

THE POSITION OF CONTRACT MARRIAGE LAW (NIKAH MUT`AH) IN INDONESIA: A COMPARATIVE STUDY

Teuku Yudi Afrizal*

Malikussaleh University

e-mail: teukuyudiafrizal@unimal.ac.id

*Correspondence: teukuyudiafrizal@unimal.ac.id

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Abstract. In the aspect of Islamic law, mut'ah marriage was allowed by Rasulullah SAW only during the war. But the permission has been abolished or the law of mut'ah marriage is forbidden and sinful for those who do it. In the aspect of national law, contract marriage is considered a legal defect because it is contrary to Article 2 paragraph (1) of Law Number 1 of 1974 on Marriage, Article 1337 and Article 1332 of the Civil Law, the principle of marriage and the purpose of marriage. Based on these provisions, a legal marriage is conducted in accordance with the teachings of religion and beliefs and is not contrary to the values of morality. Marriages that are registered or registered in accordance with applicable laws and regulations will receive protection from the State. The practice of contract marriage actually positions the position of women is very weak in the eyes of the law because the marriage is considered never happened, so the wife is not considered a legitimate wife, the wife is not entitled to alimony and inheritance from the husband if he dies and the wife is not entitled to gono gini property if it occurs. separation, because legally the marriage, the contractual marriage is considered to have never occurred.

Keywords: position; marriage contract; Indonesia; comparative study.

INTRODUCTION

Performing marriage or marriage is a form of carrying out the sunnah of the Prophet Muhammad SAW and at the same time carrying out religious orders. The existence of a religious command to marry aims to maintain the honor of the human race and protect the human race from the heinous act of adultery. According to the Compilation of Islamic Law (KHI), marriage is a very strong covenant (*miitsaaqan ghaliidzan*) to obey God's command and perform it is an act of worship.

If, marriage is an act of worship then it must be done in accordance with the guidelines of Islam with the conditions, pillars and ways that are allowed in Islam. God created man like any other creation, did not allow his instincts to do as he pleased, or allowed the relationship between men and women to be chaotic. However, Allah SWT puts the signs and rules as has been described in various *hasdis* of the Prophet Muhammad SAW ([Bastomi](#), 2016). the purpose of the arrangement is not to hinder or hinder the human race from performing marriage, rather the rules of marriage are to maintain honor and protect the rights and obligations of the parties who perform the marriage.

Marriage is a human right that cannot be limited and diminished. In the Qur'an, Allah SWT explicitly states in his words that "*Glory be to God who has created everything in pairs, both from what the earth grows and from themselves, and from what they do not know (QS Yasin: 36).*" Marriage is a divine decree for all His creatures. So, marriage is not just about channeling sexual desire

alone but marriage is a religious order that contains various rules on how to carry out marriage, rights and obligations of husband and wife and children, divorce, heirs and other rules.

However, a common phenomenon today is that marriages are based on a contract or agreement with the agreement that the bride's clause will be paid a certain amount, the duration of the marriage is limited and a better future guarantee. Such a model of marriage is called contract marriage or passport marriage ([Aidatussholihah](#), 2016). Contract marriages are often associated with the arrival of foreign tourists coming to Indonesia, especially foreign tourists from the Middle East. But in fact, not only foreign tourists who perform contract marriages, but also many local tourists who come to West Java, especially in the peak area, Bogor ([Suhartanto, Dean, Nansuri, & Triyuni](#), 2018). The term contract marriage which is rampant in the Puncak Region is used to refer to marriages performed with tourists, both foreign and local, which are limited to a certain time without any standard rules and do not follow the applicable marriage rules as they should and are not legally registered in the State administration.

The phenomenon of contract marriage will have a bad impact on women because women's position is very weak and men can go and disappear just like that. If something happens to the detriment of the woman during the contact marriage, what is the legal protection? This article will attempt to analyze contact marriage and legal protection for women.

METHODS

This type of research is legalistic, doctrinal or normative. According to Rowe, normative research aims to discover, explain, study, analyze and present systematically certain facts, principles, concepts, theories, laws so as to find new science and ideas to be suggested into a change or renewal ([Candlin, Bhatia, & Jensen, 2002](#)). In this study will examine all documents, references, facts, theories, doctrines and laws related to contact marriage and its legal consequences for women in Indonesia.

According to Mandi Zahraa, normative research is "A fresh, diligent, systematic, inquiry or investigation of the factual data and or theoretical concepts of the rules and principles of a particular legal issue in an attempt to discover, revise or improve the relevant concepts, theories, principles and application" ([de Oliveira Rodrigues, de Freitas, Barreiros, de Azevedo, & de Almeida Filho, 2019](#)). Normative research means conducting a new, thorough, systematic study, investigation of facts, data, concepts, principles, theories, specific legal issues to make findings, reviews and changes to concepts, theories, principles, formulas and models. In addition, normative research can also be conducted on issues regarding the overlap of a law, between one law contradictory and the presence of ambiguity or ambiguity in a law.

The approach used in legalistic research can be a statute approach, historical approach, case analysis approach and comparative approach ([Diantha, 2017](#)). However, this study only uses a legal or

legal approach to both Islamic law and marriage law nationally in order to analyze the laws related to the regulation of contact marriage and legal protection for women in Indonesia.

RESULTS AND DISCUSSION

Kawin Kontrak (Nikah Mut`ah) According to the Islamic View

In Indonesian, marriage comes from the word "*kawin*", which etymologically means to form a family with the opposite sex (having sex or having sex) (Ministry of Education and Culture, 1995). Anwar Harjono said that "*the word marriage is the same as the word nikah or zawaj in fiqh terms*" ([Boedi & Hasan, 2011](#)). According to the terminology of jurisprudence, marriage means a contract (agreement) that contains the ability to have sexual intercourse by using the word nikah or tazwij ([Nair, 2011](#)).

In Article 1 of Law Number 1 of 1974 on Marriage, it is concluded that marriage is a bond born of batun between a man and a woman as husband and wife with the aim of forming a happy and eternal family (household) based on the Almighty God. In the Compilation of Islamic Law it is mentioned that marriage is a marriage, which is a very strong contract and mitsaqan gholiidhan to obey God's command and perform it is an act of worship. In the compilation of Islamic law, it is emphasized that the purpose of marriage is to realize a loving family life, mawaddah and rahmah "

Based on the law that the marriage is not temporary but forever whose ultimate goal is to form a family of sakinah, mawaddah and rahmah. Marriage is eternal meaning that the marriage is not limited in time. Marriage will last forever until death separates husband and wife. This provision implicitly prohibits the existence of marriages that are limited to a certain time,

namely contract marriages. This is because the purpose of marriage is to form a happy and eternal family (household), while the concept of contract marriage is only to get pleasure that is temporary or in accordance with the time period that has been agreed by the parties (husband and wife).

Contract marriage in Islamic law is known as mut'ah marriage. Mut'ah is linguistically taken from the Arabic Al-Tamattu 'meaning to have fun, but in terminology nikah mut'ah is a marriage performed solely to satisfy lust and have fun or a marriage contract made by a man against women for a day, a week, or a month (Mubarok, 2012). It is called Nikah Mut'ah because the man intends to have fun for a while. A. Syarafuddin al-Musawiy, that the origin of the word mut'ah (Arabic) is something that is enjoyed or given to be enjoyed (Al-Hamidy, 2008). Similarly, the verbs tamatta'a and istamta'a come from the same root word, which is to enjoy or enjoy something. with a gift to him in the form of property, food, clothing or anything else. If the time has passed, then by itself they part without the word thalaq and without inheritance (Lubis & Mas, 2020).

Zomakhsyari, defines mut'ah marriage as marriage for a predetermined or known time, such as one or two days, a week or more, a month or even up to many years (Afifi, 2014). According to Mutawalli, mut'ah marriage is also called temporary marriage (contract), which is married for one day, one week, six weeks, one year, or as many as according to the agreement. All four schools of thought agree that mut'ah marriage is illegal. If the marriage contract is mentioned for a period of time, the contract becomes void and invalid. A married relationship becomes an adulterous relationship (Fincham & May, 2017).

Regarding mut'ah marriage, Maliki, Syafi'iyah, and Hanabilah scholars agree

that mut'ah marriage is the same as mu'aqqat marriage (Sarbini, 2017). Meanwhile, Hanafi scholars require the word mut'ah in mut'ah marriage, such as "*I married mut'ah with you*". The essence of mut'ah marriage is to associate the marriage contract with a specific time (Abdullah & Awang, 2021). Such time restrictions are considered contrary to the purpose of marriage, which is to form a happy and eternal family.

When viewed from the aspect of Islamic history, mut'ah marriage was once allowed by the Prophet SAW during the war. The friends at that time were single and left their wives for months. However, he later forbade and abolished the rule of mut'ah marriage (Azzam & Hawwas, 2011). Prophet Muhammad SAW said "O people, indeed I have previously allowed you to mut'ah with women. Now Allah has forbidden it until the Day of Judgment. So, whoever has a wife from mut'ah, then let him divorce and do not take something that you have given him. "

The companions of the Prophet who fought wanted to castrate his genitals in order to avoid adultery. However, the Prophet forbade such actions until the Prophet Muhammad SAW said: From Mas'ud said: at that time we were at war with the Prophet SAW and not with us women, then we said: can we castrate (our genitals). So Raulullah SAW forbade us to do that. And Rasulullah gave us relief to marry women with dowry for a while (Al-Asgalani, 2010). According to Nawawi in his words that his prohibition and his ability occurred twice, his ability was before the khaibar war then he banned in the khaibar war then allowed again in the year of the conquest of Makkah (year of Authas), after that Nikah Muth'ah was banned forever, so that the rukhshah was erased for -lamanya (Ridwan, 2014).

Allah SWT said "And those who guard their private parts, Except against their

wives or the slaves they have, then surely they are not blameworthy in this matter. Whoever seeks that which is behind it, then they are the ones who transgress. "(QS al Maarij: 29-31). From this verse, it is known that the reason for legalizing sexual intercourse is only through two ways, namely valid marriage and slavery. Abd Shomad is of the view that a mut'ah woman is neither a wife nor a slave. Thus, it is very clear that sexual intercourse is only allowed with a wife or slave, while the wife of a mut'ah marriage does not function as a wife because (Shomad, 2017):

- a. Not inheriting from each other, while the marriage contract is a reason to inherit property;
- b. Idah nikah mut'ah is not like ordinary marriage;
- c. With the marriage contract, a person's rights in his relationship with having four wives are reduced, while this is not the case with mut'ah;
- d. By performing mut'ah, a person is not considered to be a muhsin because a woman taken by mut'ah does not function as a wife, because the mut'ah does not make the woman a wife and not a slave, so the person who performs the mut'ah is included. in the word of God.

The above texts cause differences of opinion among scholars about the law of mut'ah marriage for now. According to Sunni scholars, the verse on the ability of mut'ah marriage has been removed with a verse that describes the care of farji, talaq, iddah, and also the existence of ijma '. Therefore, mut'ah marriage is included in the category of prohibited marriage. In contrast to the Shiite group, they consider that not a single verse or hadith removes the ability of mut'ah marriage, even according to them the verse about mut'ah is a muhkamat verse. However, if we study more widely some of the authentic hadiths of the Prophet Muhammad SAW

mentioned above, that mut'ah marriage was allowed in the era of the Prophet SAW in an emergency only. But this ability has been confirmed by some hadiths above. Therefore, it is very clear that the law of mut'ah marriage is haram and will be sinful for those who do it.

Contract Marriage in a Positive Indonesian Legal Perspective

Indonesia is one of the countries that upholds women's rights both legally, economically, politically and culturally. Currently, there are women's protection institutions that have been legalized and recognized by the State, such as the National Commission Against Violence Against Women (Komnas HAM). Even in the political aspect, the quota of women who enter parliament reaches 30 percent so it is expected that women can defend their people from all forms of violence, both physical and psychological violence. In terms of law, Indonesia adheres Equalitythe law principle. Law enforcement does not discriminate between the sexes but all people are equal and there is no special treatment for certain genders.

In the aspect of marriage law, every woman who performs a marriage is required to perform it legally, both religiously and state law. A legal marriage is based on State law, so all the consequences that arise after the marriage can be held accountable both at the time of the marriage, during the marriage and the end of the marriage period. Therefore, Law No. 1 of 1974 on Marriage and the Compilation of Islamic Law not only regulates the pillars and conditions but also regulates the rights and obligations and legal consequences that arise after the marriage relationship. In addition, when there is an act of domestic violence during marriage then there are several laws that can be applied to protect women such as Law No. 1 Year 1946 on the

Book of Criminal Law and Law No. 23 of 2004 on the Elimination of Domestic Violence.

Marriage that is legal according to religion and the law of the State and is not registered or registered in accordance with applicable laws and regulations. Therefore, the state can protect women from all legal consequences arising after the occurrence of marriage. This is because the law enforcement has the authority to force the parties to perform the marriage in accordance with existing legislation. The practice of contract marriage actually positions the position of women as very weak in the eyes of the law because the marriage is considered to have never happened, so that women do not get anything from the marriage.

Contract marriage is considered a legal defect because it is contrary to Article 2 paragraph (1) of Law Number 1 of 1974 on Marriage. Article 2 paragraph (1) determines that a marriage is valid if it is performed in accordance with the law of each religion and belief. In the aspect of Islamic law it has been explained above that the majority of scholars are of the view that contract marriage is prohibited and anyone who does so is a sinful act. Mut`ah marriage was once allowed in conditions of war, after which the Prophet Muhammad SAW forbade mut`ah marriage (Koro, 2010). Therefore, if referring to Article 2 paragraph (1) of the Marriage Law, if the religion of Islam adopted by both spouses to perform a contract marriage then by itself the marriage is not valid.

Looking at the practice of contract marriage that occurs, it is clear that the objective elements of an agreement are not met. Something that can be agreed objectively is in the form of goods in accordance with Article 1332 of the Book of Civil Law and Law Number 1 of 1974 on Marriage itself. The Marriage Law states that the agreement cannot be ratified if it

violates the boundaries of religious and moral law. The same thing is also mentioned in Article 1337 of the Code of Civil Law which stipulates that a cause is prohibited if it is prohibited by law or contrary to good morality and public order. Article 1335 of the Civil Code states that an agreement without cause, or that has been made for a false or prohibited reason, has no legal force. Contract marriage that is practiced today is not based on love, honesty, sincerity of volunteerism, but the purpose of contract marriage is only to advance lust by ignoring the nature of marriage itself.

Moreover, contract marriage is contrary to the basics of marriage. According to Muhammad Daud Ali, In the bond of a marriage as one form of sacred promise between a man and a woman is covered by several principles of marriage, one of which is the basis of marriage for ever. This principle emphasizes that marriage is performed to perpetuate offspring and build love and affection for a lifetime. This principle is contrary to the concept of contract marriage which is carried out within a certain period of time which has been previously agreed upon with a certain reward.

In Article 2 paragraph 2 of Law Number 1 of 1974 on Marriage stipulates that each marriage is recorded in accordance with the applicable laws and regulations. This clause is a form of State recognition of the marriage that took place so that legally, the legal consequences of not recording the marriage are :

- a. Marriage is considered invalid;
 - b. The child has only a Civil relationship with his mother;
 - c. Children and mothers are not entitled to alimony and inheritance;
 - d. Lack of confirmation of marriage certificate;
 - e. Children born without a certificate;
 - f. Not getting recognition from the state;
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- g. Such marriages have no legal protection and legal certainty;
- h. No common property.

In addition, a contract wife will not get her rights as a wife, where those rights legally include:

1. The wife is not considered a legitimate wife;
2. The wife is not entitled to alimony and inheritance from the husband if he dies;
3. The wife is not entitled to gono gini property in the event of a separation, because legally the marriage, the contract marriage is considered never to have taken place.

The above rights will not be obtained by the contract wife, because the marriage has no legal certainty. A wife will not be able to claim anything against her husband, as it is limited by a contract or agreement that has been made and agreed upon together. Where the contract or agreement is very detrimental to the woman. This is in accordance with the principle of *pacta sun servanda*, meaning that the agreement made is valid as law for the parties. So the contract that has been agreed upon binds both parties, so that the marriage ignores the meaning rather than the purpose of the marriage itself which is "And among the signs of His power is that He created for you wives of your own kind, that you may incline and feel at peace with them, and He made between you love and affection. Indeed, that means that there are signs for you who think." (QS Ar-Rum (30): 21).

CONCLUSIONS

All couples who wish to get married must comply with the applicable laws and regulations so that the marriage is legal by

religious law or state law. A legal marriage is based on State law, so all the consequences that arise after the marriage can be held accountable both at the time of the marriage, during the marriage and the end of the marriage period. Therefore, Law No. 1 of 1974 on Marriage and the Compilation of Islamic Law not only regulates the pillars and conditions but also regulates the rights and obligations and legal consequences that arise after the marriage relationship. In addition, when there is an act of domestic violence during marriage then there are several laws that can be applied to protect women such as Law No. 1 Year 1946 on the Book of Criminal Law and Law No. 23 of 2004 on the Elimination of Domestic Violence.

Marriage that is legal in religion and State law and registered or recorded in accordance with applicable laws and regulations, the State can protect the legal consequences arising after the marriage because the law has the authority to force the parties to perform the marriage in accordance with existing laws. The practice of contract marriage actually positions the position of women is very weak in the eyes of the law because the marriage is considered never happened, so the wife is not considered a legitimate wife, the wife is not entitled to alimony and inheritance from the husband if he dies and the wife is not entitled to gono gini property if it occurs. separation, because legally the marriage, the contractual marriage is considered to have never occurred.

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