

Mut'ah Marriage: Between Human Rights and *Maqashid Shari'ah*

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Abstract: Temporary marriage or nikah mut'ah is a classic discourse which is still being debated. Apart from the differences of opinion between the sunni and syiah groups, the writer has viewed it is urgent to temporary marriage as an alternative solution to avoid adultery. This paper will discuss the practice of temporary marriage from the perspective of human rights shari'ah with the aim of seeing the reality of the prevailing laws and regulations in Indonesia and the perspective of maqashid shari'ah to analyze the concept of temporary marriage. This paper is a qualitative research with a library research study approach with an explanative research nature and an evaluative research form. This study aims to identify the problem of temporary marriage, then offers a solution through the application of basic research using the post positivism paradigm. The findings of this study explain that the relationship between the concept of temporary marriage with legislation in Indonesia and maqashid shari'ah is not contradictory, even the practice of temporary marriage is in line with the spirit of Human Rights and does not violate from maqashid shari'ah.

Keywords: Mut'ah Marriage; Human Rights; Maqashid Shari'ah

1 Introduction

Temporary marriage is a classic discourse that is still being debated today, especially since it is one of the marriage models of pre-Islamic Arabic marriage. [1] These debates usually discuss the discourse battle between Sunni and Shi'a schools. [2] The debate on temporary marriage, especially among Sunni and Syi'ah scholars in Indonesia, resulted in two opinions, namely illegalization and legalization. [3] The argument that forbids temporary marriage is based on the valid hadith and the Fatwa of Umar bin Khattab [4]. Another argument is that there are negative aspects of temporary marriage, namely as an object of male lust satisfaction, contrary to Religion and the Marriage Law of 1974 and the Compilation of Islamic Law (KHI), contrary to the spirit of forming happy family and full of love (sakinah, mawaddah wa rahmah). While arguments that legalize temporary marriage because there are positive aspects, such as temporary marriage can prevent free sex and can be an alternative solution for free sex, [5] legitimized by the verses of the Koran and Hadith,[6] protecting human dignity (one of which

is material benefits for women who temporary marriage), maintaining honor, life, property and security. [7]

Mut'ah marriage in Indonesia is always claimed as a typical Shiite marriage, as Eva F. Nisa said: "practiced only among Shi'ite Muslims, a creed that does not officially exist in the eyes of Indonesian law, which treats all Muslims de jure as Sunni".[8] While one of the models of marriage in Indonesia that is still ambiguous is sirri marriage. Sumanto al-Qurtuby when examining the relationship and social interaction between Arabs and local Indonesians found something positive.[8] According to him, at least there is a contribution from the Arab or Indo-Arab community in Indonesia, - one of which is temporary marriage. This is precisely practiced by Arab men and Indonesian women (especially ethnic Sundanese), including locations that are centers of temporary marriage practices such as in Cisarua, Cipanas, Ciawi, Badong, and Bogor in West Java. Arab tourists believe that the practice of temporary marriage is religiously legal, while Muslims and the Indonesian community generally view the practice of temporary marriage as synonymous with prostitution. [9] This view is based on the fact that the practice of mut'ah marriage does not comply with the terms and conditions of temporary marriage.[10]

Regardless of differences of opinion, both those that forbid because there are negative aspects and those that allow because there are positive aspects, most of which are anecdotal.[11] The results of Sami Badran and Brian Tumbull's research proved that differences of opinion (*khilafiyah*) on temporary marriage is anecdotal based on the study of empirical phenomena in the Middle East, North Africa Region (MENA) and surrounding areas. The purpose of this study is "... to answer how, and under what conditions, temporary marriage can be either exploitative or liberating for the individual woman".[11] The results obtained that temporary marriage can be used as a bridge to enter the stage of permanent marriage. According to him:

"A man living in a Western country described how temporary marriage was used with his partner (both recently converted to Islam) to give them time to prepare their families for their eventual marriage... Overall, narratives that mentioned the manifest theme of dating legitimation tended to be latently coded as positive, and those who mentioned seeking a legitimate sexual relationship were both positive and neutral, but none negative. Finally, of those who entered the relationship looking for a permanent marriage partner, five were latently coded positive, with only one negative. Three of these resulted in a permanent marriage; while one other foresees a permanent marriage in the near future".[11]

The explanation above can be stated that temporary marriage is still urgent to be studied at this time. The author will discuss the practice of temporary marriage in relation with human rights and maqashid shari'ah. This discussion does not only involve actors wishing to practice temporary marriage, but also involves the goals to be achieved. Therefore, the author will discuss how the reality of legislation in Indonesia gives authority to each individual to freely will according to their interests, and the extent to which the ideal goal of the practice of temporary marriage is. This research examines the laws and regulations in Indonesia and maqashid shari'ah as a perspective for analyzing the concept of temporary marriage.

2 Research Methods

This paper is included in a qualitative research family which involves a library research approach. Based on the type, the authors mapped this study into four groups.[12] *First*, the nature of the research, which is explanative because it connects two perspectives (legislation in Indonesia and maqashid shari'ah) in analyzing the concept of temporary marriage. *Second*, the form of research, namely evaluative because it discusses temporary marriage through the

perspective of legislation in Indonesia and maqashid shari'ah. *Third*, the research objective, namely problem identification regarding temporary marriage and then the problem solution. *Fourth*, the point of application is pure or basic research because it is related to the development of legal science (conventional and Islamic). This study uses the post positivism paradigm,[13] so that the axiom is seen from the ontology, epistemology and methodology. Then, the problems examined include the objectives of the problem and represent novelty which includes the objectives of the investigation, the nature and way of knowledge collected, accuracy and validity or quality criteria, value, and accommodations.

3 Result and Discussion

Temporary marriage or nikah mut'ah is linguistically focused on the word *al-mut'ah wa al-tamattu' wa al-istimta'* which means pleasure, enjoyment, or marriage only for a certain time.[14] According to Ustawan Hasanah, temporary marriage is a marriage contract,[7] so that in terms of pronunciation it consists of three things, namely the al-hajj contract, the al-talaq contract, and the al-nisa' contract. Temporary marriage has various meanings, but ultimately refers to the definition of *al-intifa'* from a philological aspect with the meaning of seeking and expecting benefits and delights.[7]

Muslim scholars agree that the Prophet Saw. ever allowed the practice of temporary marriage, but in the end it was forbidden. For example, scholars in Indonesia, such as Hamka, admit that temporary marriage is a distortion or deviation of God's rules. He began discussing the concept of temporary marriage when interpreting the end of the verse in the QS. al-Nisa: 27. Hamka interprets the meaning of the end of the verse "but those who obey their lusts want to turn with a big turn".[15] Furthermore, he explained:

"So that even though God's regulations already exist, they will look for excuses as well as twirling and twisting God's rules to obey their lusts ... One of those deflections is what people call the temporary marriage, namely marrying a woman by agreement will only mingling for a few days, or weeks, or a month and two months, with the prior intention on both sides that this was just a temporary marriage. Strangely enough, to legalize this temporary marriage, the woman who is married is not included in the wife list, so if there are four wives, then the wife who is temporary marriage is not included in the fifth. It's really just to let go of addiction".[15]

However, Hamka acknowledged that temporary marriage was used during the conditions of war during the time of the Prophet. and legalized in order to avoid adultery. Furthermore, Hamka agreed with the opinion of the ulama' ahl al-sunnah that this acquisition is a gradual way (*tadrij*) which ultimately cannot be done forever.[15] Other scholars, such as Quraish Shihab when discussing the context of temporary marriage begin his explanation in the middle of another verse by explaining the word (فَمَا اسْتَمْتَعْتُمْ بِهِ مِنْهُنَّ) *fama istamta'tum bihi minhunna* in QS. al-Nisa: 24. Quraish Shihab interprets that the meaning of the middle of the verse "so the wives that you have enjoyed (meddle) among them, give them their reward as an obligation; and it is okay for you to something that you have given up for each other, having determined that obligation. Allah is All-Knowing, Most Wise.[16]

According to him, the word *istamta'tum bihi minhunna* is understood by the majority of ahl al-sunnah scholars, namely enjoying a normal marriage relationship, so that the emphasis is on the enjoyment and delicacy of physical relations.[16] Quraish Shihab explains that the word *istamta'tum* in the middle of QS.al-Nisa: 24 according to syi'ah and sunni scholars refers to temporary marriage. The contemporary Sunni scholar, Shaykh Muhammad Thahir Ibn Asyur as a great scholar and Tunisian mufti with the Maliki sect, allows the practice of temporary

marriage in emergencies, for example when traveling far away or in other situations such as fighting because he does not bring his wife. The legal temporary marriage is valid if it meets the requirements as a regular (permanent) marriage, such as guardian, witness, dowry, children born are legitimate children, and a woman's 'iddah is one menstruation (whereas according to Thabathaba'i two menstruation).[16] Quraish Shihab himself argues that the practice of temporary marriage is not in line with the purpose of marriage as desired by the Koran and the Sunnah, namely marriage that is permanent, lifelong, even to the next day by referring to the QS. Yasin: 56. Even so he argues that the majority of scholars view that the practice of temporary marriage is not an act of zina.[16]

The writer does not intend to re-discuss differences of opinion about temporary marriage, but he wants to show it from the side of its validity and reliability. Temporary marriage is a marriage discourse carried out by a male and female partner with an agreed time limit, mutual willingness, and conditions that are determined as a permanent marriage, and carried out in an emergency (traveling far without bringing a wife). On the other hand, the objectivity is that temporary marriage is a mysterious practice in the Islamic world. In fact, the practice in Indonesia has undergone a shift which has become a new problem as a form of 'shari'ah prostitution' because it is not in accordance with the prevailing provisions of the temporary marriage. This is in line with the explanation from Taushif Kara that the practice of temporary marriage is one of the most mysterious processes in the contemporary Islamic world.”[17] Another reason is that the tendency to apply the practice of temporary marriage has been distorted from time to time. Over time, even the temporary marriage became a political tool to use the soldiers to increase their influence on the youth.[17] But on the other hand, the practice of temporary marriage can be done to prepare the time to form a real family and change the tradition of dating into a legitimate and positive relationship.

The practice of temporary marriage in Iran is officially recognized by state law. This is intended to differentiate between temporary marriage and permanent marriage.[18] Mohamadreza Marandi, et. for example, providing a mapping of the legal aspects in his research when studying marriage and civil law aspects of its dissolution in Iran.[19] he explained the subtitles of types of marriage as:

“Civil marriage law is twofold: permanent marriage and temporary marriage. Legislator in civil law (1), temporary marriage is considered as a kind of marriage. Article 1075 of the Civil Code states: “When marriage is interrupted for a certain period of time.” The difference permanent marriage with temporary marriage. 1. Derived from materials in 1075 and 1076 of the Civil Code, it is necessary to determine how long the temporary marriage. 2. Article 1095 of the Civil Code of Iran derived from the basic conditions of temporary marriage, seal and stamp of the contract would be invalid. 3. The obligation to pay alimony to the wife by husband of temporary marriage does not exist “unless conditions or the contract that it is now” (Article 1113 of the Civil Code). 4. Divorce of Article 1120 BC Special permanent marriage and temporary marriage is not implemented and the separation of husband and wife of waiver term expiration or termination of the contract will be realized. 5. Some of the region’s wife after separation from her husband in a non-pregnant woman two Thwarts (haidh), while some marriage annulment or divorce in marriage is a permanent three-theorem (haidh). If the woman does not become the region with the requirements of age, his number is 45 days, while some of these women marry for three months (of 1151 and 1152 BC). 6. Temporary marriage couple do not inherit from each other. (940 and 1077 BC).[19]

3.1 Temporary Marriage and Legislation in Indonesia

Temporary marriage is a practice of marriage based on time restrictions and the willingness of both parties (male and female partners) as human rights because they have a consensual bond. The Basic Constitution of 1945 discusses in detail the 10 articles of Human Rights in Chapter XA. There are 7 articles that are closely related to the practice of temporary marriage, especially in the Human Rights Chapter such as article 28A, article 28C paragraph (2), article 28E paragraph (1) (2) (3), article 28G paragraph (1), article 28H paragraph (2) and (4), article 28I paragraph (1) (2) (4) (5), and article 28I, the explanation is as follows:

- a. Article 28A "Everyone has the right to live and has the right to defend his life and live".
- b. Article 28C, paragraph (2) "Every person has the right to advance himself in fighting for his rights collectively to develop society, nation and state".
- c. Article 28E paragraph (1) Everyone is free to embrace a religion and worship according to his religion, choose education and teaching, choose work, choose citizenship, choose a place to live in the territory of the State and leave it, and have the right to return ". (2) Everyone has the right to freedom of belief, to express thoughts and attitudes, according to his / her conscience. (3) Everyone has the right to freedom of association, assembly and expression.
- d. Article 28G paragraph (1) "Every person has the right to protection of himself, family, honor, dignity and property under his control, and the right to a sense of security and protection from the threat of fear to do or not do something that is a human right" .
- e. Article 28H paragraph (2) "Everyone has the right to get special facilities and treatment to get the same opportunities and benefits in order to achieve equality and justice". (4) "Every person has the right to own private property and these rights cannot be taken over arbitrarily by anyone.

In the context of temporary marriage in general, marriage is a part of Human Rights, because human biological needs are part of life (Article 28A). Sexuality functions to fulfill one of the basic human needs so that its influence can provide encouragement to build society, nation and state (article 28C paragraph 2). Temporary marriage is not a practice of adultery, as previously emphasized by the Quraish Shihab, but in order to avoid adultery so that temporary marriage can be used as an alternative to adultery (article 28E, verses 1, 2, and 3). Temporary marriage upholds the principle of willingness, agreement, and mutual determination of time as a form of protection, honor and dignity for both parties, both men and women who carry it out (article 28G paragraph 1). Therefore, the practice of temporary marriage has elements of justice and equality of rights (article 28H paragraph 2).

The view which states that the prohibition of temporary marriage is due to the appearance of negative impacts (madharrat), such as: 1) contrary to the purpose of marriage in Islam. 2) forms of harassment against the dignity of women. 3) disturbing family harmony and disturbing society. 4) result in neglect of the child resulting from the temporary marriage. 5) contrary to Law Number 1 of 1974 concerning Marriage articles 1 and 2. 6) it can cause and spread venereal disease. 7) has the potential to destroy the personality and noble culture of the Indonesian people.[20] This opinion is irrelevant because temporary marriage is carried out not only to wreak lust, but Human Rights for each individual.

The practice of temporary marriage is considered contrary to Law Number 1 of 1974 concerning Marriage and Compilation of Islamic Law, it seems inappropriate that Law Number 1 of 1974 concerning Marriage and Islamic Law Compilation (KHI) is intended for permanent marriage with the aim of forming a family or a happy and eternal home. Meanwhile, temporary marriage is an alternative to permanent marriage, with the aim of avoiding adultery, as an alternative, and as a solution to the urgent condition related to sex because of not bringing a

wife.[5] There are similarities and differences between temporary marriage and permanent marriage,[21] which can be seen in the following table:

Table 1. Similarities and Differences between temporary marriage and permanent marriage

	Similarities	Differences
Temporary Marriage	Child status Mahram	Duration Mahar Women's freedom in determining the conditions according to their wishes
	'Iddah	Inheritance The 'iddah period of temporary marriage is two menstrual periods or forty days.

The concept of temporary marriage basically does not conflict with the reality of legislation in Indonesia, apart from referring to the Basic Law 1945, the writer also refers to Law Number 39 of 1999 concerning Human Rights, as in Article 2, states: "The Unitary State of the Republic of Indonesia recognizes and upholds human rights and basic human freedoms as rights inherently inherent in and inseparable from humans, which must be protected, respected and upheld for the sake of enhancing human dignity, welfare, happiness, and intelligence and justice."

Temporary marriage is a basic human freedom because in practice it is based on the consensual/willingness of both parties (male and female). Even this practice is a form of increasing human dignity, welfare, happiness, intelligence and justice because in practice the elements of agreement from both parties must also be fulfilled. Likewise in the practice of permanent marriage, it can take place on the basis of free will between the two parties, as in Article 10, paragraph (2): "A legal marriage can only take place on the free will of the prospective husband and future wife concerned, in accordance with the provisions of the legislation".

Prospective husbands and prospective wives can practice temporary marriage as an alternative to preparing themselves to form a family. From this it appears that between temporary marriage and legislation in Indonesia there is substantially no contradiction, even has the same spirit. It's just procedurally, temporary marriage are still not accommodated by positive law in Indonesia, so there is an assumption that temporary marriage is classified as the practice of adultery, even this practice can be turned into prostitution, because it doesn't follow the rules or provisions of the temporary marriage.

3.2 Temporary Marriage and Maqashid Shari'ah

Temporary marriage in general is part of Human Rights. When viewed from the point of view of maqashid shari'ah, according to al-Syatibi that maqashid is divided into two things: *First*, qashd al-shari' (a return to a religious law intent). *Second*, qashdi al-mukallaf (individual who is given responsibility). The first explanation has four statements, including:

- a. Qashd al-Shari' fi wadh'i al-shari'ah (the purpose of religious law in making syari'ah).
- b. Qashd al-shari' fi wadh'i al-shari'ah li al-ifham (the purpose of religious law which makes it easy to understand).
- c. Qashd al-shari' fi wadh'i al-shari'ah li al-taklif bimuqtdadhaha (the purpose of religious law makes responsibility given to humans).
- d. Qashd al-shari' fi dukhul al-mukallaf tahta ahkam al-shariah (the purpose of religious law is to make individuals responsible for carrying it out).

The second explanation regarding *qashd al-mukallaf* (the purpose of *mukallaf*) emphasizes the actions of human actions that are to be brought to their original goals and intentions. The context of temporary marriage can be explained by referring to the explanation regarding: *First*, *qashd al-shari' fi wadh'i al-shari'ah* (the purpose of making *shari'ah*), such as: *hifz al-din* (maintaining or maintaining religion), *hifz al-nafs* (nurturing the soul), *hifz al-'aql* (maintaining reason), *hifz al-mal* (maintaining property and objects), *hifz al-nasl* (maintaining offspring). *Second*, *Qasd al-syari 'fi wadh'i al-syari'ah li al-ifham* (the purpose of religious law which makes it easy to understand). That is, the practice of temporary marriage exists to avoid adultery (*hifz al-din*), especially in the contract, a *mahr* is required which can help the economy of the economy according to a mutually voluntary agreement (*hifz al-mal*). Individuals are also creatures who have basic needs such as sex (*hifz al-nafs*), because if you want to prepare a real family with a permanent marriage, it is necessary to have careful preparation such as doing a temporary marriage as a substitute for the habit of dating or dating. In simple terms it can be understood that *qashd al-shari' fi wadh'i al-shari'ah li al-ifham* in the context of temporary marriage is not only to avoid adultery, but also to fulfill individual basic needs and desires.

Temporary marriage cannot be equated with prostitution because it has terms and procedures that must be met as a form of *Qashd al-shari' fi wadh'i al-shari'ah li al-taklif bi muqtadhaha* (the purpose of religious law is to make the given responsibility to humans) and *Qashd al-shari' fi dukhul al-mukallaf tahta ahkam al-shari'ah* (the purpose of religious law is to make individuals responsible for carrying it out). As for the terms and conditions of the marriage *mut'ah* procedure as follows:

"The legal conditions for a temporary marriage such as: *baligh*, reason, and there are no other obstacles that are *syar'i* when a temporary marriage takes place (*nasab* relationship, sibling, still being someone else's wife, brother-in-law. Other conditions regarding temporary marriage, among others: there is a contract between the two partners who want to *mut'ah* without witnesses, men are free from living, can marry more than four women, women do not have inheritance rights, no guardian is required, there is a time limit ... the procedures regarding temporary marriage, among others: 1) Temporary marriage is the same as permanent marriage, there must be an oral *qabul* agreement. 2) the word *ijab* in the temporary marriage contract is: may be with *matta'tu ... zawwajtu ... ankahtu ...* and the *qabul* uses the word *qabiltu al-mut'ata ...* can also be *qabiltu*. Muslim women are not allowed to marry an infidel man, and vice versa... 4) In a temporary marriage, it is required to mention a dowry... 5) The contract is broken and canceled if the woman has a husband or the family of a male wife or in-laws. 6) Temporary marriage is required to state the period of time ... 7) Divorce does not apply in temporary marriage ... 8) There is no mutual inheritance relationship. 9) *mustahab* (recommended, *sunnah*) if the woman is an *afifah* (avoid bad behavior) and a believer. 10) it is treacherous to get married to an adulterous woman.[5]

Women in prostitution do not have an *iddah* (waiting period) period, but in temporary marriage it is compulsory for women to *'iddah* for two menstruation or 45 days. The provision of *iddah* must be implemented perfectly so that there is no deviation based on passion alone, so that it can be in line with *qashd al-mukallaf* (the purpose of *mukallaf*), not just using women to fulfill the needs of passion alone. All provisions of the terms and procedures must be implemented and the woman accepts voluntarily according to the agreement between the two. The explanation above can illustrate that the relationship between the concept of temporary marriage and legislation in Indonesia does not experience differences, but is in line with the spirit of Human Rights. Likewise, the relationship between the concepts of temporary marriage and *maqashid shari'ah* appears to be in line and without any friction.

4 Conclusion

The practice of temporary marriage in question is considered contrary to Law Number 1 of 1974 concerning Marriage and the Compilation of Islamic Law (KHI), which it seems inappropriate because the regulation is emphasis more on permanent marriage that is to form a happy and eternal family or household. Meanwhile, temporary marriage can be used as an alternative action related to sexual problems in order to avoid adultery at conditions of emergency. In addition, temporary marriage can be used as a means to form a happy family. In terms of Human Rights, temporary marriage does not contradict the 1945 Constitution and Law No. 39/1999 concerning Human Rights, it is even part of Human Rights.

Meanwhile, temporary marriage does not contradict maqashid shari'ah and nikah mut'ah is not the same as prostitution because in its implementation there are conditions and procedures that it must be fulfilled. Temporary marriage can be seen as part of qasd al-shari' fi wad'i al-shari'ah li al-taklif bimuqtadaha (the purpose of religious law makes responsibility given to humans) and qasd al-shari' fi dukhul al-mukallaf tahta ahkam al-shari'ah (the purpose of religious law is to make individuals responsible for carrying it out).

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