

Review Of Islamic Law In The Shafi'i School And The Hanafi School On The Marriage Contract Of Persons With Speech Impairment

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ABSTRACT

*This article examines the practice of marriage contracts for individuals with speech disabilities (tunawicara) from the perspective of Islamic Law, particularly according to the Shafi'i and Hanafi schools of thought, as well as Indonesian legislation as outlined in the Compilation of Islamic Law (KHI). The focus of this study arises from the issue of *ijab* (offer) and *qabul* (acceptance), which must be performed consecutively without a long pause, as any interruption or inability to speak may affect the validity of the marriage contract. This study aims to analyze the legal status of marriage contracts involving speech-impaired individuals according to both schools of Islamic jurisprudence and to explore the basis of *maslahah* (public interest) in establishing the law. This research employs a qualitative method using a library research approach. Data were collected from books, journals, and other relevant literature, and then analyzed descriptively to explain legal concepts and draw conclusions. The results show that both the Shafi'i and Hanafi schools permit the marriage contract of a speech-impaired individual through writing or gestures. However, the two differ in their legal approaches: the Shafi'i school applies *qiyyas*, equating spoken words, writing, and gestures, while the Hanafi school applies *istihsan*, considering gestures not fully equivalent to writing. Therefore, gestures are only permitted when the speech-impaired individual is unable to write.*

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Introduction

Marriage is a universal phenomenon that applies to all of God's creations, including humans, animals, and plants. It is one of the means chosen by Allah SWT for His creatures to continue their lineage (Slamet Abidin, 1999). Marriage is an act commanded by Allah SWT and His Messenger; numerous injunctions in the Qur'an encourage marriage, and it is regarded as a prophetic tradition (sunnah) whose performance is considered an act of worship. Marriage is not merely a written or verbal contract pronounced by two parties, but rather a mutual agreement between two families witnessed by members of the Muslim community. The marriage contract (aqdu an-nikah) has specific pillars (rukun) and conditions (syarat) that must be fulfilled, as these determine its legal validity. Although the terms "pillars" and "conditions" are closely related, they are conceptually distinct. Pillars constitute essential elements that form an integral part of the act itself, whereas conditions are prerequisites that must exist but do not form part of the act. In the context of marriage, the absence of any pillar or condition renders the marriage invalid. For Muslims, it is beyond doubt that marriage is a sacred legal contract ('aqd shar'i), the validity or invalidity of which is determined solely by divine law. Since inner consent and willingness are psychological states that cannot be directly observed, a clear symbolic expression is required to demonstrate the intention to establish a marital bond. This expression is articulated verbally by both parties during the contract, which is referred to as the sighth of marriage (Slamet Abidin, 1999).

The initial declaration expressing the intention to establish a marital relationship from the bride's side is known as ijab, while the subsequent statement pronounced by the groom indicating acceptance and consent is called qabul. Together, ijab and qabul constitute the marriage contract. In fiqh terminology, ijab and qabul represent an expression of intent originating from the woman's side, followed by the man's acceptance as a form of consent to the marriage. In principle, a marriage contract may be conducted in any language that conveys the intended meaning, provided it is understood by both contracting parties and the witnesses present. The ijab and qabul must occur in a single session without interruption by unrelated conversation that could disrupt the continuity of the contract (Sumarjoko, 2018). Scholars unanimously agree that ijab and qabul are essential requirements for the validity of marriage. According to the Hanafi school, once the guardian (wali nasab) or his representative has pronounced the ijab, the groom may pause briefly before pronouncing the qabul, and the marriage remains valid. In contrast, the Shafi'i school holds that the groom must immediately pronounce the qabul after the ijab without any delay. This latter opinion is generally practiced among Muslim communities in Indonesia. The most fundamental aspect of marriage for both parties is mutual consent, sincerity, and willingness to enter into the marital bond. As these

elements are psychological and difficult to measure, consent must be expressed through words, actions, or signs that are clearly understood, provided they are not accompanied by rejection (Slamet Abidin, 1999).

For individuals with speech impairment, ijab and qabul are considered valid when expressed through comprehensible signs, similar to the validity of sales transactions conducted through gestures, since such signs convey intelligible meaning. However, if one of the parties does not understand the gestures, the ijab and qabul are deemed invalid, as the contract involves only the two concerned parties. This is in line with Article 17 paragraph (3) of the Compilation of Islamic Law (KHI), which states: "For prospective spouses who suffer from speech or hearing impairment, consent may be expressed through writing or understandable signs." Based on this explanation, the author seeks to examine the process of the marriage contract for individuals with speech impairment, particularly regarding the groom's expression of qabul, from the perspectives of Islamic law in the Shafi'i and Hanafi schools.

Method

This research employs a qualitative approach aimed at gaining an in-depth understanding of the aspects surrounding the marriage contract of individuals with speech impairment. The study is categorized as library research, relying on primary sources in the form of classical works authored by scholars of the Shafi'i and Hanafi schools. The data used in this study are derived from literature review, including books on marriage, classical jurisprudential texts of the Shafi'i and Hanafi schools, the Compilation of Islamic Law, works on usul al-fiqh, the Qur'an and Hadith, as well as relevant academic studies related to the topic under discussion.

Results

The Perspective of Islamic Law in the Shafi'i School on the Marriage Contract of Persons with Speech Impairment

Based on research findings concerning the implementation of verbal marriage contracts (ijab and qabul) for individuals with speech impairment in the Shafi'i school, it is established that the contract may be conducted through gestures, provided that the gestures are clear and unambiguous. If the gestures are unclear or imply indirect meanings (kinayah), or if the person is capable of writing, then appointing a representative is recommended. If appointing a representative is not possible, the marriage contract may still be validly concluded through indicative gestures or written expression if necessary. The appointment of a representative

must be agreed upon by the bride and the marriage witnesses to ensure the validity of the contract.

واما ان كان زوجا فان كانت اشارته صريحة عقد بها وان كانت كناية او
كان له كتابة فان امكنه التوكيل وكل والا عقد بها للضرورة

If the prospective groom is unable to speak, then if his gestures are easily understood, he may use those gestures as a substitute for verbal expression. However, if the gestures carry meanings other than marriage, or if he is capable of writing, then—if possible—he should express it in writing. If he is unable to write, then the ijab and qabul (marriage contract) may be conducted through ambiguous gestures or by means of writing in situations of necessity (Hāshiyah al-Iqnā'). As explained in I‘ānah al-Tālibīn, volume 3, when the marriage contract is required to be conducted in Arabic, a person with speech impairment should first attempt to learn Arabic sign expressions. If this is not possible, then the marriage contract may be carried out by appointing a representative.

A person who is unable to speak may use gestures and writing as substitutes for verbal expression, which constitute forms of communication different from those used by individuals who can speak audibly. According to Imam al-Shāfi‘ī, gestures and writing are considered equivalent in many legal aspects, such as in the contexts of wills, marriage, divorce, sale transactions, qīṣāṣ punishments, and similar matters (Radd al-Muhtār).

Understanding is not limited only to those who are experts in interpreting such signs. It is also considered valid for a mute person to contract a marriage through written communication. This view is not controversial, as mentioned in the book al-Majmū‘ (a compendium of Islamic jurisprudence). However, there are groups who oppose this view on the grounds that indications in divorce are metaphorical and not explicit. Marriage contracts are more significant than divorce, and the validity of marriage through indications is therefore not disputed. In line with the opinion of the Muṣannif, if a mute person has no comprehensible signs and experiences difficulty in expressing himself due to necessity, then his indications are equated with written expression. Likewise, for a person with a speech impairment who cannot clearly articulate before the marriage guardian and two male witnesses, Islamic jurisprudence provides solutions, and scholars have exercised ijtihād (independent legal reasoning) regarding this matter. In deriving legal rulings, Imam al-Shāfi‘ī employed the methodology of uṣūl al-fiqh, beginning with the primary sources of Islamic law—the Qur‘an—followed by the Sunnah (Prophetic traditions), and, in the absence of explicit guidance, scholarly consensus (ijmā‘) among qualified jurists (al-Shāfi‘ī, 1971). Imam al-Shāfi‘ī also considered context and consequences in determining legal rulings.

First, regarding the validity of a marriage contract conducted through writing, Imam al-Shāfi‘ī considered it valid provided that someone reads it aloud on behalf of the speech-impaired person. If no one reads it on their behalf, the marriage contract is deemed invalid. He also regarded as valid a marriage contract for a speech-impaired person who uses bodily gestures due to inability to write; however, if writing is possible, it is preferable to combine gestures and writing.

Second, for the marriage contract of a mute person, it may be conducted through gestures, provided that the gestures are clear. If the gestures are unclear or carry metaphorical meanings (kināyah), or if the person is capable of writing, then if possible he should appoint a representative. If appointing a representative is not feasible, the marriage contract may still be validly conducted through suggestive gestures or in written form when necessary. A marriage involving a mute person is considered valid if it is conducted through clear written communication or intelligible gestures. Once the marriage contract (ijab and qabul) is fulfilled, the marriage is deemed valid according to religious teachings, even if the pronouncement is made without sincerity or genuine intention to marry.

Discussion

Islamic Legal Perspective of the Hanafi School on the Marriage Contract of a Speech-Impaired Person

Imam Abū Ḥanīfah held the view that a mute person may express a contract, including a marriage contract, through clear signs if he is unable to write. Similarly, a marriage contract as well as a sales contract is considered valid if the gestures or signs used are understandable.

ولو كان الزوج اخرس فان الطلاق يقع باشارته لانها صارت مفهومة فكانت كالعبارة في الدلالة استحساناً فيصخ بها نكاحها وطلاقها وعتاقه وشراؤه

If a person is mute, then divorce occurs through his gestures, because such gestures are understood and function as expressions that indicate consent. Therefore, matters such as marriage, divorce, emancipation, and sale become clear through these gestures. (*Al-Bahr al-Rā’iq*)

If a mute person is unable to write but is able to make clear gestures indicating divorce, marriage, or sale, then this is permissible based on *istihsān* (juristic preference). However, it is not considered valid according to *qiyās* (analogical reasoning), because such gestures may not explicitly express the written forms. Sign language is commonly used by mute persons in everyday activities. Therefore, if these signs can be understood by the general public, contracts

such as divorce, marriage, and sale may be concluded through signs based on the principle of *istihsān*. In contrast, under the method of *qiyās*, such contracts are not deemed valid when conducted through gestures, because the gestures do not contain specific letters. As long as the signs made by a mute person can be understood, they are considered equivalent to verbal expressions under the principle of *istihsān*. Accordingly, several contracts concluded through gestures remain valid.

One of the scholars of the Ḥanafī school, Ibn ‘Ābidīn, in his work *Radd al-Muhtār*, also affirms the permissibility of using gestures in marriage and divorce. He emphasizes that the validity of using gestures for such contracts depends on the inability of the mute person to write. As long as the person is able to write, gestures are not accepted. The preference for writing is based on the fact that written communication provides a clearer and more universally understood form, since not all gestures made by mute persons can be understood by the general public. In the Ḥanafī school, a marriage contract conducted in written form falls into the category of ‘aqd *kināyah* (indirect contract), namely a contract whose declaration is not expressed explicitly (*sariḥ*) (Sumarjoko, 2017). Conveying intent through writing is essentially equivalent to conveying intent through speech, because writing consists of arranged letters that convey meaning, just as spoken words do. This applies both to ordinary individuals and to mute persons who are able to write. A marriage contract may therefore be considered valid when concluded through clear written expression by a mute person, because writing holds the same legal status as spoken words.

وَإِنْ كَانَ الْأَخْرَسْ لَا يَكْتُبُ وَكَانَتْ لَهُ اِشَارَةٌ تُعْرَفُ فِي طَلاقِهِ وَنِكَاحِهِ وَشَرَائِهِ
وَبِيَعِهِ فَهُوَ جَائِزٌ اسْتِحْسَانًا وَفِي الْقِيَاسِ لَا يَقْعُدُ شَيْءٌ مِّنْ ذَلِكَ بِإِشَارَتِهِ
لَا يُتَبَيَّنُ بِإِشَارَتِهِ حُرُوفٌ مَّنْظُومَةٌ

If a person is mute but not deaf, and he is able to give signs that can be understood in matters of divorce, marriage, and sale, then such acts are considered valid based on *istihsān*. However, according to *qiyās*, these acts are not valid when based solely on gestures, because through gestures one cannot see arranged letters. (*Al-Sarakhsī Mabsūt*, 1989) The use of writing, whether by ordinary individuals or by persons with speech impairments, makes the communication process clearer, especially in the context of the marriage contract, which is a vital component of marriage involving the transfer of rights and responsibilities from the guardian to the groom.

Legal Basis for Application

The legal basis for applying marriage contracts involving persons with speech impairments in both the Shāfi‘ī and Ḥanafī schools is similar, namely allowing the use of writing or gestures. However, the methods employed differ. The Shāfi‘ī school justifies this through *qiyās*, equating divorce expressed through gestures and writing with divorce expressed verbally, because both can be understood. According to the Shāfi‘ī school, a person with a speech impairment may convey a marriage contract through writing or gestures, as both are considered equivalent to verbal expression in conveying meaning to the other party. The Shāfi‘ī school views these two methods as equal and directly equates their legal status with the speech of a person who is able to speak.

On the other hand, the Ḥanafī school employs *istihsān* (Sumarjoko, 2017) and holds that gestures cannot be equated with writing. For the Ḥanafī school, as long as a person is still able to write, the use of gestures is not permitted. The Ḥanafī school considers writing to be more effective because it consists of arranged letters that convey meaning, unlike gestures, which do not contain such letter structures.

Both of these views are also reflected in the Compilation of Islamic Law (*Kompilasi Hukum Islam*—KHI) applied in religious courts in Indonesia. The KHI serves as a guideline in examination procedures, adjudication, and decision-making in matters related to Islamic civil law. Article 17 paragraph (3) of the KHI states that for prospective spouses who have speech or hearing impairments, consent may be expressed through writing or understandable gestures. This means that prospective spouses with hearing or speech limitations may use sign language and be assisted by an interpreter so that their intentions can be understood by the witnesses. Furthermore, Article 29 of the KHI provides the following provisions:

1. Only the prospective groom has the personal right to pronounce the *qabul*.
2. In certain circumstances, the pronouncement of the *qabul* may be delegated to another man, provided that the prospective groom gives written authorization clearly stating that the representative's acceptance of the marriage contract is on his behalf.
3. If the prospective bride or her guardian objects to such representation, the marriage contract may not be concluded.

Article 29 paragraph (2) of the KHI explains the granting of authority in pronouncing the *qabul*, whereby the prospective groom must provide written authorization to another party to represent him in the marriage contract, explicitly stating that the acceptance by the representative is on behalf of the groom. Thus, if the pillars and conditions of marriage are

fulfilled, the marriage is considered legally valid, and the parties acquire the lawful status of husband and wife. With this status, the rights and obligations of husband and wife take effect.

Conclusion

1. The Shāfi‘ī school permits persons with speech impairments to convey a marriage contract through either writing or gestures, as both are considered valid alternatives for expressing intent. The Shāfi‘ī school regards both as equivalent to verbal speech, since writing and gestures are capable of conveying understanding to the other party. Accordingly, the Shāfi‘ī school treats writing and gestures as equal and allows their use without restriction.
2. The Ḥanafī school places greater emphasis on the use of writing than on gestures, considering it more effective and clearer, because writing consists of letters that convey meaning, unlike gestures, which lack a letter-based structure. The Ḥanafī school firmly acknowledges the validity of a marriage contract conducted through gestures on the legal basis of *istihsān*, while maintaining that gestures are not equivalent to writing. Therefore, gestures are only permitted when a person with a speech impairment is unable to write. In summary, both schools deem the marriage contract of a speech-impaired person valid when conducted through writing or gestures, but they differ in their legal approaches. The Shāfi‘ī school relies on *qiyās*, resulting in legal equivalence between gestures, writing, and speech, without restriction on their use. The Ḥanafī school relies on *istihsān*, viewing gestures as not equivalent to writing, and thus permitting gestures only when writing is not possible.

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