

**A Gender-Based Maqashid Sharia Study of Penghulu in Indonesia  
(A Study of Jasser Auda's Views)**

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**Keywords:**  
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**Abstract:** *The Penghulu in Indonesia has always been identified and held by men instead of women. The legal opportunity in Ministry of Religious Affairs Regulation No. 20/2019 on Marriage Registration has been annulled by Compilation of Islamic Law (KHI), which requires men as guardians, where the existence of marriage guardians is one of the duties of the head of the family, which inhibits women from serving as head of the family. Although fiqh as the main source of KHI has given legality to women as marriage guardians, KHI does not adopt arguments in favour of women becoming marriage guardians. Whereas the duties of the penghulu are not only limited to wali hakim, there are many duties of benefit in marriage such as providing legal certainty through marriage registration. This article aims to find out the existence of female headmen in Indonesia in the perspective of maqashid sharia. The research employs a literature content analysis. The results showed that based on the study of the six features of maqashid sharia proposed by Jasser Auda, the existence of female headmen is basically something that should be commonplace in Indonesia. The value of maslahah behind the administrative duties and legal certainty of marriage is an objective reason for women to serve as penghulu. This is because realising benefit is the obligation and responsibility of every human being, regardless of gender. This is supported by the existence of cognitive features, wholeness, openness, interrelationship between levels, multi-dimensionality, and meaningfulness of women's headship which has fulfilled the elements of maslahat and the objectives of Islamic law. Therefore, through this research, the reconstruction of guardianship law in KHI should be carried out immediately so that it can pave the way for women to access the position of penghulu.*

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### **The Introduction**

Women's involvement in the public sphere is an important factor in efforts to realise gender equality in democratic countries. In this case, Indonesia is among the countries that are committed to upholding the principle of non-discrimination, both through national laws and several international agreements (Junaenah, 2014). Several policies have provided

affirmation for women to engage in politics (Kiftiyah, 2019), government (Bari, 2010), economics (Malonda, 2009), and also religion (Izzati, 2018). The space for women's movement in the productive sector is a contemplative study that gender equality is only an empty discourse at the normative level. More than that, practically, women's involvement is also needed to build a democratic state of law.

In the field of marriage, one of the roles of women can be seen from the legal opportunity to become a marriage officiant (penghulu). So far, there are several studies on the possibility of women to become penghulu in legal regulations in Indonesia. Especially in the Minister of Religious Affairs Regulation Number 20 of 2019 concerning Marriage Registration, according to Nurul Mutmainah (Mutmainah, 2022), Saidah Nafisah (Nafisah, 2016), and Yusril Hidayat Maulidi (Maulidi, 2022) the position of penghulu can not only be held by a man but also by a woman. The article that is used as a basis is Article 1 paragraph (5) which states that "Penghulu is a Civil Servant (PNS) as a Marriage Registration Officer who is given full duties, responsibilities, authorities and rights by the Minister of Religion to carry out marriage / referral service activities, headship development, and Islamic community guidance". This article does not mention a specific gender for the position of penghulu. Therefore, both men and women according to this regulation are allowed to serve as penghulu.

However, in practice, the quantitative presence of female headmen is still rare or even not found at all in Indonesia. Muhammad Ishom in his study revealed that the absence of space for women to serve as headmen was caused by two factors. First, normative juridical factors. Article 3 of the Regulation of the Minister of Religious Affairs No. 30/2005 on Wali Hakim states that wali hakim is the Head of the Sub-district KUA, Penghulu, and Assistant Penghulu. In other words, if female civil servants are appointed as Penghulu or Head of KUA, their position will be questioned when they carry out their duties as wali hakim, which in fiqh must be a man (Ishom, 2017). The logical consequence if a woman serves as a penghulu is that she only carries out duties in administrative matters such as marriage registration, marriage announcements and the provision of marriage books (Saputra, 2018).

The second factor is sociological-psychological. In a patriarchal society, to enter the public sphere, women ASNs are considered to still have obstacles that hinder them, such as if they supervise and record marriages in the mosque while they are not in a state of purity, and attend marriage contracts that are held outside the office and outside working hours, and so on (Ishom, 2017). These conditions make it more difficult for women to access the position of penghulu, and the community itself practically judges that penghulu should be held by men.

Based on this description, the author considers that the problem of women's accessibility as headmen is not only motivated by the legal divergence between the Minister of Religious Affairs Regulation No. 20 of 2019 concerning Marriage Registration and the Minister of Religious Affairs Regulation No. 30 of 2005 concerning Wali Hakim. Because basically in Imam Abu Hanifah's fiqh, women are allowed to become wali hakim (Al-Hanafi,

t.t.). So the real problem lies in the interpretation of the text on wali hakim, where this position makes women unable to carry out their duties as penghulu.

It cannot be denied that patriarchal culture still dominates the interpretation of legal texts and is assumed to contribute to perpetuating gender injustice (Chotbah & Kasim, 2020). One form of gender injustice, as occurs in the issue of female penghulu, is marginalisation, which is the process of excluding women from work (Fakih, 2008). In this case, social factors are more prominent than juridical factors, where natural conditions have closed the opportunities for women that have actually been given by law. Regarding this dichotomy, Faqihudin Abdul Qodir emphasises the concept of anti-patriarchal tawhid to eliminate gender bias in legal practice. According to him, tawhid brings a new perspective on the status, position, role, and value of men and women. The quality of both as human beings is not determined by gender, but by piety which is characterised by how far life benefits humanity (Qodir, 2019).

In this article, a gender-based maqashid sharia perspective on the existence of female headmen in Indonesia will be examined. The use of maqashid sharia theory in the study of Islamic law is very applicable and has been proven to be able to produce actual legal interpretations in the contemporary era. Especially in gender issues, Mohammad Lukman Chakim revealed that the gender equality of women's fiqh has fulfilled the six feature systems (benefits) of maqashid sharia initiated by Jasser Auda. In the cognitive system, equality has a cognitive suitability that is able to reveal the meaning or practical implications of Islamic law (Chakim & Putra, 2022). This also opens the possibility that the existence of women as penghulu contains elements of maslahat towards gender equality as desired by Islamic law.

### **Research Method**

The research method used in this study is descriptive qualitative which is focused on describing the maslahat side of the position of female penghulu in Indonesia, both in juridical and empirical aspects. The literature study was carried out using the documentation method of legislation on marriage, classical fiqh books, books, journal articles and other written sources related to the research theme. The data analysis uses content analysis techniques with the following procedures: First, parsing the theoretical concept of penghulu in the Indonesian context; Second, looking for the significance of women's acceptance as penghulu in fiqh and positive law in Indonesia; Third, examining the existence of female penghulu in the perspective of maqashid sharia.

### **Discussion and Results**

#### **The Existence of Penghulu in Marriage Law in Indonesia**

Basically, classical Islamic law as a reference for Indonesian Muslim communities does not recognise the term or position of penghulu. But historically, the existence of penghulu cannot be separated from the dynamics of community life and is an integral part of the overall development process.

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The existence of penghulu is widely recognised by the Indonesian people as an expert in the field of Islamic religion that has existed for centuries. Historically, the existence of penghulu as an official in the government has existed since the existence of Islamic Kingdoms both in Java and areas outside Java, including in the Dutch colonial government with the following structure:

- a. Centre Level : Penghulu Agung
- b. District Level : Penghulu Kepala (Belanda: Hoofd Penghulu)
- c. Sub-district Level : Penghulu/Naib (Departemen Agama RI, 2005).

During the Dutch East Indies government, the penghulu occupied a number of positions and duties, namely as a judge of a religious court, as well as a mufti (Islamic religious advisor). This position was related to the state aspect of the judiciary, with the task of helping to handle customary cases in the district court. The Penghulu also acts as the mosque's penghulu or imam, who leads the five daily prayers. The Penghulu also takes care of the mosque's finances, called the mosque treasury, and various recitation activities and celebrations of Islamic holidays that have become a tradition in Java..

In relation to the issue of marriage, the task that must be carried out by the penghulu is "recording marriages" in addition to having the authority of the position of wali hakim. As an official or officer of the marriage registrar, wali hakim, mosque imam, the figure of the penghulu always gets a sharp spotlight from various circles, especially the Dutch colonial government, especially regarding money and salaries.

Another task carried out by the penghulu is to become an advisor on religious matters for the regent or assistant regent. In practice, the penghulu is also often assigned to supervise the field of Islamic religious education. In addition, the penghulu is also assigned to provide counselling to the community. Many things have been done by the penghulu, but their status as government employees has never been fulfilled. They are appointed and dismissed by the government, but they are not provided with a budget for the cost of activities and office administration delegated to them.

The institution of the penghulu was further strengthened when the colonial government issued the 1882 staatsblad. This regulation, among other things, regulated the composition of the kepengulon council and its working procedures, while the authority of the cases that could be resolved by the penghulu was still the old one. In terms of area, the authority of the penghulu was the area of authority of the district court. The Dutch East Indies government also established a religious court of appeal called the High Islamic Court (Mahkamah Islam Tinggi, MIT) which held its first session on 7 March 1938, attended by representatives of the colonial government and the general public. The High Islamic Court continued to exist until the end of the Dutch East Indies rule in Java. The powers, duties and working procedures of the kepenghuluan institutions, both at the district level and beyond, as well as the courts of appeal, remained unchanged in Java (Saputra, 2018).

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In later developments, precisely after independence until now, the penghulu is known as a marriage officer or official who is specifically assigned only as an official who takes care of the administration of marriage in accordance with statutory provisions. In carrying out their main duties, the penghulu are guided by the legal basis for marriage registration which includes:

- a. Law Number 1 Year 1974 on Marriage;
- b. Government Regulation No. 9 of 1975 concerning the implementation of Law No. 1 of 1974 concerning Marriage;
- c. Law No. 7 of 1989 concerning Religious Courts as amended several times, most recently by Law No. 50 of 2009 concerning the second amendment to Law No. 7 of 1989 concerning Religious Courts;
- d. Regulation of the Minister of Religious Affairs No. 2 of 1989 concerning Assistants of marriage registration officers;
- e. Joint Regulation of the Minister of Religious Affairs and the Head of the National Civil Service Agency Number 20 of 2005 and Number 14A of 2005 concerning Guidelines for the Implementation of the Functional Position of Penghulu and Credit Score;
- f. Minister of Religious Affairs Regulation No. 13/2012 on the Organisation and Working Procedures of Vertical Agencies of the Ministry of Religious Affairs;
- g. Presidential Regulation No. 7/2015 on the Organisation of the Ministry of State;
- h. Presidential Regulation No. 83/2015 on the Ministry of Religious Affairs;
- i. Minister of Religious Affairs Regulation No. 34/2016 on the Organisation and Working Procedures of the Sub-district Religious Affairs Office;
- j. Peraturan Menteri Agama Nomor 42 Tahun 2016 tentang Organisasi dan Tata Kerja Kementerian Agama;
- k. Regulation of the Minister of Administrative Reform and Bureaucratic Reform of the Republic of Indonesia Number 9 of 2019 concerning Functional Position of Penghulu;
- l. Regulation of the Minister of Religious Affairs No. 20/2019 on Marriage Registration.

Based on the main duties and functions of the penghulu, the penghulu is also in the Marriage Counseling, Development and Preservation Agency (BP4). Penghulu has the following authority.

- a. Providing guidance, counselling and information on marriage, divorce, and reconciliation to the community, both individually and in groups;
- b. Provide guidance on laws and regulations relating to the family;
- c. Providing mediation assistance to parties outside the Religious Courts.;
- d. Providing advocacy assistance in overcoming problems of marriage, family and household disputes outside the Religious Courts;
- e. Reducing the occurrence of disputes and divorce, irresponsible polygamy, underage marriages and unregistered marriages;

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- f. Cooperate with agencies, institutions, and organisations that have similar goals both at home and abroad;
  - g. Publish and disseminate marriage and family magazines, books, brochures, and electronic media as deemed necessary;
  - h. Organising bride-to-be courses, upgrading or training, discussions, seminars, and similar activities related to marriage and family;
  - i. Organising family education to increase the appreciation and experience of the values of faith, devotion, and akhlaqul karimah in order to foster a Sakinah family;
  - j. Take an active role in cross-sectoral activities aimed at fostering the Sakinah family;
  - k. Increase efforts to empower the family economy;
  - l. Other efforts and endeavours deemed beneficial for the benefit of the organisation and for the happiness and well-being of the family (Millah, 2014).

In addition to the duties and authorities mentioned above, the penghulu also has the authority to become a wali hakim in certain circumstances. The role of the penghulu as a marriage guardian is confirmed in article 18 paragraph (3) of PMA No. 11 of 2007. The paragraph states that in order to carry out the marriage contract, the nasab wali can delegate his authority as a marriage guardian to a Marriage Registration Officer (PPN), Penghulu, PPN Assistant or other qualified person. This regulation verbatim shows that one of the duties/authorities of the penghulu or PPN is to become a marriage wali by taukil wali.

Furthermore, Article 23 of the KHI regulates the reasons and causes for the appointment of a wali hakim by the Minister of Religious Affairs. This article explains that the reason the Minister of Religious Affairs appoints a guardian is because there is no nasab wali or the nasab wali cannot be present for various reasons. The reasons that make it impossible for the nasab guardian to be present include the residence of the nasab wali is unknown, the nasab wali is missing (mafqud) or unseen, or the wali adhal or refuses to marry the bride. Article 12 paragraph (3) letter (d) of Minister of Religious Affairs Regulation No. 19/2018 on Marriage Registration also adds that the absence of the nasab wali can also be caused by the nasab wali being in detention. In addition to these reasons, article 2 paragraph (1), PMA Number 02 of 1987 adds that the wali hakim can be caused by the nasab wali who does not meet the requirements to be a marriage guardian. In the case of an unqualified guardian, the legislation clearly states that the nasab wali is not a Muslim, as stated in Article 12 paragraph (3) letter (e) (Zamani, 2019).

Penghulu's tasks related to the application of Islamic teachings and sharia in the field of marriage are not just a ceremonial event, but these tasks are also a means of realising the obedience of a Muslim and binding the sacred bond of birth and mind between a man and a woman. Marriage is a gateway for a person to start and form a new life that is happy and prosperous and creates a quality next generation. Thus, marriage for a Muslim is a very important moment and strategy in navigating married life.

In accordance with the development and dynamics of the community that must be served by the penghulu, the function of the penghulu is not only to record and supervise marriages/marriages, but also to provide guidance to prospective brides, and marriage/marriage counselling, as well as to provide guidance for a sakinah family and the completion of marriage/marriage disputes. Penghulu must also be able to act as an Islamic religious leader in the region and become a role model for the community.

In the community there is still falsification of marriage certificate quotations, underhand marriages, and polygamy without the permission of the Religious Court (PA). Cases like this must be resolved immediately professionally by the penghulu. Thus, the penghulu is required to have an adequate level of knowledge, insight and ability in the field of Islamic religion in addition to mastering other practical knowledge related to the operationalisation of their daily duties and functions, such as communication science, religious psychology, education science and sociology (Departemen Agama RI, 2005).

In its development, the head of the religious affairs office has a very important role in creating a harmonious family. One of them is by playing an indirect role in reducing the divorce rate in the community. This is done through improving the quality of P3N, socialisation, fostering sakinah families, and also providing regular counselling (Nugroho, 2016). Efforts to form harmonious families in the community by the penghulu are also carried out by conducting courses for prospective brides and the formation of sakinah family cadres. By applying the principles of good governance, penghulu carry out their duties which include the utilisation of social media for online consultation, the provision of marriage books and legalisation directly after the *ijab kabul*, and the application of time discipline in the implementation of marriages in the community (Fazari, 2019).

### **Gender Analysis of Women's Accessibility as Penghulu in Fiqh and Positive Law in Indonesia**

Basically, penghulu is not specifically tasked with managing religious affairs alone, but has metamorphosed into a profession in the public sphere as a practitioner. Penghulu is a profession in government with functions and duties representing the government in recording and supervising marriages. Penghulu is ideally the sole actor in carrying out the duties of headship in the field of marriage registration, especially urgent issues that require legal certainty for the community. Besides being mandated by law, Penghulu is also related to the ideals of legal certainty and protection of the parties (Sutrisno & Sukar, 2022).

In Indonesia, the position of penghulu is always identified as a profession that can only be held by men (Nafisah, 2016). It would be very taboo if a woman serves as a penghulu who is always identified as the person in charge of marrying prospective married couples. Meanwhile, in Palestine the existence of female headmasters has begun to be recognised. A woman named Tahrir Hammad, a master's graduate in Contemporary Islamic Studies, has made history by becoming the first woman to be recognised by

the Palestinian government as a marriage officiant, which was previously only done by men (Sutrisno & Sukar, 2022).

In today's context, the existence of a female penghulu is debatable, especially when faced with global issues such as gender. Of course this is a form of discrimination against a woman. Moreover, in the current context, the movement for the struggle for women's rights is incessant.

In relation to female penghulu, between fiqh and the laws and regulations in Indonesia actually do not rule out the possibility of this happening. However, both also do not explicitly state the permissibility of women becoming penghulu. This is because the thoughts and legal wording in them do not support each other or at least both provide a way for women to access the position of penghulu.

The legislation that has been used as a foothold for the opening of the possibility of women serving as headmen is Minister of Religious Affairs Regulation Number 20 of 2019 concerning Marriage Registration. Article 1 paragraph (5) states that the penghulu is a Civil Servant (PNS) as a Marriage Registration Officer who is given full duties, responsibilities, authorities and rights by the Minister of Religion to carry out marriage/reconciliation service activities, kepenghuluan development, and Islamic community guidance. By not mentioning a certain gender as a requirement to become a penghulu, the regulation has actually provided wide opportunities for women.

The duties of the penghulu include planning kepenghuluan activities, supervising the recording of marriage/reconciliation, implementing marriage/reconciliation services, providing fatwa services on munakahat law and muamalah guidance, fostering sakinah families, and monitoring and evaluating kepenghuluan activities and kepenghuluan development. When viewed from the main task, of course there is no prohibition if the position of headman is carried out by a woman. This shows that the legal construction of the kepenghuluan position in Minister of Religious Affairs Regulation Number 20 of 2019 concerning Marriage Registration has accommodated the position of women in the eyes of the law. In line with the general principles adopted by Indonesian law, which prioritise the principle of equality and balance of rights and obligations between men and women. The law always provides general arrangements by not distinguishing aspects of gender (Pagar, 2006).

However, in practice, there is one regulation that closes the "gate" for female penghulu, namely the regulation relating to the duties of the penghulu as a marriage guardian. Juridically, the Compilation of Islamic Law confirms in Article 20 that the one who acts as a wali is a man who fulfils the requirements of Islamic law, namely Muslim, aqil and baligh. The wali of the marriage includes the wali nasab and the wali hakim, where the wali hakim is the duty of a penghulu when the wali nasab is absent or it is impossible to present him or his residence is unknown or absent or adlal (reluctant).

Of course, a wali is different from a penghulu, because not every penghulu can be a wali if they do not fulfil the existing conditions and requirements. Meanwhile, there are so many other duties as mentioned in the previous discussion in the Minister of Religious Affairs Regulation that it



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is very possible for a woman to do. Moreover, in the duties and functions mentioned there is no point that mentions being a wali. This means that a woman is very allowed to become a penghulu (Saputra, 2018). Therefore, it is too narrow if the position of penghulu is only identified with the duties of a wali. Whereas there are many other humanitarian tasks that must be carried out for the benefit of the community in the field of marriage.

The next question that arises is: If a woman becomes the penghulu, can she not perform the duties of a wali hakim? According to the author, this is very possible. Basically, Islamic law, which has been the legal basis for the Compilation of Islamic Law, still provides space for women to become wali. Although this opinion is only partially found in some opinions among the ulama only.

The majority of the ulama are of the opinion that women, unlike men, cannot marry themselves. So that the presence of a female wali is a necessity for the validity of the marriage contract. Meanwhile, according to Imam Malik, the need for a wali is only for women who have a high social status (sharifah), while ordinary women can marry themselves or ask an adult male (even if he is not a relative) to marry them (al-Bashayyi, 1991). In other words, the view of previous ulama has placed women as people who are not perfect in their ability to act so that they need to be under guardianship. In principle, a person's ability to act is measured by his ability to reason, and a person's ability to reason is measured by his maturity (Khallaf, 1993).

The regulation on guardianship of marriage in KHI itself is dominated by the thoughts of the Shafi'i madhab, where the adoption of this madhab's thoughts is considered to be motivated by the needs of Indonesian Muslims (Umam, 2017). According to Imam Shafi'i, wali in marriage for girls is a must and is part of the pillars of marriage, so that marriages performed without wali are invalid. According to Imam Syafi'i, the guardianship of marriage is on the path of ashabah (one male descendant) and for the wali hakim is also required to be a Muslim man who is pubescent, intelligent, fair, and independent (Asy-Syafi'i, 1983).

In contrast to the majority of ulama, Abu Hanifah and the Hanafiyyah ulama were generally of the opinion that an adult woman can marry herself without the intervention of a wali (Al-Hanafi, t.t.). So for them the presence of a wali in the marriage contract is not required at all. Meanwhile, Ibn Hazm, who was of the Dzahiri school of thought, differentiated between girls and widows (Al-Andalusia, 1988). If it is a widow then she can marry herself off, while if it is a girl it must be with a wali. According to Abu Tsaur, what is required is not the presence of a wali who performs the marriage but the permission of the wali (al-San'ani, 1980).

Imam Abu Hanifah did give women more space in terms of marriage guardians. The verses of the Qur'an used as evidence by Imam Abu Hanifah that allow women's marriages without guardians (Al-Hanafi, t.t.), one of which is surat al-Baqarah (2) 232:

وَإِذَا طَلَقْتُمُ النِّسَاءَ فَبَلَغْنَ أَجَلَهُنَّ فَلَا تَعْضُلُوهُنَّ أَنْ يَنْكِحْنَ أَزْوَاجَهُنَّ إِذَا تَرَاصُوا بَيْنَهُمْ بِالْعُرْفِ ۗ  
ذَلِكَ يُوعِظُ بِهِ مَنْ كَانَ مِنْكُمْ يُؤْمِنُ بِاللَّهِ وَالْيَوْمِ الْآخِرِ ۗ ذَلِكَُمْ أَزْكَى لَكُمْ وَأَطْهَرُ ۗ وَاللَّهُ يَعْلَمُ وَأَنْتُمْ لَا  
تَعْلَمُونَ ﴿٢٣٢﴾

*“When you have divorced your wives and their waiting period has expired, then do not prevent them (their wali) from remarrying their future husbands, if there is mutual consent between them in a manner that is acceptable to them. That is what is advised to those who believe among you in Allah and the Last Day, and that is better for you and more pure. Allah knows, and you do not know” (Q.S. Al-Baqarah: 232).*

Surah al-Baqarah verse 232 contains a prohibition against a husband preventing a woman from remarrying after she has been divorced by him and her 'iddah has expired. The subject of the verse - according to the Hanafis - is the husband, not the wali.

Because the beginning of the verse states: *وَإِذَا طَلَقْتُمُ النِّسَاءَ* (When you divorce your wives). The word "you" in the verse is clearly the husband, and not the wali. This indicates that the one who divorces his wife is her husband.

Then the verse continues: *فَبَلَغْنَ أَجَلَهُنَّ فَلَا تَعْضُلُوهُنَّ* (Then their 'iddah expires, so do not prevent them from doing so). The word "you", according to the Hanafis, in this verse refers to the husband and not the wali. This is because, according to the followers of Abu Haneefah, if the wali is the one who has to give the woman in marriage, then it is even more improper for him to be prohibited from preventing the woman from marrying him if that is the case (al-Harrāsi, 1985). And if women do not have the right to do the marriage contract themselves, then it is not true what is mentioned in the verse, which reads: *فَلَا تَعْضُلُوهُنَّ* (So do not prevent them from remarrying their future husbands). The word "they" in the verse refers to wives, that is, wives who have been divorced by their husbands. This means that women can marry themselves without a wali (Devy, 2017).

Returning to the position of women as marriage guardians, if it is seen that the criteria for people who have the ability to act perfectly as stated are adult humans and sound mind, then actually adult women can also be seen as people who have the ability to act perfectly. Then if the woman is considered to have perfect capacity to act, then she does not need a wali to do the marriage contract, rather she can be a wali for people who deserve to be under her guardianship, such as minors, insane people and people who lack mental capacity.

So, adult women as well as adult men can be a wali of marriage. This of course depends on the context of the community, as the rule states that the law in Islam can change by considering the interests in accordance with the context of space and time. Thus, if the existence of a marriage wali for women in a society is still mashlahah, it needs to be maintained, and vice versa. It's just that the function of the guardian is basically as a guide and advisor (Hidayati, 2018). This fiqh framework then opens the possibility for women to

serve as penghulu. Because it has directly provided an opportunity for her to become a wali hakim, which is a task that has been considered an obstacle for women to access the position of penghulu.

The Compilation of Islamic Law as a product of legislation should adopt Abu Hanifah's opinion on the permissibility of women becoming wali. Thus, it opens the way for women to serve as penghulu who also serves as wali hakim. This is also an affirmation that the provisions in the KHI have placed women in an equal position with men (Asni, 2008). Referring to this premise, there should be no more discrimination or marginalisation of women in family life, society, nation and state.

### **The Existence of Female Penghulu in the Study of Maqashid Sharia**

Building a methodological foundation for masalah-based gender fiqh requires a framework of ushul fiqh studies as a tool to find the right method. Although the previous ulama have established various kinds of ushul fiqh and fiqh rules that discuss various kinds of humanitarian issues, the application has not been maximised. The results of the study of previous scholars in the field of fiqh are more considered as a 'result' or 'product' of ijtihad and not as a methodology. So that there is no solution to some contemporary problems, such as the issue of the position of women as penghulu and wali hakim (Arsyad, 2020).

Maqashid sharia is one of the relevant theories and instruments to unravel the discourse of gender equality in Islam. Maqasid comes from the Arabic "Maqasid", the plural form of maqsid which refers to the purpose, goal, thing of interest, and the ultimate goal. The role of maqasid in the study of Islamic law is very important. Maqasid explains the wisdom behind the rules of Islamic law. In addition, maqasid is also a set of good goals that Islamic law seeks to achieve by permitting or prohibiting something. Maqasid is also considered as a set of divine goals and moral concepts that underlie the formulation of Islamic Shari'ah-based laws. Today, maqasid has undergone a development that finally arrived at Jasser Auda's concept of maqasid sharia through a systems approach which contains six features including: cognitive nature, wholeness, openness, interrelationships between levels, multidimensionality, and the purposefulness of Islamic law (Auda, 2015).

The Maqsid-based ijtihad approach can conceptually become an epistemological footing for Islamic family law reform in Indonesia. Themes that are considered discriminatory, such as guardianship rights, marriage witnesses, the position of the head of the household, the concept of nuzus, polygamy, interfaith marriage, inheritance distribution, and so on can be found arguments and methodological footing based on the context-based ijtihad approach and Maqashid-based ijtihad.

Equality and humanity are two important foundations for realising benefit, mercy and justice (Anggoro, 2019). This is the case in the position of penghulu, as explained earlier that the task of penghulu in the field of marriage has a mission of benefit and humanity to create legal certainty in society. Therefore, the relationship between men and women must be interpreted as a broad partnership whose purpose is the benefit of human

life. The law should provide opportunities for men and women to realise the common good by becoming headmen.

The significance of maqashid sharia in answering this issue is as a tool that can find the maslahat side for female penghulu. The following will describe the maqashid sharia analysis of the existence of female penghulu through the six features approach initiated by Jasser Auda.

a. Cognitive Features

Cognitive nature is an expression of the correlation between conception and reality. The hypothesis of the Islamic legal system is a conceptual building that appears in the perception of the fakih. Islamic law (fiqh) is the result of human ijtihad on the text in an effort to reveal the hidden or practical meaning of the sharia contained in the Qur'an and Hadith. Therefore, the cognitive nature of Islamic law is necessary to examine the wide differences of views in determining Islamic law (Auda, 2015).

Fiqh is the endeavour of a fiqh expert born of thought and ijtihad based on the Qur'an and sunnah in order to find the intended meaning. Fiqh is a process of mental cognition and human understanding. That understanding is very likely to be wrong in capturing God's intention. To dismantle the validation of all cognition (knowledge of the text), Auda emphasises the importance of separating the text (al-Qur'an and as-sunnah) from people's understanding of the text (Wahyudi, 2015).

Departing from the above understanding, the regulation of marriage guardianship in KHI can be interpreted as a cognitive product created based on a combination of fiqh ulama' madzhab which is recognised and has been studied in various academic circles based on the context, cultural and political patterns at that time. Of course, it does not rule out the possibility that the law made at that time can still be/not always applicable to the current context, given the rapid development of the times. Changing a law is not impossible based on the nature of the law itself which is dynamic depending on the context of the era. This can happen when the law is seen as less suitable for the culture and civilisation of Muslims in Indonesia.

The problem of gender bias in the issue of female wali and penghulu in KHI does appear to be clearly caused by the cognitive aspects of the compilers. This is known from the requirement that the wali is a man, where the thought of fiqh mazhab adopted by KHI is only partial. KHI itself does not accommodate the opinion of Imam Abu Hanifah, which actually has provided opportunities for women to become wali, which of course also has implications for the permissibility of women to become penghulu. Taking into account this aspect of cognition, the position of women as marriage wali must be studied simultaneously in all madhhabs so as to give birth to gender-equitable legal products.

b. Integrity Feature

Based on systems theory, Jasser Auda states that every cause-and-effect relationship should be seen as parts of a whole picture. The

relationship between the parts plays a certain function in a system. The interrelationships are built as a whole and are dynamic, not just a static collection of parts.

Not only using one source of law or text to resolve a case that occurs, but here also compares with laws and texts that may still have a connection with the problem or problem in the field, it is likely that many single texts that are concluded and interpreted are propositions that are limited by certain conditions, and sometimes one text can have many meanings and can even change its original meaning. (Gumanti, 2018).

In relation to the existence of female penghulu in Indonesia, if reviewed as a whole by combining the nash and also the existing regulations, this is very possible. The general foundation used is PMA Number 5 Number 20 of 2019 concerning Marriage Registration which does not require a certain gender to serve as a penghulu. The vision of gender justice in the PMA should not be overturned by KHI which then states that the judge wali is required to be male. Because basically fiqh - as the source of KHI law - has provided opportunities for women to become marriage wali.

#### c. Openness Feature

In systems theory, it is stated that a living system must be an open system. Even seemingly dead systems are in fact open systems. The openness of a system depends on its ability to achieve goals under various conditions. It is these conditions that affect the achievement of a goal in a system. Conditions are the influencing environment. An open system is a system that always interacts with the conditions/environment outside it.

By adopting such a system theory, Jasser Auda says that the Islamic legal system is an open system. The principle of openness is important for Islamic law. Opinions that state that the door to ijtihad is closed will only make Islamic law static. Whereas ijtihad is an urgent thing in fiqh, so that jurists are able to develop certain mechanisms and methods to respond to a new problem.

Referring to the first openness scheme and openness mechanism, namely changing a law by looking at the worldview of a fakih is one solution in facing world challenges and stagnation of Islamic law or fiqh. The reason is that Muslims are now living in the midst of a growing and almost universal era of globalisation (Auda, 2015).

In this case, the existence of Hammad Tahrir, who has been recognised as a female headman in the world, should be an inspiration for the Indonesian government to open the way for women to become headmen. This proves that there has been an effort to approach by putting aside the notion of inferiority towards women. It is not "femaleness" that makes an obstacle for women to serve as headmen, but other factors that may also exist in men such as age and ability to

reason. Therefore, Muslim women who are mature, sensible, and free should also be allowed to become penghulu.

d. Features of Linkages between Tiers

Systems are formed from system particles that have interconnected relationships with other systems, especially in terms of goals. The branch of the system is a categorisation approach based on many concepts or thoughts that are intral and systematic. The implementation of the system's relationship to Islamic law can be seen as a tree hierarchy that has many roots. Islamic law does not grow from one thought, but many thinkers to achieve one tree or goal. Islamic law is strongly influenced by the ideology and conditions of the scholars with various considerations such as economic, social and cultural. Jasser Auda's method of approach focuses on the background of the emergence of the cause and effect of the thought of a law, which is more on the context. Similarly, the study of women's fiqh gender equality emerged as a result of the representation of civilisation that inevitably had to exist, so that the purpose (maqasid) of sharia could be realised (Khilmi, 2019).

Fiqh can be interpreted as the primary source for the preparation of the Compilation of Islamic Law. The implication is that KHI in the current era must try to adjust to contemporary fiqh which is placed in a higher hierarchy than KHI itself. It is explicitly stated that the reconstruction of gender justice in fiqh has wanted and allowed women to become wali, including being a penghulu. So it is necessary to deconstruct the law of guardianship in KHI in accordance with gender justice fiqh.

e. Multi-Dimensional Features

A system does not grow from a single system, but involves multiple dimensions. The system is formed from various dimensions, which are interrelated with others in a coherent manner. Because systems have broad signals. Islamic law can be described as a system. The texts of the Quran and Hadith certainly contain elements of universal values. These values vary, there are values of life, worship, technology, nature, social, justice and others. As for the value of equality, of course Islam does not tolerate discrimination. From this, it can be proven that the position of men and women is equal or balanced (Chakim & Putra, 2022). This framework then underlies the validity of women as wali hakim and also penghulu in Indonesia.

f. Intentionality Feature

According to Jasser, the realisation of maqasid is an important and fundamental basis for the Islamic legal system. Exploring maqasid must be returned to the main texts (al-Qur'an and hadith), not the opinions or thoughts of the faqih. Therefore, the realisation of maqasid becomes the benchmark of the validity of any ijtihad, without linking it to a particular trend or madhhab. The purpose of Islamic

lawmaking must be returned to the benefit of the surrounding community by being oriented towards protecting the family, caring more about the institution of the family and preserving and protecting human dignity, preserving and protecting human rights.

Jasser suggests the development of Maqāsid al-shari‘ah which used to be nuanced in preservation and preservation into maqāsid al-shari‘ah which is nuanced in the development and glorification of human rights. In addition, Jasser Auda also suggested including human rights as a typology of contemporary Islamic legal theory (Putra & Sumbulah, 2020).

Female Penghulu is not only interpreted as an effort to provide work opportunities that are identified with seeking wealth. More than that, the purpose of female penghulu has a mission of justice and equality of position between men and women in an effort to uphold Islamic law in the field of marriage. Serving as a penghulu is not only a right, but also an obligation when it is intended to realise benefits. This obligation certainly does not distinguish between male or female gender, because the benefit is a common property that must be achieved together.

## **Conclusion**

Maqashid sharia as coined by Jasser Auda has a significant role in the study of gender justice in Islamic law. Gender equality resulting from maqashid sharia studies is not a counter to the gender-biased editorials found in classical fiqh. Instead, maqashid-based studies attempt to put forward the mission of justice and equality between men and women, which has actually been promoted by Islam since its inception.

Through the study of the six features of maqashid sharia proposed by Jasser Auda, the matter of female penghulu is basically something that should be commonplace in Indonesia. Given that there are many humanitarian tasks in it that also carry the mission of benefit in the field of marriage. This is supported by the existence of cognitive features, wholeness, openness, interrelationship between levels, multi-dimensionality, and the meaningfulness of women's headship which has fulfilled the elements of *maslahat* and the objectives of Islamic law. Therefore, through this research, the reconstruction of guardianship law in KHI should be carried out immediately so that it can pave the way for women to access the position of penghulu.

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