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## **Application of Usul Fiqh Rules to the Phenomenon of Online Marriage Contracts**

**Ida Halimatus Sakdiyah**

Universitas Islam Negeri Syarif Hidayatulloh Jakarta, Indonesia | [ihsakdiyah@uinjkt.ac.id](mailto:ihsakdiyah@uinjkt.ac.id)

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### **Abstract**

Current technological developments are leading society towards the globalization of telecommunications, media and informatics. In the current condition, there are many problems that arise in a contract through electronic media, for example, online marriages where consent and consent transactions are carried out through connectivity or activities that are connected to a network or internet system (via online). Starting from the problems above, Fiqh as a product of human thought related to Islamic law must be able to provide juridical answers to changes that occur in society. Therefore, opportunities for Fiqh studies must always be open, and must be carried out by taking into account the social implications of the application of the products of legal thought, while maintaining their relevance to the will of the Qur'anic doctrines regarding human behavior.

**Keywords:** online marriage, Fiqh rules, al-masyaqqah.

### **Introduction**

Seeing the development of Information Technology (IT) is so rapid, and this development has penetrated into all aspects of social life in Indonesia. Moreover, in the world of communication based on ease, speed and efficiency in conducting direct personal relationships. In the context of universal Islamic law, the law must also develop according to the social needs of society. (Yang & Chen, 2023)

One of the indications is the use of telecommunications developments as a medium for conducting marriage engagements. The problem is that Islamic law and positive law do not specifically regulate marriage rules or laws through telecommunication technology, while the development of information technology is faster and faster than the development of legal substance. Therefore, it is necessary to renew the law through legal reform, or interpretation in order to provide benefits or social welfare for the community. This legal reform was carried out to fill the legal vacuum, especially related to the development of marriage using

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communication technology. So that the issue of marriage by telephone, video call, internet, and others need to get serious attention and needs more in-depth study.(Kamali, 2011)

Marriage affairs in Indonesia have been under the umbrella of Marriage Law No. 1 of 1974 and its provisions are regulated in the Compilation of Islamic Law. The essence of Islamic rules regarding marriage, divorce, Waqf, inheritance and Islamic economics sources from classical Islamic Fiqh literature from various schools which are summarized and adapted to the needs of the Indonesian people. The two legal bases regarding marriage and family affairs are expected to become a legal basis for Indonesian people who will carry out marriages.(Yasa, 2015)

However, with the development of technology, on May 13, 1989 in Jakarta there was a process of marriage contract between a man Ario Sutarto bin Darmo Atmodjo, a resident of Jakarta and a woman Nurdiani Harahap bint H. Baharudin Harahap who is also a resident of Jakarta. However, the process of the marriage contract is carried out via telephone. This is because the groom is currently in America to complete his studies, and both parties do not have the money to return to Indonesia or return to America.

With the encouragement of both parties who wanted to get married soon, the man took the initiative to send a letter of the marriage contract. Then on the initiative of the bride's parents that the marriage contract process was carried out only by telephone. Then the woman appeared before the head of the Kebayoran Baru KUA and obtained approval, so the marriage ceremony was held on May 13, 1989 at 10.00 WIB, or 22.00 WIB, United States Indiana time, attended by the marriage apparatus, invitees, as well as witnesses and the bride and the witnesses from the male side who is in the United States, and is directly supervised by the head of the KUA.(Jalil, 2019)

### **Literatur Review**

This was also done by the couple Dewi Tarumawati and Syarif Abdurrahman Ahmad using the *Teleconference media* on December 4, 2006, in which the two couples were in different places, namely Dewi Tarumawati in Bandung and Syarif Abdurrahman Ahmad at 304 Oakland Ave Ave 9 Pittsburg PA 15213 United States of America, got married at the Indosat Landing Point office, Jln. Bandung Stone Fruit Canal. Previously, Dewi Tarumawati's marriage to Syarif Abdurrahman Ahmad was almost the same as a general wedding, there was a groom who was not physically present and the sighat of the contract was not in one assembly but in the form of pictures and television. The 29-inch television became the center of attention for dozens of relatives who attended the event, especially Dewi Tarumawati and Syarif Abdur's parents.

In addition to the example above, there was also a procession of a long-distance marriage contract on January 11, 2006 between Rita Sri Mutiari Dewi (50) in Bandung and Wiriadi Sutrisno (52) in California. The procession of the marriage contract was attended by Rita's older sister who was also her marriage guardian, as well as Mrs. Wiryawan, Rita's mother, head of the Penghulu District of Andir, Bandung City, Sohidin Efendi, and several other people including witnesses. The marriage contract is held via video conference using *Voice Over Internet Protocol (VOIP)*.(Elaryh Makki Dafalla et al., 2022)

## **Research methods**

This research uses a qualitative approach with a descriptive analysis method. The data needed are data in the form of descriptive data and sourced from books, journals and articles that present cases as an example. Departing from the case studies that have been described by several media and written works, the researcher then conducted an in-depth descriptive analysis.

## **Discussion**

### **Pillars of Marriage Agreement**

In the perspective of Islamic law, etymologically, marriage or marriage (lughah) means gathering or uniting, while terminologically (the term) means 'aqd (bond) which justifies the relationship between men and women which was originally forbidden. In carrying out the marriage contract, it is in the form of a series of consent uttered by the guardian and qabul spoken by the groom or his representative witnessed by two witnesses.(Nurdin et al., 2021)

From the definition of the marriage contract, it can be understood that the pillars of marriage include the definition of the marriage contract itself, namely: First, there are the bride and groom. Second, there are guardians. Third, two witnesses and fourth are a marriage vow.

Islamic jurists in Indonesia agree on the occurrence of a marriage contract if the pillars and conditions of the marriage contract have been fulfilled, namely:(Lamatande et al., 2019)

1. Both partners are akil baligh (aged and have common sense).
2. There is a marriage guardian from the bride's side.
3. There is a dowry that must be given to the bride from the groom after being officially married.
4. There were 2 male witnesses who were Muslim, free and fair.
5. There is a procession of ijab qabul, ijab, which is a statement by the bride that is spoken by the guardian of the woman's marriage. Qabul is an expression of the groom to express his readiness and willingness to accept a contract from the bride's marriage guardian and mention the dowry (dowry) in his marriage.
6. Holding a walimatul ursy (wedding party) as a sign of the marriage ceremony.
7. Marriage must be registered by a marriage registrar as authentic proof of the occurrence of marriage in accordance with Article 7 of the Presidential Instruction No. 1 of 1991 concerning the Dissemination of the Compilation of Islamic Law.(Sujono, 2022)

Talking about the marriage contract, it can be seen that Law No. 1 of 1974 concerning Marriage does not explain the marriage contract. The provisions stipulated in Law No. 1 of 1947 only in general do not concern matters of substantial marriage law. In KHI it is explained in the general provisions of letter c that the marriage contract is a series of consent uttered by the guardian and qabul uttered by the groom or his representative witnessed by two witnesses. From these general provisions, it includes aspects of the pillars of marriage.(Karimi et al., 2019)

Article 28 of the KHI also states that the marriage contract is carried out personally by the guardian of the marriage concerned. The marriage guardian represents another person. In

this context, if the marriage guardian is unable to become the guardian in the marriage contract, then he can be represented by the judge's guardian, as Article 20 Paragraph (2) states that the marriage guardian consists of the nasab guardian and the judge's guardian. In the KHI it is also explained technically that the one who pronounces qabul is the prospective groom himself. However, in certain cases the marriage vows can be represented by another man provided that the prospective groom gives express authorization in writing that the representative accepts the marriage contract for the groom. (Naixin, 2019)

### **Online Marriage Contract**

In the past, a marriage contract without one assembly was known as a marriage contract through writing (a letter). In this matter, ancient Fiqh scholars differed in their response. Some classical Fiqh scholars allow it, and some prohibit it. On this matter, Fiqh scholars are divided into two opinions: (Ab. Rahim et al., 2020)

**First:** the opinion of Fiqh scholars that it is not permissible to enter into a marriage contract through writing (letters), except in an emergency, such as a mute person. This is the opinion of the majority of Fiqh scholars, namely the Maliki, Shafii, and Hambali schools of law. Second: the opinion of the Fiqh scholars who allow the marriage contract to be carried out in writing (letter). This is the opinion of the Hanafi School of Scholars.

The basic opinion of the majority of Fiqh scholars is:

1. The marriage contract must be carried out at one time by way of consent and acceptance of the marriage contract in one assembly directly without any time lag. Even in the Syafii School, the qabul pronounce from the groom must be uttered immediately after the consent lafaz is finished from the bride's guardian.
2. There must be witnesses at the time of the marriage contract. A witness in the marriage contract is a legal requirement for a marriage contract with the Syafii School and the Hambali School. That was also the opinion of Umar bin Khattab, Ali bin Abu Talib, Ibn Abbas, Sa'id Ibn al-Musayyib, Jabir bin Zaid, Ibrahim bin Yazid al-Nakh'iyy, Qatadah bin Di'amah bin Aziz, Sufyan al-Tsauri, Abdurrahman al-Auza'iyy, and others. However, in the Maliki School, witnesses in the marriage contract may not be present at the time the marriage contract is taking place, but it is enough with advertisements or notifications when the marriage contract is taking place.

The legal basis for the Hanafi School, which allows the marriage contract to be carried out through writing or letters is the event that Umami Habibah and her husband Ubaidillah bin Jahsy moved to Habsyah (Etopia), and her husband died in Habsyah. Then King Habsyah, al-Najasyi married her to Rasulullah SAW. Then al-Najasyi sent Umami Habibah to Rasulullah SAW together with Syurahbil bin Hasanah (HR. Imam Abu Dawud).

The wedding event began with the action of Rasulullah SAW sending a letter to al-Najasyi whose contents proposed marriage to Umami Habibah. Then al-Najasyi as the King acted as the guardian of Umami Habibah and married her to Rasulullah SAW.

However, the Hanafi School, which allows marriage contracts through this letter must fulfill the following conditions:

1. The performer of the marriage ceremony is not in place (unseen)
2. When sending a marriage contract witnessed by two witnesses

3. The recipient of the marriage certificate (the woman) pronounces the acceptance (qabul) aloud, not in writing.
4. The woman who receives the marriage contract must be accompanied by two witnesses. Then he read it and received it in the presence of the two witnesses.

Marriage contract through sophisticated communication tools at this time was not known in the past. However, we need to look at the conditions that must be met in carrying out the marriage contract as explained by various schools of Fiqh. Namely the release of the consent granted, the two parties carrying out the contract can hear each other (one assembly), in direct succession between the consent and qabul, the two witnesses hear the pronouncement of the ijab and qabul. The conditions stipulated by the Fiqh scholars are fulfilled in the implementation of the marriage contract through the current means of communication. (Kinasih et al., 2019)

However, present-day scholars differ on this issue:

1. Scholars who authorize the implementation of the marriage contract by telephone or online marriage contract. Like Shaykh Mustafa al-Zarqa, Shaykh Wahbah al-Zuahili, Dr. Muhammad Uqlah, Dr. Badran Abu al-Ainain.
2. The majority of contemporary Islamic scholars do not allow marriage contracts to be carried out by telephone or online marriage contracts. This attitude is also an official fatwa in Saudi Arabia.

In the past, in Indonesia, several elite intellectuals gave responses such as those made by the Minister of Religion Munawir Syadzali and Chairman of the Central MUI KH Hasan Basri. He was both unanimous against the marriage and stated that such a marriage was not valid.

In line with some of the scholars above, several Ulama gathered in the largest Religious Organization in Indonesia, namely Nahdlatul Ulama on the occasion of the Bahtsul Masail forum in 2010 in Makassar decided that the marriage contract could not be carried out by teleconference because it was different from other contracts. As for contracts in buying and selling, it is permissible because what is being contracted is goods while in a marriage contract it is humans who start with God so that the sacredness of marriage requires clear provisions and tend to be standard. (Mufid, 2020)

A different statement came from another religious mass organization, namely Muhammadiyah. On its official website, Muhammadiyah.or.id, it is explained that the marriage contract via teleconference is a form of legal reform due to changing times. The problem that is being debated by scholars is about Ittihad almajlis which is understood differently between whether one place (Ittihad al-makan), or one time (Ittihad al-shaman), or one position (Ittihad al-hah). According to their statement, the Ulama have actually agreed that long-distance marriage contracts are legal on the basis of the argument that there are examples of discussions in classical literature about a man who marries a woman through a letter sent.

### **One Akad Majlis**

If you look at the problems related to one assembly in the marriage contract, there are two interpretations of what is meant by Ittihad (united) assembly as follows: marriage contract ceremony, not carried out in two separate time intervals. This means that the consent is said in one ceremony, then after the ceremony is finished, the consent is also pronounced in the next event. In the case of the latter, even though two consecutive separate events may be carried out in the same place, but because the continuity between the consent and consent is broken, the

marriage contract is invalid. Thus, the requirement for a united assembly is related to the necessity of continuity of time between consent and acceptance, not regarding the unity of the place. Because, as stated above, even though the places are united, if it is done in two times, in two separate events, then the continuity between the implementation of the consent and the implementation of the consent is not realized. Therefore the marriage contract is invalid. Shaykh Sayyid Sabiq in his book *Fiqh as-Sunnah* in explaining the meaning of a united assembly for consent and qabul, emphasizes the understanding of the meaning of a united assembly for ijab and qabul, emphasizing the meaning of the uninterrupted understanding between ijab and qabul. (Miri & Moghadam, 2018)

**Second**, the opinion which says that a united assembly is required, is not only to ensure continuity between consent and qabul, but is very closely related to the duties of two witnesses who, according to this opinion, must be able to see with their own eyes that the ijab and qabul were actually uttered by the two people who did the contract. As it is known that one of the legal requirements for a marriage contract is to be attended by two witnesses. The task of the two witnesses, as agreed by the scholars, is primarily to ensure with certainty the validity of the consent and consent, both from the editorial point of view, as well as from the point of view of certainty that the consent and consent were said by both parties. It is understood that the validity of an editorial can be ascertained by hearing it. However, that the original editorial was spoken by the two people who were doing the contract, the certainty can only be guaranteed by seeing the parties who said it directly.

This opinion is held (mu'tamad) among the mujtahid scholars, especially among the scholars of the Shafi'i School. As a consequence of this opinion, the testimony of a blind person cannot be accepted for the marriage contract. Imam Ibn Hajar al-Haitami, a jurist scholar of the Shafi'i School of Jurisprudence (died 973 H) in his book *Tuhfatul Muhtaj*, rejected the testimony of blind people, the reason being that marriage testimony must be based on sight and hearing. The testimony of a blind person according to him is the same as the testimony of someone who is in complete darkness. The two testimonies were invalid, because both of them could not see who was doing the contract, and therefore he could not ensure that the consent and qabul were actually said by both parties who took the contract. (Rahmadi et al., 2017)

Syekh Abdul Hamid al-Syarwani in his commentary on Ibn Hajar's decision said: "the testimony of people in dark conditions is invalid, because they cannot know the two people who are doing the contract". Meanwhile, holding on to voice alone cannot be sufficient. If the two witnesses hear the consent and consent, but do not see the two people who pronounce it, even though the two witnesses know very well that the consent and consent are the voices of both parties, the marriage contract is still considered invalid, with the reason that it was not seen with their own eyes (al-mu'ayanah). Under these conditions, some scholars allow the marriage ceremony to be carried out by telephone or other telecommunications equipment, because the two parties carrying out the marriage contract can see each other, hear each other, and the two witnesses can also see the bride and groom, and can clearly hear the consent granted by them, be spoken. (Analiansyah & Ulfatun, 2020)

So it's not surprising, Dr. Usamah al-Asyqar accepts the opinion of scholars that it is permissible for the marriage contract to be over the phone or online. This is because the conditions in the marriage contract set by the classical scholars are fulfilled in the marriage

contract through the current means of communication. This attitude was also chosen by Dr. Badr Nashir al-Subai'iy.

### **Fiqh Rules**

The fiqhiyyah rule is the general basis of syara' law, from which it is known the laws of something that fall under its scope. Hasbi Ash-Shiddiqi concluded that fiqhiyyah rules are general legal principles taken from general arguments originating from the Koran and al Hadith, which are the main kulliyah rules that can be adapted to many juz'iyah, as intended by syara' in placing the mukallaf under the burden of taklif, and to understand the secrets of tasyri' and the wisdom contained therein. ("Pre-Marriage Course Regarding Health Reproductive: Knowledge and Attitude of Bride and Groom Candidate in Preparing Health Status before Pregnant in Grobogan Regency," 2020)

The Fiqh rules start from the identification of several legal facts that are similar and have the same motives inductively, then make general Fiqh rules that can be applied to similar juz'iyah problems that fall within its scope. This means that the principles of fiqhiyyah actually originate or absorb from the Al-Quran and Sunnah but not directly. Because the principles of Fiqh are taken from Fiqh, and Fiqh is produced from shale Fiqh through a process of ijtihad which comes from the Koran and Sunnah. (Syatar & Bakry, 2021)

There are at least five main principles in Fiqh that have been generalized by Fiqh scholars from various existing furuiyah problems with inductive reasoning. These five principles govern almost all chapters of Fiqh studies, both worship and muamalah. Then from these five rules give birth to branches of other rules that are still in line with the main rules.

1. Everything depends on the goal (الأمر بمقاصدها)
2. Confidence is not lost because of doubt (اليقين لا يزال بالشك)
3. Difficulty brings ease (المشقة تجلب التيسير)
4. Evil must be eliminated (الضرار يزال)
5. Traditions/customs can become law (العادة حمكة)

However, the stated Fiqh rule only strengthens the legal basis for scholars who allow marriage contracts by telephone or online. The rule of Fiqh related to cases of marriage by telephone and others is that there are difficulties in making a marriage contract directly in one assembly. Like far apart countries, or during the earlier covid with various restrictions on social contact. So, Fiqh rules start from identifying several legal facts that are similar and have the same motives inductively, then make general Fiqh rules that can be applied to similar juz'iyah problems that fall within its scope. This means that the principles of fiqhiyyah actually originate or absorb from the Al-Quran and Sunnah but not directly. Because the principles of Fiqh are taken from Fiqh, and Fiqh is produced from shale Fiqh through a process of ijtihad which comes from the Koran and Sunnah. (Syatar & Bakry, 2021)

The rules of fiqh that are closely related to this issue are the rules:

المَشَقَّةُ تُجْلِبُ التَّيْسِيرَ

Meaning: "Difficulties bring ease"

That is, if a law has difficulties or difficulties in fulfilling and implementing it, both to the body, soul, or assets of a mulatto, then the law is lightened so that it is no longer difficult. The meaning of the rule is that difficulty causes ease. The point is that law which in their application cause difficulties and difficulties for the mukallaf (legal subject), sharia relieves

them without difficulties and difficulties. This is in accordance with the basic rules, the word of Allah SWT and the hadith of the Prophet,

**God bless you**

*Allah wants convenience for you, and does not want trouble for you.* (QS. Al-Baqarah: 185)

وَمَا جَعَلَ عَلَيْكُمْ فِي الدِّينِ مِنْ حَرَجٍ

"He never made for you in religion a narrowness". (QS. Al-Hajj: 78).

يَسْرُوا وَلَا تَعْسُرُوا، وَبَشِّرُوا وَلَا تُنْفِرُوا

"Make it easy and don't make it difficult, give news happy and don't make people run away." (Narrated by Bukhari).

Therefore, the scholars divide this *masyaqqah* (difficulties) into three levels, namely:

1. *Al-Masyaqqah al-Azhimmah* (very severe difficulties), such as fear of loss of soul and/or damage to limbs. Because guarding the soul (life) is more important than sacrificing the soul in the implementation of worship.
2. *Al-Masyaqqah al-Khafifah* (mild difficulty), such as feeling a little pain in the hand or head. Such difficulties have no effect on getting dry. Because achieving benefit is more important than refusing such difficulties.
3. *Al-Masyaqqah al-Mutawasithah* (medium difficulty, not too heavy nor too light). When the troubles of this part are close to the first tribulation, relief is given.

So, during the Covid-19 era, there were indeed big difficulties making a marriage contract directly in one assembly. So this condition supports the validity of the marriage contract by telephone and other means. Far-flung countries with tasks that cannot be abandoned, also create difficulties in making marriage contracts in one assembly face-to-face, so that can be used as the basis for the permissibility of marriage by telephone or other means of communication. (Muksalmina et al., 2021)

## **Conclusion**

Scholars differ on the matter of telephone marriage. The first opinion says that it is legal to do so if the conditions for marriage and its pillars have been fulfilled. While the opinion of the majority of scholars says that marriage, like this is not valid, because the contract must be carried out in one place where both parties can meet face to face. In an emergency, face-to-face marriage contracts cannot be made in one assembly, so the fiqh rule can be used as a basis to support the opinion of some scholars who allow online marriage contracts.

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