

ISLAMIC LAW BASE ON IMAM ABU HANIFAH'S VIEWS ON THE MECHANISM OF MARRIAGE FOR MUTE PEOPLE

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Abstract

Marriage is an integral part of Islamic law that is inseparable from the dimensions of Islamic faith and morals. So Islam provides guidelines so that judges and courts do not deviate or deviate. Because Islamic law as a living law in the Indonesian national legal order, of course it must be able to balance and answer the problems and legal developments that occur in society. The occurrence of a marriage bond does not only have an impact on civil relations, such as the rights and obligations of husband and wife, guardianship, children's position, joint property, inheritance, kinship, neighbourhood and customs, but also involves the obligation to obey religious orders and prohibitions, both in human relations with God and human relations with humans (mu'amalah) in social life so that they are safe in this world and safe in the hereafter. The process of the marriage contract by pronouncing the consent and qabul was carried out orally. If the parties are unable to perform the consent and qabul verbally due to certain obstacles, then the marriage contract can be carried out using a sign. This research belongs to the type of library research, namely research that uses literature, both in the form of Islamic law books (fiqh books, compilations of Islamic law) related to this research. Based on the results of this study, Imam Abu Hanifah distinguishes between people who are mute since birth and normal people who become mute. If a person has the possibility to speak, then he should not use sign language because he is not classified as a mute person. However, if a person is confirmed to be mute until he dies, then the law is the same as for a mute person.

Keywords: *Marriage contract; The Marriage of the Mute; Ijab Kabul and Qabul*

I. INTRODUCTION

An important event in the reality of human life is the inner birth bond between a man and a woman as a husband and wife with the aim of forming a happy and eternal family/household based on the Almighty Godhead. With marriage, the family is formed which is the smallest unit of community building that also determines order in society, therefore from the beginning of human existence, the rules of

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orderly marriage have been determined, so that the orderly living system of society can be achieved. ⁴

Marriage is an integral part of Islamic shari'a that is inseparable from the dimensions of Islamic creeds and morals. So Islam provides guidelines so that judges and the judiciary do not deviate or mislead. Because Islamic law is a law that lives in the Indonesian national legal order, of course, it must be able to compensate and answer the problems and legal developments that occur in society.⁵

Before the birth of the Marriage Law, regarding the provisions, procedures and validity of a marriage for Indonesians was generally based on religious law and their respective customary laws. According to customary law, marriage is a bond between a man and a woman to form a household that is carried out traditionally and religiously by involving the families of both relatives and relatives.⁶

After the enactment of the Marriage Law, there was a legal unification in marriage in Indonesia, where marriage has a very close relationship with religion/spirituality. The legal arrangements on marriage have applied equally to all citizens, therefore, every citizen must comply with applicable laws, including the Marriage Law which is the basis for creating legal certainty, both from the point of view of family law, property, and the legal consequences of a marriage.⁷

The ideal purpose of marriage according to the marriage law is to form a happy and eternal family (household), as affirmed in Article 1 of Law Number 1 of 1974 concerning Marriage states: "a bond is born and a bond between a man and a woman as a husband and wife with the aim of forming a happy and eternal family based on the Almighty Godhead". In addition to forming a happy family, husband and wife also help and complement each other, so that each can develop a helpful personality and achieve spiritual and material well-being.⁸

The occurrence of a marital bond, not only has an impact on civil relations, such as the rights and obligations of husbands and wives, guardianship, the position of children, common property, inheritance, kinship, neighborliness and customs, but also concerns the obligation to obey religious commandments and prohibitions, both in human relations with His God (worship) and human relations with fellow human beings (*mu'amalah*) in the association of life in order to be safe in the world and safe in the world.⁹

⁴ Directorate General of Islamic Religious Institutional Development, *Legal Counseling Materials*, (Jakarta: Ministry of Religion of the Republic of Indonesia, 2001), p. 117.

⁵ Bambang Sutyoso and Sri Hastuti Puspitasari, *Aspects of the Development of Judicial Power in Indonesia*, (t.t: UII Press, 2005), p. 11.

⁶ Soerjono Wignjodipoere, *Principles of Customary Law*, (Jakarta: Gunung Agung, 1988), p. 55.

⁷ K. Wantjik Saleh, *Indonesian Marriage Law*, (Jakarta: Ghalia Indonesia, 1982), p. 3.

⁸ C. S. T. Kansil, *Civil Law Module*, (Jakarta: Pradnya Paramita, 1995), p. 115.

⁹ Hilman Hadikusuma, *Indonesian Marriage Law According to Law, Customary Law and Religious Law*, (Bandung: Mandar Maju, 2003), p. 8.

The most important thing in marriage for the bride and groom who will carry out the marriage bond is the willingness and agreement with the bond. It is abstract and psychological so it is difficult to measure. Therefore, in reaching consent must be in the form of an understandable word, action, or gesture, as long as it is not followed by rejection.¹⁰ The process of the marriage contract by means of the pronunciation of *ijab* and *qabul* is carried out orally. If the parties do not allow to perform *ijab* and *qabul* orally due to some particular obstruction, then the marriage contract can be performed using gestures.¹¹

In the terminology mentioned in Law No. 8 of 2016, persons with disabilities are those who have physical, mental, intellectual, or sensory suffering over a long period of time where interaction with various obstacles can complicate full and effective participation in society based on equality with others.¹² Speech impaired is a malfunction or interference from sound, articulation of speech sounds, or fluency in speech.

A blind person (mute) if one of the people who performs the contract is mute or has difficulty speaking, if he is able to write then the marriage contract is valid by using the writing, as is valid by using gestures. This opinion has been agreed upon by scholars, even by *shafi'iyah* as well. Because of an emergency. However, the most prominent opinion of *Hanafiyah* scholars says that in this situation the marriage contract is not validly carried out by gesture, and it is only legal to do so by using the written media if it is able to do so. That's because writing is stronger in showing the intent at the desired and far from various possibilities when compared to gestures. The most important thing is that according to the agreement of the scholars, the writing is more mainstream than the gesture. Because the writing is equivalent to a statement that is *sharih* (obvious) in the matter of *thalaq* (divorce) and *iqrah* (statement).

If a mute person or the like is incapable of writing, the scholars agree that a valid marriage contract is performed with gestures that can provide understanding and are easy to understand. Because in these circumstances, gestures are a special communication medium that is able to express their wishes. The marriage contract of a mute person is legally carried out by writing or cue according to jurists. According to *Hanafiyah* scholars, marriage contracts are only valid if they use written media when they are able to do so.¹³

¹⁰ Rahmat Hakim, *Islamic Marriage Law*, (Bandung: Pustaka Setia, 2000), p. 84.

¹¹ Neng Djubaedah, *Registration of Marriages and Marriages Is Not Recorded*, (Jakarta: Sinar Grafika, 2012), p. 115.

¹² Syahbuddin, *The Path of Humanity, A Guide to Strengthening Human Rights*, (Yogyakarta: Lapera Pustaka Utama, 1999), p. 50.

¹³ Wahbah Az-Zuhaily, *Islamic Fiqh*, (Jakarta: Gema Insani, 2011), p. 54.

II. DISCUSSION

Imam Abu Hanifah's View on Marriage for the Blind (Mute)

The main issue discussed by scholars about marriage for the mute is about the lafaz ijab ordinance of the guardian and kabul of the groom to be perfected. This is because, lafaz ijab and kabul are one of the pillars of marriage that must be fulfilled so that the marriage performed is valid from a religious point of view. Scholars have discussed this issue by understanding the Shari'a's view of the validity of the marriage contract using gestures.

Scholars agree that not all sign language is acceptable, for example, the sign language used is not common so its meaning is difficult for people to understand. But if the sign language is expressed by a mute person who learns sign language so that the sign language can be easily understood by others then the contract becomes valid. Nevertheless, scholars differ in opinion about the conditions that must be met by mute people who use sign language.

The difference is divided into three elements, namely: *First*, the difference in the views of scholars in applying sign language *takyif* and the extent to which he is able to explain and convey the intentions of the mute person. Some scholars consider a clear and understandable gesture to be the same as a conversation without specifying a number of rules or conditions for receiving the gesture. However, some scholars also set some conditions for marriage contracts for mute people. For example, the cues used should be understandable to everyone. If it is only understood by some people, then the gesture is *a kinayah* (allusion) that should not be considered as a substitute for existing regulations. *Second*, the origin of a marriage is by conversation and this contract must not be bound in any other way. This is because scholars are very careful in discussing this matter, especially from the aspect of setting the conditions for obtaining sign language for mute people. *Third*, dissent among scholars on sign language for mute people. Dissent among scholars towards marriage contracts with sign language for mute people is the reason for the birth of this difference of view.

One of the differences in views referred to here is that Imam Abu Hanifah distinguishes between sign language for people who are mute from birth and sign language for normal people who become mute. The mute person from birth receives his clear cue in the marriage contract. For a (normal) person who is mute due to something or a person who is stuck in his tongue so that he cannot speak, then he must not carry out the marriage contract so that he can speak but he does continue to be mute so that he dies. A clear cue for a person who is mute from birth is accepted in the marriage contract. However, if the mute person is likely to be able to speak or speak, then he is not allowed to use gestures during the marriage contract.

Imam Abu Hanifah distinguishes between a person who is mute from birth and a normal person who becomes mute. If a person has the possibility of speaking, then he should not use sign language because he is not classified as a mute person.

However, if a person is confirmed to be mute until he dies, then the law is the same as that of a mute person.

The development of the times that brings changes everywhere. Many new things are not explained by religion and turn out to have use value in human life. For mute people according to Imam Abu Hanifah, the marriage contract can be done using other media, one of which is using writing.

Regarding imam Abu Hanifah's opinion on the ability of the marriage contract by writing, it cannot be separated from his legal *istinbath* regarding the terms of *the ijab qabul*. *Istinbath* the law of Abu Hanifah, rested on the Qur'an, hadith, *aqwal al shahabah*, *ijma'*, *qiyas*, *istihsan*, and *'urf*. The order is adjusted according to its virtues. This means that when in *beristinbath* has found the basis of the Qur'an and is supported by hadith then *aqwal al shahabah*, *ijma' qiyas*, *istihsan*, and *'urf* are no longer pursued in the process of *istinbath*. This indicates that *aqwal al shahabah*, *ijma'*, *qiyas*, *istihsan*, and *'urf* are alternatives in enforcing the law of a matter that has not been explained in the Qur'an or hadith.

So it can be concluded that Imam Abu Hanifah allowed the marriage contract with the inscription (letter) because the writing was *Khitab (al-Khitab min al-gaib bi manzilah al-khitab min al-attend)* on condition that it was attended by two witnesses. According to this opinion, the marriage contract is considered legally valid through the medium of communication. Imam Abu Hanifah explained that the marriage contract is allowed by letter by sending a messenger and then reading a letter by the messenger in front of the witness. Imam Abu Hanifah's opinion with *ijtihad* that the speech of the messenger is the same as the utterance that sends, and the reading of the letter is interpreted as one assembly in the marriage contract.

Legal Implications for The Marriage of Mute People

A man as a husband and a woman as a wife, have a complementary relationship, and support each other. Even in its pronunciation it is required to be done side by side in the sense that it must not be intermittent or intermittent with other things, something that has nothing to do with the process of *ijab* and *qobul*. The sentences used in the *ijab qabul* should use language that can be understood by the guardian and the future husband, the sentences spoken during the contract indicate a desire to marry, so as not to cause other meanings.

The purpose of Allah Almighty to observe His law is to preserve the benefit of man, to avoid *mafsadat*, or a combination of both at once both in the world and in the hereafter. This goal is to be achieved through *taklif*, the implementation of which depends largely on understanding the main sources of law, namely the Qur'an and hadith. In order to realize benefit in the world and in the hereafter, based on the research of *ushul fiqh* experts, there are five main elements that must be maintained and realized including religion, soul, reason, descent and treasure. A *mukallaf* will

gain benefit, when he can maintain these five basic aspects, and conversely he will feel the existence of mafsadar when he cannot maintain them properly.

Maqashid or maslahat is something that must exist in order to realize the benefit of religion and the world. Including *maslahat* or *maqashid al-khamsah* there are five namely: religion (*al-din*), soul (*al-nafs*), descent (*al-nasl*), treasure (*al-mal*) and reason (*al-aql*).

a) Maintaining Religion (*al-din*).

Religion is the main human need that must be met, because it is religion that can touch human conscience. God commands people to keep trying to uphold religion. Allah Almighty requires to realize, confirm, and establish it by obliging someone who already has the ability to marry so as not to fall into intoxication.

b) Nurturing the Soul (*al-nafs*).

Nurturing (preserving) the soul: the human self (life): Islam requires the realization and preservation of the human race by the way of marriage and continuing offspring. In order to maintain and guarantee human life, Islam requires definitely to eat, drink, clothe and others.

c) Nurturing Reason (*al-aql*).

Nurture (keep) reason : Reason is a great favor. Allah Almighty gave him to distinguish between humans and other beings, therefore Allah Almighty arranged marriage for humans to keep their minds because humans are the most perfect creatures of Allah swt and are equipped with reason. In order to preserve human reason from sinful deeds and maxiat, God forbids everything that can corrupt or weaken reason in this case adultery.

d) Nurturing Offspring (*al-nasl*).

Nurturing (keeping) offspring: Therefore shari'a still preserves marriage and advocates it. In order to keep it, Islam forbids adultery and enforces punishment for the perpetrators. This is because it prevents from mixing the nasab and preserves the glory of man.

e) Preserving Treasures (*al-mal*).

Maintaining (guarding) property: Property is one of the reasons for survival. Therefore, Shari'a requires that it produces treasure, and strives to obtain treasure.

The marriage contract can be held anytime and anywhere. Generally, the marriage contract is carried out in a mosque or house and is carried out in one assembly (the bridegroom and the female guardian are in one place). But even though the marriage contract is carried out in one assembly but when the guardian recites the *ijab* cannot be answered by the bridegroom because there is something (unable to speak) then in this case Islam provides a solution, namely by representing with someone who can be trusted or by writing.

This method is a way of communicating between the guardian (*ijab* pronouncer) and the bridegroom (*qabul*), so that if this marriage contract is included as a means of communication, what about the marriage contract that uses communication media such as writing. Imam Abu Hanifah said that the marriage contract was validly done by letter, because the letter was *Khitab (al-khitab min al-gaib bi manzilah al-khitab min al-attend)* on condition of being attended by two witnesses. According to this opinion, marriage in the sense of a marriage contract is considered legally valid to be carried out through the medium of communication.

Meanwhile, according to *jumhur ulama* explained that the marriage contract is a strong covenant rope (*misaq al-goliz*) so that the marriage contract must be attended directly by both parties of the bride and groom, the marriage guardian and two witnesses. Islam does not explain disability. Such a conclusion is painful for Muslims who believe that the Qur'an is the answer to the whole problem. On the contrary, in the book of Muslims there are those who convey the message positively and in a negative tone. From this explanation, it can be concluded that Islam does not have a single answer to answer the question of disability.

If we look at it from the point of view of jurisprudence, Islamic law has special rules for those who have disorders, both physically and mentally so that they cannot explain worship normally, in this case especially the implementation of the marriage contract. As we know in Islamic law there is a concept of *ruhsah* which is a very common rule in jurisprudence. This concept is a concept that provides waivers in worship for those who are in difficult conditions so that they can carry out worship in other ways. This is in accordance with the rules of *jurisprudence al-masyaqqat tajlib at-taisir* (the difficulty of entrusting ease).

The marriage contract with a letter has a condition that the bridegroom must not be one assembly, if both sides of one assembly then the contract with the writing is invalid, the second must bring in witnesses both at the time of writing there must also be witnesses who know and when the implementation of the marriage contract with writing there must be witnesses.

Thus marriage is not valid with *qabul* which is a word or deed such as giving up a dowry, nor giving up a dowry, nor by the writing of the person present (two persons who are contracted), but it may be done by the person who is not present on condition of telling the witnesses what is written, it is valid while the *lafadz* does not use the word command.

Imam Abu Hanifah has a solution if the bridegroom and the party who is the deceased or the guardian cannot gather in one assembly, then the marriage contract can use the letter and the law is valid. This conclusion was reached because according to this group, what is meant by the assembly that is mandatory in each contract is not the existence of two persons performing *ijab qabul* in one place physically. It may be that the places where the two are far apart, but if there is a means of communication that allows the two to carry out the marriage process at

the same time, then it is still called one assembly, so that the contract carried out is still punished legally.

So based on the explanation above, it can be concluded that the marriage contract is not only done orally but can also be done with other media, namely by letters (writings). Although Islam does not specifically regulate a person who has a disability (mute) but because here there is an element of benefit and coercive conditions so it is impossible for a person who has a deficiency (mute) to be able to perform *ijab qabul* using oral.

III. CONCLUSION

Based on the explanation that has been described, conclusions can be drawn, namely: 1) That Imam Abu Hanifah allows performing a marriage contract with a letter (writing) for a person with a blind (mute) provided that the person is truly mute from birth and is confirmed to be mute until he dies. 2) In Islamic law there is a concept of *ruhsah* which is a very common rule in the rules of jurisprudence. This concept is a concept that provides waivers in worship for those who are in difficult conditions so that they can carry out worship in other ways. In this case, it is the worship of the marriage contract performed by a mute person.

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