis Undang-Undang Nomor 12 Tahun 2022 Tentang Tindak Pidana Kekerasan Seksual Terhadap Korban Dalam Sistim Peradilan Pidana Terpadu Yang Berkeadilan Gender,” *UNES Law Review* 5, no. 2 (23 Desember 2022): 564–79, <https://doi.org/10.31933/unesrev.v5i2.361>.

50 Nur Azisa et al., “The Crime Of Forced Marriage Against Children In The Perspective Of Criminal Law,” *Awang Long Law Review* 5, no. 2 (May 31, 2023): 669–74, <https://doi.org/10.56301/awl.v5i2.799>. child marriage is categorized as a criminal act of sexual violence based on forced child marriage. The criminal provisions related to forced child marriages, the TPKS Law is disharmony with The Law of the Republic of Indonesia Number 16 Year 2019 concerning Amendments to The Law of the Republic of Indonesia Number 1 Year 1974 concerning Marriage (Marriage Law



and restoring the rights of victims<sup>51</sup>; third, implementing law enforcement that has been in effect to rehabilitate perpetrators of sexual violence; Fourth, creating an environment that is safe without any behavior of sexual violence, Fifth, guaranteeing peace and comfort so that sexual violence behavior does not recur.<sup>51</sup>

Forced marriage, referred to in Law No. 12 of 2022 concerning Sexual Violence Crimes, contains justification for women's rights that are not given the authority to decide their marriage. First, the existence of coercion in marriage where women do not have a choice to obey their parents' will; this marriage is referred to as forced marriage. Second, the practice of forcing the perpetrator of rape to marry the victim on the grounds of covering up the victim's disgrace. Third, the practice of hanging divorce against women who are forced to marry, but when they want to divorce, their lawsuit is not accepted. Fourth is the practice of blind love marriage, where women are forced to marry but only to return to their original husband to reconcile after three divorces.<sup>52</sup>

The explanation above shows that sexual violence is a complex problem. Article 3 of the Sexual Violence Crime Law explains the substance that the law prevents all forms of sexual violence, handles, protects, and restores victims, enforces the law and rehabilitates perpetrators, creates an environment without sexual violence, and guarantees that sexual violence does not recur.<sup>53</sup>

### 3.4 Review the benefits of forced marriage authority possessed by *mujbir* guardians according to maqashid sharia and the TPPKS Law.

The meaning of marriage is a threat based on things that endanger the physical and spiritual so that he cannot fight. While coercion is an act that contradicts someone's conscience who is forced, coercion that is *ikrah* can be declared null and void by law. The wali *mujbir* Imam Syafi'i concept is based on welfare to protect his daughter's rights as a form of love and responsibility as a father. The understanding of *ijbar* is very different from that of *ikrah*, which is more inclined towards human rights violations due to threats. Imam Syafi'i, in giving the right of *ijbar*, also does not immediately provide that right. Still, there are binding conditions to give the predicate of wali *mujbir* to a father or grandfather.<sup>54</sup>

The conditions for a guardian given the right of *ijbar* are as follows: First, there is no hostility between father and child. Second, women are married to equal men; third, they are married to mahr mitsil. Fourth, The dowry is in the form of money from that country. Fifth, the husband is not in trouble and is stingy when giving a dowry. Sixth, married to someone who does not complicate his family life later, such as being blind and frail. Seventh, the daughter who is married is not in a state of *hajj*.<sup>55</sup>

Wali number, as stipulated, is not explicitly mentioned in the Qur'an and Hadith. Still, several verses indirectly hint at the phenomenon of wali number, for example, in the Qur'an Surah *al-Baqarah* verse 232. This verse explains the prohibition of a guardian to prevent a former wife who has been divorced by her husband and has finished her waiting period from returning to her former husband. However, this verse explains the guardian's relationship with a widow; it can be hinted that the treatment of virgins and widows is different.<sup>56</sup>

The practice of forced marriage by wali *mujbir* in the current context is categorized as a criminal act of violence. Article 10 of Law No. 12 of 2022 on Sexual Violence Crimes states that forced marriage is motivated by culture, such as Lily marriage, blind Cina marriage, Marriage, grebeg/maghrib marriage, hanging divorce, and forced marriage to rape victims. Child marriage is categorized as sexual violence crimes.<sup>57</sup> Lily marriage, blind Chinese marriage, Marriage, grebeg marriage, and hanging divorce is a forced marriage that exists in Indonesian

51 Nova and Elda, "Implikasi Yuridis Undang-Undang Nomor 12 Tahun 2022 Tentang Tindak Pidana Kekerasan Seksual Terhadap Korban Dalam Sistem Peradilan Pidana Terpadu Yang Berkeadilan Gender." 569

52 Askana Fikriana and Yudi Agusfinanda, "Analisis Perkawinan Paksa Sebagai Tindak Pidana Kekerasan Seksual Dalam (Rancangan Undang-Undang) Penghapusan Kekerasan Seksual," *Dalihan Na Tolu: Jurnal Hukum, Politik Dan Komunikasi Indonesia* 2, no. 01 (2023): 60–66.

53 Siti Shalima Safitri, Mohammad Didi Ardiansah, and Andrian Prasetyo, "Quo Vadis Keadilan Restoratif Pada Perkara Tindak Pidana Kekerasan Seksual Pasca Undang-Undang Nomor 12 Tahun 2022 Tentang Tindak Pidana Kekerasan Seksual (Studi Terhadap Pasal 23 UU TPKS)," *Jurnal Hukum Dan HAM Wara Sains* 2, no. 01 (2023): 29–44.

54 Ahmad Agung Setya Budi, "Kawin Paksa Dalam Perspektif Hukum Islam dan Konteks Kajian Hak Asasi Manusia," *Jurnal Dunia Ilmu Hukum (Jurdikum)* 1, no. 2 (2023): 44–49, <https://doi.org/10.59435/jurdikum.v1i2.168>.

55 Wahbah Az-Zuhaili, "Fiqh Islam Wa Adillatuhu, Terj." h. 174

56 Syaiful Hidayat, "Wali Nikah dalam Perspektif Empat Madzhab," *INOVATIF: Jurnal Penelitian Pendidikan, Agama, dan Kebudayaan* 3, no. 2 (2017): 3.

57 Pratama and Natangsa Surbakti, "Urgensi Pengesahan Dan Penegakan Undang-Undang Nomor 12 Tahun 2022 Tentang Tindak Pidana Kekerasan Seksual (UU TPKS) Di Indonesia."

tradition; its application tends to sexual violence that impacts the victim women. This violence is sometimes challenging to avoid because it has become a customary habit in a region.<sup>58</sup>

Forced marriage to rape victims, in many customary systems, women who are victims of rape are required to marry the perpetrator. Such marriages are carried out to protect the village's good name and prevent customary stigma against children born out of wedlock. Unfortunately, this often harms the victim, who has to face ongoing trauma because they continue to remember the rape incident and experience repeated rape.<sup>59</sup> Child marriage is considered forced marriage because a child is unable to consent fully, especially in marriages that will significantly impact their future. Marriage at a child's age can also be considered as rape hidden behind the institution of marriage, considering all forms of sexual relations with children should be regarded as a crime.<sup>60</sup>

Covert/hidden rape refers to a condition where a person is forced to have sexual intercourse without their consent, but the form of coercion or threat used is not always explicit or visible. This situation can involve various methods of manipulation, deception, or mental pressure aimed at forcing the victim to participate in sexual activity.<sup>61</sup>

Sexual activity, as defined by WHO as an act of coercion without consent, if an analysis is drawn on forced marriage by wali mujbir, it can be categorized as part of sexual violence that occurs to women as a violation of Human Rights, as mentioned in the Vienna Declaration 1993 which states that violence against women is a violation of women's fundamental rights and freedoms. This hinders women's ability to express and enjoy their rights and freedoms.<sup>62</sup>

Forced marriage, as depicted in Law No.12 of 2022 on Sexual Violence Crimes, is an answer to the anxiety about sexual violence cases that are developing in society. The development of technology and communication systems makes the opportunity for sexual violence against women increasingly have a gap for the occurrence of deviant behavior.<sup>63</sup> Forced marriage is one of the categories of sexual violence crimes. However, the concept of coercion is equated with the idea of wali *ijbar* rights and is considered to be harmful; this opinion continues to be voiced on the pretext of acts of violence that occur to women.

Looking at the concept brought by Imam Syafi'i, the existence of forced marriage by wali mujbir is the authority and responsibility of a father as someone who has the right to the welfare of his daughter. However, looking at the practice that occurs in the RUU-TPKS, the practice considered forced marriage as sexual violence does not meet the requirements in Imam Syafi'i. The conditions to become a wali mujbir in Imam Syafi'i are the purpose of welfare *maqâsid syarîah* of preserving religion *hifdz ad-din*, preserving life *hifdz an-nafs*, preserving offspring *hifdz an-nasl*, preserving mind *hifdz al-aql*, preserving property *hifdz al-mal*.

The application of the aspect of *hifdz ad-din* preservation of religion in maintaining the religious element of forced marriage wali mujbir Imam Syafi'i has the condition to marry a daughter to an equal man. Equality means a marriage with aspects of equality and equivalence between husband and wife; all these qualities are assessed from various elements, namely, social, work, and others. The Mazhab scholars agree that the emphasis on equality lies in the equality of religion. Namely, the couple must both be Muslims. So it can be understood that forced marriage by wali mujbir Imam Syafi'i fulfills welfare to maintain religion.<sup>64</sup>

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58 Safitri, Ardiansah, and Prasetyo, "Quo Vadis Keadilan Restoratif Pada Perkara Tindak Pidana Kekerasan Seksual Pasca Undang-Undang Nomor 12 Tahun 2022 Tentang Tindak Pidana Kekerasan Seksual (Studi Terhadap Pasal 23 UU TPKS)," 12.

59 Yusuf Saefudin et al., "Tindak Pidana Kekerasan Seksual Dan Perlindungan Hukum Bagi Korban Kekerasan Seksual Di Indonesia," *Kosmik Hukum* 23, no. 1 (February 10, 2023): 24, <https://doi.org/10.30595/kosmikhukum.v23i1.17320>.

60 Komisi Nasional Anti Kekerasan terhadap Perempuan, *Kekerasan terhadap Perempuan Berbasis Budaya: Pemaksaan Perkawinan* (Jakarta: Komnas Perempuan, 2013)

61 Amanda Amanda and Hetty Krisnani, "Analisis Kasus Anak Perempuan Korban Pemerkosaan Inses," *Focus: Jurnal Pekerjaan Sosial* 2, no. 1 (2019): 120–36.

62 Deklarasi Vienna 1993 sebelum di sahkannya Declaration on the Elimination of Violence Against Women atau Deklarasi Penghapusan Kekerasan terhadap Perempuan PBB.

63 Miftahudin Azmi, "Protection of Human Rights Victims of Sexual Violence through Maqasid Al-Shari'ah: A Case in Batu City Indonesia," *Jurnal HAM* 13 (December 3, 2022): 613, <http://dx.doi.org/10.30641/ham.2022.13.613-630>.

64 Mhd Rasidin, Natardi Natardi, and Doli Witro, "The Impact of Unequal Marriage on Household Harmony (Case Study in Sungai Penuh City, Jambi)," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 4, no. 2 (December 28, 2020): 313–36, <https://doi.org/10.22373/sjkh.v4i2.8083>.Jambi

The aspect of *hifdz an-nafs* preservation of life in forced marriage by wali number is based on a father's sense of responsibility to determine a good partner for his daughter. The conditions for becoming a wali number show the seriousness of a guardian in choosing a prospective husband for his daughter to provide future support in preserving body and soul; one of the conditions is to marry a man who is equal and able to offer a mahar missile.<sup>65</sup>

The aspect of *hifdz an-nasl* preservation of offspring and *hifdz al-aql* preservation of intellect, one of the conditions in forced marriage by Imam Syafi'i is not to marry someone difficult for her, such as blind, physically disabled, and insane. This shows the concern for the continuity of offspring that will result from forced marriage by considering the condition of the prospective husband must be healthy and able to earn a living to achieve the purpose of marriage. Still, it should be noted that in this condition, there is no discrimination against people with disabilities. Still, it only provides the best choice for daughters in forced marriage by wali mujbir to achieve welfare for themselves.

The aspect of *hifdz al-mal* preservation of wealth, one of the conditions of forced marriage by wali mujbir, according to Imam Syafi'i, is that the husband should not be from the people who find it challenging to provide a dowry and provide dowry money according to the country's currency, the condition aims to ensure the daughter's life in wealth and sustenance in her life because it is considered that the prospective husband can provide wealth and can provide sustenance as a fulfillment of the aspect of *hifdz al-mal* preservation of wealth.

The explanation above shows that the right of wali *ijbar* proposed by Imam Sayfi'i is in line with welfare law's mission and sharia's purpose. Because in its application, the right of *ijbar* wali is based on the relationship between child and father where there is no dispute. However, in practice, this concept often misunderstands society, where wali *mujbir* is considered to have absolute power over his child. This then gives birth to the phenomenon of forced marriage, which contradicts Law No.12 Year 2022 on Sexual Violence Crime.<sup>66</sup>

The power of the right of *ijbar* can trigger resistance to protecting women's human rights. Male domination over women can result in women losing their right to choose their life partner. This contradicts the basic principles of Islam, which are significantly related to humanitarian values and the concept of equality and equality between men and women. In addition, one of the essential aspects of religion is its ability to liberate humans from various forms of oppression.<sup>67</sup>

The power of *ijbar* rights can trigger resistance to protection of women's human rights. The dominance of men over women can result in women losing their right to choose their life partners. This is contrary to the basic principles of Islam which are very related to human values, and the concept of equality and equality between men and women. In addition, one of the important aspects of religion is its ability to liberate humans from various forms of discrimination.<sup>68</sup>

According to Article 16 Paragraph 1 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), countries that are parties to this convention must take appropriate steps to eliminate discrimination against women in all aspects to marriage and family relationships. In particular, such countries must ensure equality between men and women in the following matters: first, equal rights to enter into marriage; second, the same right to choose a partner freely and get married only with the full and free consent of both parties, of course, if you follow the *ijbar* rights given, it will violate the regulation because Indonesia has adopted the regulation.<sup>69</sup>

According to Nasaruddin Umar, if religious teachings in the form of Fiqh have a patriarchal pattern, it can result in an understanding that tends to demean women. Excessive intervention from a wali mujbir towards a child often reflects more on the culture and personal character of the father or grandfather than religious guidance. In

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65 Mahar Mitsil refers to a type of dowry whose value and form are determined based on what is usually accepted by the bride's family, because there is no specific determination before the marriage contract. If a wife asks for a dowry and her husband has not determined it, or if the husband dies before determining the dowry, then this Mahar Mitsil will be set. Look at Muallim Hasibuan, "Mahar Musamma Dan Mahar Mitsil Dalam Pelaksanaan Perkawinan," *AL-ILMU* 8, no. 1 (2023): 12–32.

66 Mohsi, "Analisis Perkawinan Paksa Sebagai Tindak Pidana Kekerasan Seksual Dalam Rancangan Undang-Undang Penghapusan Kekerasan Seksual PKS."

67 Subeitan, "Forced Marriage."

68 Subeitan.

69 Chatryen M. Dju Bire and Melinda Ratu Radja, "Perlindungan Hak Perempuan Berdasarkan Convention On Elimination Of All Forms Of Discrimination Against Women (Cedaw) Dalam Tradisi Kawin Tangkap Di Sumba," *Jurnal Hukum Samudra Keadilan* 18, no. 1 (May 21, 2023): 131–41, <https://doi.org/10.33059/jhsk.v18i1.7473>.

Islam, the values of freedom and independence are highly valued, both at the individual and communal levels.<sup>70</sup>

The concept of wali mujbir Imam Syafi'i, where the enforcement of this law was at a time when the role of women was still not seen in occupying an essential position in the social order and was considered weak and did not have the competence in making choices, especially in choosing a life partner. However, along with the passage of time and the change of increasingly modern social order in Indonesia to this day, initiated by a female hero, R.A Kartini, with various contemporary gender issues stating the position of women equal to men, thoughts about gender violence began to be voiced.<sup>71</sup>

The advancement of information systems in communication has changed social life and culture, especially highlighted by women. These changes have led women to develop rapidly; who were once women only associated with kitchens, wells, and housework, but with the development of technology, the increasingly advanced information window has resulted in women quickly establishing relationships and getting to know a man, with that interaction it is seen that women who were once incapable of choosing women have shifted to women understanding themselves and the people who interact with them.<sup>72</sup>

Various reasons above show that the sociocultural development of women in Indonesia today is very different from the conditions in the time of Imam Syafi'i. However, what needs to be underlined is that the existence of wali mujbir in the time of Imam Syafi'i is a form of welfare for women at that time that must be fulfilled *dharuriyyat* because women at that time did not know men. In today's context, Ijbar can be established as a supervisor and adviser to daughters and occupies a complement *hajiyyat* because of the context of the times and the concept of applying different legal ilaws.

As mentioned by *Yusuf Qardhawi*, he disagrees with the concept of *ijbar* rights. He argues that this concept results from traditions that need to be changed by the principle of changing fatwas due to changes in time, place, conditions, and traditions. He emphasizes that a father does not have the right to force his adult daughter, who does not have a legal defect, to marry a man of the father's choice. The reason is that social changes have allowed women to interact more with the opposite sex through education, work, and other social activities.<sup>73</sup>

The analysis of *maqasid syariah* on the concept of forced marriage by wali mujbir Imam Syafi'i and Law No.12 of 2022 on Sexual Violence Crimes can be more clearly summarized in the table:

**Table 1. Analysis of the differences in the concept of wali mujbir**

| No. | Imam Syafi'i  | Law no. 12 of 2022 concerning the Crime of Sexual Violence  | Offering Solution   |
|-----|---|---|---|
| 1.  | The authority to enforce marriage is given to fathers and grandfathers for the welfare of daughters who may not know the criteria for a good husband (in the time of Imam Syafi'i), provided it aligns with the objectives of <i>maqâshid</i> and al-Syar'iah of preserving religion <i>hifdz ad-din</i> , preserving life <i>hifdz an-nafs</i> , preserving offspring <i>hifdz an-nasl</i> , preserving mind <i>hifdz al-aql</i> , preserving property <i>hifdz al-mal</i> . | Forced marriage, which has a negative connotation, involves coercion that violates human and women's rights. Such regulations exist to protect women's rights in choosing their life partners. This concept can safeguard the welfare of women and uphold their rights in terms of preserving religion <i>hifdz ad-din</i> , preserving life <i>hifdz an-nafs</i> , preserving offspring <i>hifdz nasal</i> , preserving mind <i>hifdz al-aql</i> , and preserving property <i>hifdz al-mal</i> . | The solution offered should equate various actions without exception to the criteria for coercion that occurs in forced marriages and it is better to eliminate them so that there is no misunderstanding regarding the granting of mujbir guardian rights to fathers or grandfathers.. |

70 Nasaruddin Umar, *Ketika Fikih Membela Perempuan*, (Jakarta: Gramedia, 2014). 95-98

71 Muttaqin and Fadhilah, "Hak Ijbar Wali Tinjauan Maqashid Syari'ah Dan Antropologi Hukum Islam."

72 Thahir and Nasution, "Analysis Of The Legal Status Of Forced Marriage (IJBAR) By Wali Mujbir In Marriage From The Perspective Of Islamic Law."

73 Moch. Aufal Hadliq Khayyul Millati Waddin dan Ridwan Yunus, *Relevansi Hak Ijbar Wali Nikah (Studi Pemikiran Wahbah Az-Zuhail Dalam Fiqih Islam Wa Adillatuhu, dan Kompilasi Hukum Islam)*, Jurnal Mabahits: Jurnal Hukum Keluarga, Vol. III, No. 2, (November 2022). 121

|    |   |  |   |
|----|---|--|---|
| 2. | The enforcement of marriage is given to fathers or grandfathers who have met the requirements in Imam Syafi'i.  | Forced marriage, indicated as sexual violence, refers to 4 acts: child marriage, forced marriage in the name of cultural practices, and forced marriage between the victim and the perpetrator of rape.  | All forms of sexual violence contained in Law No. 12 of 2022 concerning Criminal Acts of Sexual Violence are general coverage of various acts of discrimination in the occurrence of forced marriages in society.   |
| 3. | This was applicable during the time of Imam Syafi'i when women were still considered incapable of choosing a partner and often confined themselves at home.                       | This is a response and an answer to the anxiety of sexual violence that occurs in modern society, which is assessed from various aspects of life that have changed, especially the existence of gender equality and the abolition of the patriarchal system, especially for victims, usually women. This has become an essential indicator for the elimination of sexual violence. | Of course, the times are increasingly advanced, and the application of wali mujbir is not relevant because women today are braver and have a career focus, which is different from the time of Imam Syafi'i, where women at that time were looked down upon in society. |
| 4. | The concept of forced marriage by wali <i>mujbir</i> father or grandfather can be interpreted as supervision and advice to daughters and serves as a complement <i>hajiyyat</i> . | The prevalence of sexual violence, especially in forced marriages, as stated in Article 10 of Law No.12 of 2022 on Sexual Violence Crimes, is an essential argument for achieving welfare. Thus, its implementation is greatly needed for <i>dharuriyyat</i> to achieve welfare.   | Both concepts are intended to protect women, but the author agrees more with the concept offered by Law No. 12 of 2022, which eliminates all acts of discrimination against women, especially in forced marriages carried out by mujbir guardians.                      |

Source: <https://ejournal.unzah.ac.id/index.php/assyariah/article/view/247>, 24 Juli 2024

As explained above, the author concludes that there is a difference in the concept of wali mujbir according to Imam Syafi'i and Law No. 12 of 2022 on Sexual Violence Crimes; there are indicators of a shift in values in the ijbar rights of guardians in Islam. The right of ijbar should be interpreted as the right to advise daughters in choosing their life partners, not as a tool to control and force their children to marry. This value shift has been accommodated by state law, which protects all citizens, especially women, in determining their life partners. This reflects the existence of agreement and happiness from both parties in marriage.

However, the right of ijbar is still very much needed in emergencies when there are violations of the values in al-kulliyat al-khums. For example, if a child asks for permission to marry a non-Muslim man or if there is suspicion that the child may be involved in adultery. This right of ijbar should be considered a last resort and avoided as much as possible.

## 4. Conclusion

The right of ijbar wali, when juxtaposed with the concept of forced marriage, has the right concept and diction; the polemic of coercion that occurs in marriage seems to take away women's rights to choose a life partner, the coercion seems to sabotage women even though the concept given by Imam Shafi'i aims to give fathers the right to protect their daughters. This practice is contrary to Law No. 12 of 2022 concerning the Crime of Sexual Violence because it causes forced marriage, which is a criminal act of sexual violence, so the view of the concept of wali mujbir cannot be implemented in Indonesia.

Wali Mujbir, if viewed from the perspective of its benefits in providing conditions in its implementation, does not provide benefits because it is contrary to the regulations of Law No. 12 of 2022. practice, there is discrimination that does not provide benefits and deprives women of their rights in choosing their life partners.

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