

## THE MARRIAGE AGREEMENT IN ARTICLE 29 OF LAW NUMBER 1 OF 1974 IS REVIEWED ACCORDING TO ISLAMIC LAW

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### Abstract

The purpose of this research is to determine the view of Islamic law on the Marriage Agreement in Article 29 of Law no. 1 of 1974. This research is juridical normative because it examines sources of written legal data and library materials by referring to the statute approach and syar'i approach related to Islamic law. The Sources of legal materials used in this study are primary and secondary legal materials. Marriage requirements can only be made before and at the time of the contract, where the contents must not conflict with the syari'at and the purpose of marriage. Ulama clarified that there is a marriage agreement that is shahih, which is that it has benefits and is in accordance with the purpose of the marriage, so this must be fulfilled, the conditions that fasid do not have to be fulfilled because there are parties who are hurt and it is against the law. The contents of the agreement can include assets in marriage and other agreements. The agreement that has been made cannot be revoked again, because this is likened to a person who withdraws a gift that he has given and Rasulullah Saw strongly denounces this act. However, this is allowed if there is an agreement between both parties and neither party is disadvantaged.

**Keywords:** Agreement, Marriage, Legislation, Islamic Law

### Abstrak

Penelitian ini bertujuan untuk mengetahui pandangan hukum Islam terhadap Perjanjian Perkawinan pada Pasal 29 Undang-Undang No. 1 Tahun 1974. Penelitian ini bersifat yuridis normative karena mengkaji sumber data hukum tertulis dan bahan pustaka dengan mengacu pada pendekatan undang-undang (statute approach) dan pendekatan syar'i yang berhubungan dengan hukum Islam. Sumber bahan hukum yang digunakan dalam penelitian ini dari bahan hukum primer dan bahan hukum sekunder. Persyaratan perkawinan hanya bisa dibuat sebelum dan pada waktu akad, yang mana isinya tidak boleh bertentangan dengan syari'at dan tujuan pernikahan. Ulama mengklarifikasikan perjanjian perkawinan itu ada yang shahih yaitu memiliki manfaat dan sesuai dengan tujuan pernikahan maka ini harus dipenuhi, syarat yang fasid tidak harus dipenuhi karena ada pihak yang tersakiti dan bertentangan dengan syari'at. Isi dari perjanjian bisa meliputi harta kekayaan dalam perkawinan dan perjanjian lainnya. Perjanjian yang telah dibuat tidak boleh dicabut lagi, karena hal ini diumpamakan seperti orang yang menarik kembali hibah yang telah dia beri dan Rasulullah Saw sangat mencela perbuatan tersebut. Namun hal ini diperbolehkan jika telah ada kesepakatan kedua belah pihak dan tidak ada pihak yang dirugikan.

**Kata Kunci:** Perjanjian, Perkawinan, Undang-Undang Nomor 1 Tahun 1974, Hukum Islam

### INTRODUCTION

The marriage agreement is important to protect the legal consequences of marriage, namely the relationship between husband and wife, property and the relationship between parents and children.<sup>1</sup> The marriage

agreement is regulated in article 29 of Law No. 1 of 1974, articles 45-52 of the Compilation of Islamic Law (KHI) and articles 139-154 of the Civil Code (Burgerlijk Wetboek). In Islam, it is better known as the

<sup>1</sup> Ni Kadek Ani, I Nyoman Putu Budiarta, and Ida Ayu Putu Widiati, "Perjanjian Perkawinan Sebagai

Perlindungan Hukum Terhadap Harta Bersama Akibat Perceraian," *Jurnal Analogi Hukum* 3, no. 1 (2021): 17-21, <https://doi.org/10.22225/ah.3.1.2021.17-21>.

condition in marriage which is essentially the same, namely making an agreement between the future husband and wife that is beneficial to both. Marriage agreements that are still considered as *tabuh* but have benefits as preventive measures for domestic life to always be harmonious and peaceful.<sup>2</sup>

This agreement can also be referred to as a prenuptial agreement because it is executed in writing at the time or before the marriage is held and must be ratified by the Registrar of Marriages, each party must also promise to comply with what is promised.<sup>3</sup> However, based on the Constitutional Court Decision No. 69/PUU-XIII/2015 of 2015, a marriage agreement can be made after the marriage takes place.<sup>4</sup>

The content of the marriage agreement is growing with the increasingly critical mindset of society, namely as the separation of property in marriage, the prohibition of polygamy, the rights and obligations of husband and wife in marriage, responsibility for the child born, the work of each husband and wife, the prohibition of the parties to domestic violence and all things that are worried about happening during marriage and after marriage. According to the law a valid marriage will have legal consequences, namely; the relationship between husband and wife, property in wealth, and the relationship between parent and child.<sup>5</sup>

In classical fiqh literature, marriage agreements are known as "requirements in marriage" which are conditions that do not affect the validity of the marriage and must be fulfilled by the party to the agreement. According to the clerics, there is a marriage agreement that is *shahih*, which is in line with *shari'a* and must be fulfilled, there is also a *fasid* agreement, namely a treaty that is contrary to *shari'a* and the law is void.<sup>6</sup>

Based on the above presentation, the researcher wants to study the marriage agreement in Article 29 of Law No. 1 of 1974 according to Islamic Law.

## METHOD

In this study, a type of research that is normative juridical is used, for this reason, data collection techniques are needed by collecting a number of written texts in the form of books, literature and documents that contain research discussions, namely works on marriage, marriage agreements, and various Islamic and positive civil law literature.<sup>7</sup> This research refers to the statute approach, which is an approach method to obtain information from various aspects by examining all laws related to the legal issues discussed, and the legal approach (*syar'i*) by explaining according to existing norms or methods, namely those related to Islamic law.<sup>8</sup>

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<sup>2</sup> Annisa Istrianty and Erwan Priambada, "Akibat Hukum Perjanjian Perkawinan Yang Dibuat Setelah Perkawinan Berlangsung," *Privat Law* III, no. 2 (2015): 84–92,

<sup>3</sup> Muhammad Akbar Aulia Ramadhan, "Perjanjian Perkawinan Terhadap Harta Yang Diperoleh Selama Perkawinan Pasca Perceraian," *Jurnal Ilmiah Hukum Kenotariatan* 6, no. 2 (2017): 157–69.

<sup>4</sup> John Kenedi, *Analisis Fungsi Dan Manfaat Perjanjian Perkawinan*, 2018, <https://www.ptonline.com/articles/how-to-get-better-mfi-results>.

<sup>5</sup> Esther Masri and Sri Wahyuni, "Implementasi Perjanjian Perkawinan Sebelum, Saat Dan Sesudah Perkawinan," *Jurnal Kajian Ilmiah* 21, no. 1 (2021): 111–20.

<sup>6</sup> Herniati and Kajagi Kalman, "Kedudukan Perjanjian Perkawinan Dalam Hukum Positif Di Indonesia," *Jurnal Ius Publicum* 1, no. I (2021): 1–13.

<sup>7</sup> Ahmad Masfuful Fuad, "Ketentuan Batas Minimal Usia Kawin: Sejarah, Implikasi Penetapan Undang-Undang Perkawinan," *Petita: Jurnal Kajian Ilmu Hukum Dan Syariah* 1, no. 1 (2016).

<sup>8</sup> Fajrul Wadi, "The Income of Business Snack Video Application on the Covid-19 Pandemic toward Islamic Economic Law Perspective in Bukittinggi" 16, no. 1 (2022): 1–30.

explaining according to existing norms or methods, namely those related to Islamic law.<sup>9</sup>

Data collection methods in normative legal research are carried out with document studies/literature studies, namely; by collecting a number of written texts in the form of books, literature and documents that contain research discussions, namely works on marriage, marriage agreements, and various Islamic and positive civil law literature. This study also uses data from searching websites/websites of journals related to the discussion<sup>10</sup>

The method used in normative legal research is in a qualitative descriptive way, namely analyzing data in the form of library materials that will be presented in a simple systematic manner and legal materials based on theories, concepts, related laws and regulations, legal principles, doctrines, opinions of legal experts or opinions of researchers<sup>11</sup>.

### Overview of the Marriage Agreement

An agreement is an agreement (written or oral) made by two or more persons each agreeing to fulfill and abide by what is promised. Marriage agreements are generally made because one party has a larger number of property than the other party, the husband and wife bring considerable input (aanbrengrst), to protect each business so that if one party goes bankrupt the other party is not caught and each party is liable for the debts they made before the marriage.<sup>12</sup>

The term for agreement (overenkomst) and contract (contract) in Islamic law is contract. Akad comes from the Arabic al-'aqd which means to bind, connect or connect. The existence of ijab and kabul as statements of the parties to give birth to a legal consequence and its object, this is what the contract means.<sup>13</sup>

In Islamic law the term marriage covenant is not found but is better known as the condition in marriage (al-Syurūth fī an-nikāh). According to the terminology of ushul scholars, a condition is something that is needed by something and not part of the essence of a thing. Meanwhile, Al-Shaukani explained that the condition is a strong nature again clear and if there is no stipulation of the absence of masyrū'at but its existence does not guarantee the presence or absence of masyrū'at. The conditions in marriage referred to in this discussion are not conditions as the validity of marriage that cause the annulment of the marriage if not fulfilled, but the conditions put forward between husband and wife for the continuity of marriage (Luzhūm al-nikāh)<sup>14</sup> with a specific purpose that has benefits for both. According to Wahbah az-Zuhailī, the condition in marriage is that one of the parties entering into a contract requires something to the other party with a specific purpose. Ijab qabul will occur if it is accompanied by conditions because the two are interrelated.<sup>15</sup>

At the time of Caliph Umar ibn Khattab the requirements in this marriage had existed. This suggests that making covenants or conditions in marriage is not something new

<sup>9</sup> Hendri Hendri et al., "Tokoh Falak Minangkabau (Studi Pemikiran Saadoeddin Djambek Dan Tahir Jalaluddin)," *Islam Transformatif: Journal of Islamic Studies* 3, no. 1 (2019): 89.

<sup>10</sup> Hendri, "Fenomena Fajar Shadiq Penanda Awal Waktu Shalat Subuh, Terbit Matahari, Dan Awal Waktu Dhuha," *Al-Hurriyah* 02, no. 02 (2017): 149–68.

<sup>11</sup> Ru'fah Abdullah, "Perjanjian Dalam Perkawinan Perspektif Hukum Islam Dan Perundang-Undangan," *Jurnal Studi Gender Dan Anak* 7, no. 01 (2017): 31.

<sup>12</sup> Ramadhan, "Perjanjian Perkawinan Terhadap Harta Yang Diperoleh Selama Perkawinan Pasca Perceraian."

<sup>13</sup> Hartana, "Hukum Perjanjian (Dalam Perspektif Perjanjian Karya Pengusahaan Pertambangan Batubara)," *Jurnal Komunikasi Hukum* 2, no. 2 (2016): 147–82.

<sup>14</sup> Wahyu Wibisana, "Pernikahan Dalam Islam," *Jurnal Pendidikan Agama Islam -Ta'lim* 14, no. 2 (2016): 185–93.

<sup>15</sup> Rizky Perdana Kiay Demak, "Rukun Dan Syarat Perkawinan Menurut Hukum Islam Di Indonesia," *Lex Privatum Vol. VI*, no. 6 (2018): 122–29.

to talk about but is already known in Islam. At the time of Caliph Umar there was a violation in the treaty and they complained directly to Caliph Umar for decision. The details of the case are;

*“A man marries a woman and requires (promises) to remain in her home. Then the man would take her to move because of that they complained to khalifah Umar bin Khattab. The Caliph declared that the woman had the right to be fulfilled. So said the man, then, they (the wives) will divorce us (the husbands). Thus said Umar: What is the breaker in (human) rights are the terms (which they agree on)”.*

Caliph Umar ibn Khattab became a mediator in the case of the husband and wife about the obligation to qualify. For other friends this obligation is not denied, and as long as the condition does not conflict with the purpose of marriage fulfilling it is mandatory.<sup>16</sup>

#### **Marriage Agreement According to Law No. 1 of 1974**

The term marriage agreement comes from *Burgelijk Wetboek (BW)* which is a translation of the word *huwelijksvoorwaarden*. The word *huwelijks* means marriage between a man and a woman, while *voorwaard* means condition.<sup>17</sup> The marriage agreement in Law No. 1 of 1974 is regulated in Chapter V article 29 and consists of 4 paragraphs, which reads;

At the time or before the marriage is performed both parties by mutual consent may enter into a written agreement ratified by the Clerk of the registrar of marriages, after which the contents also apply to the third party as long as the third party is caught.

1. The treaty cannot be ratified if it violates the boundaries of law, religion and decency.
2. The agreement is effective from the moment the marriage takes place.
3. During the marriage the agreement cannot be changed, unless from both parties there is an agreement to change and the changes do not harm the third party.

Article 29 paragraphs (1), (3) and (4) of Law No. 1 of 1974 on Marriage was expanded in meaning by the Constitutional Court in its decision No. 69/PUU-XII/ 2015. With the opening of the test room of the Act on the application of Mrs. Ike Farida who felt that her constitutional rights had been harmed among others by Article 29 paragraph (1), paragraph (3), paragraph (4), and Article 35 paragraph (1) of Law No. 1 of 1974 on Marriage.<sup>18</sup>

The application began when the applicant bought a unit of flats in Jakarta. After the payment was paid in full, the developer did not hand over the flats and even the developer canceled the sale and purchase of the flats. The developer requested an injunction to the court to refund the money paid by the petitioner on consignment. The developer canceled the agreement to buy and sell flat units based on the provisions of Article 36 paragraph (1) of the Agrarian Law and Article 35 paragraph (1) of the Marriage Law. These articles explain that an Indonesian citizen (WNI) woman who is married to a foreign citizen (WNA) man and does not make a marriage agreement so that the status of property becomes common property is prohibited from buying land and/or buildings

<sup>16</sup> Sakban Lubis, “*Pandangan Islam Terhadap Mediasi Di Pengadilan Dalam Sengketa Perdata,*” *Jurnal Hukum Responsif FH UNPAB* 7, no. 7 (2019): 11–26.

<sup>17</sup> Fitriyani Fitriyani, “*Aspek-Aspek Pembaruan Hukum Islam Dalam Hukum Keluarga Di Indonesia,*” *TASAMUH: Jurnal Studi Islam* 11, no. 2 (2019): 249–70, <https://doi.org/10.47945/tasamuh.v11i2.162>.

<sup>18</sup>[https://mkri.id/public/content/persidangan/putusan/69\\_PUU-XIII\\_2015.pdf](https://mkri.id/public/content/persidangan/putusan/69_PUU-XIII_2015.pdf), Diakses pada tanggal 03 Oktober 2020, pukul 07.56 Wib

with the status of Building Use Rights (HGB).<sup>19</sup>

Before the marriage took place the petitioner and her husband did not make a marital agreement on the property in the marriage this automatically led to the union of property between them.<sup>20</sup> Then under article 29 paragraph (1) of the Marriage Law, the applicant and her husband no longer have the opportunity to enter into an agreement for the separation of property because the agreement can only be made at the time or before the marriage takes place.

In connection with this application, on October 27, 2016 the Constitutional Court of the Republic of Indonesia gave a decision, namely granting part of the applicant's application in the provisions of Article 29 paragraphs (1), (3) and (4) of Law No. 1 of 1974 concerning Marriage. The verdict is as follows;<sup>21</sup>

1. Article 29 paragraph (1) of Law No. 1 of 1974 concerning Marriage is contrary to the 1945 Constitution of the Republic of Indonesia as long as it is not interpreted "At the time, or before it is carried out or during the marriage bond of both parties by mutual consent can submit a written agreement ratified by an employee of the registrar of marriages or notaries, after which the contents also apply to third parties as long as the third party is stuck."
2. Article 29 paragraph (3) of Law No. 1 of 1974 concerning Marriage is contrary to the 1945 Constitution of the Republic of Indonesia as long as it is not interpreted "The agreement enters into force from the moment the marriage takes place, unless otherwise specified in the marriage agreement."

3. Article 29 paragraph (4) of Law No. 1 of 1974 concerning Marriage is contrary to the 1945 Constitution of the Republic of Indonesia as long as it is not interpreted "During the marriage, the marriage agreement can be regarding marital property or other agreements, cannot be changed or revoked, unless from both parties there is an agreement to change or revoke, and the change or revocation does not harm the third party."

Previously, in Article 29 paragraph (1) of Law Number 1 of 1974 concerning Marriage, marriage agreements can only be carried out at the time or before the marriage is held, but after the issuance of the Constitutional Court (MK) decision, the time for the marriage agreement is made, namely it can be made before, during and after the marriage (as long as the marriage lasts).

The marriage agreement, which was previously only valid from the time the marriage was held onwards as stated in Article 29 paragraph (3) of Law Number 1 of 1974 concerning Marriage, can finally take effect at any time in accordance with what the parties stipulated in the marriage agreement based on the decision of the Constitutional Court (MK).

In previous Article 29 paragraph (4) of Law Number 1 of 1974 also concerning Marriage could not be changed the marriage agreement unless there was agreement of both parties as long as it did not harm the third party, then with the issuance of a decision of the Constitutional Court (MK) a marriage agreement can be made regarding marital property or other agreements, it can be changed and revoked by mutual agreement and does not harm anyone and any party.

<sup>19</sup> Faizal Liky, "Harta Bersama Dalam Perkawinan," *Ijtima'iyya: Jurnal Pengembangan Masyarakat Islam* 8, no. 2 (2015): 1–26.

<sup>20</sup> Liky.

<sup>21</sup> Liky.

### Provisions of the Marriage Agreement in Article 29 of Law No. 1 of 1974 According to Islamic Law

Based on the provisions of article 29 paragraph (1), it regulates the timing and form of the marriage agreement. The marriage agreement can only be made at the time or before the marriage takes place. The agreement is made in written form which of course relates to an authentic deed, namely a deed in the form of a law and is made before the authorized person (employee of the registrar of marriages or notaries).<sup>22</sup> Marriage registration can be done by the Clerk of the Registrar of Marriages, Talak and Refer to the Office of Religious Affairs (KUA) for citizens who are Muslims and the Civil Registry Office or agencies/officials who assist them for citizens of religions other than Islam.

After the issuance of the Constitutional Court's (MK) decision on Article 29 paragraph (1), marriage agreements that previously could only be carried out at the time or before the marriage was held can be made before, during and after the marriage (as long as the marriage lasts).<sup>23</sup>

T. Jafizham expressed the opinion that the marriage agreement should be in line with Islamic law, namely; "In Islamic law, a marriage agreement is only valid if it is made after marriage, which is why *ta'liq thalaq* which is also included in the agreement is executed after marriage. It is better if this marriage agreement is provided first before the marriage is signed and read out after the marriage. Thus it is valid according to applicable law and also valid according to Islamic law."

In Islamic law as quoted from the words of Muhammad Ibn Shalih al-Utsaimin, namely;

وأعلم أن الشرط في النكاح يعتبر أن تكون مقارنة للعقد، أو سابقة عليه – لا لاحقة به

*"Know that the requirements put forward in marriage are only valuable at the time of the marriage contract or before the marriage contract, not following after the marriage contract"*<sup>24</sup>

From the above presentation, the time to hold or submit conditions can only be done before the marriage contract takes place and when the marriage contract procession. In general, the conditions that are taken into account in each contract are the conditions put forward at the time of the contract (*al-muqarin*), such as the words of the guardian: I marry my son to you on the condition that he gives him a dowry of 500 riyals or not polygamy on it.<sup>25</sup> However, if both parties have agreed on these conditions, the status is like the conditions proposed at the time of the contract (*al-muqarin*) and the marriage contract become bound (*muqayyad*) with the conditions proposed.

Ibn Taimiyah (d. 728 H) explained that when one of the parties proposes the conditions of marriage before the marriage contract takes place, the law is valid with a note that when the marriage contract takes place the condition is not canceled. In *zhahir* the Hanafi School, the Māliki School and some Shafi'i Schools also hold this opinion on all contracts. However, among the Hambali School, the conditions have no effect on the continuity of the contract if it

<sup>22</sup> Maisara Sunge, "Beban Pembuktian Dalam Perkara Perdata," *Jurnal Inovasi* 9, no. 2 (2012): 8.

<sup>23</sup> Tine Suartina, "Pluralisme Hukum Dan Sistem Perkawinan Wong Sikep," *Jurnal Masyarakat Dan Budaya* 16, no. 3 (2014): 399–410, <https://jmb.lipi.go.id/jmb/article/view/43>.

<sup>24</sup> Reka Desrina Wati, "Perjanjian Perkawinan Pada Pasal 29 Undang- Undang No. 1 Tahun 1974 Tentang Perkawinan Ditinjau Menurut Hukum Islam" (2021).

<sup>25</sup> Faisal Faisal, "Pembatalan Perkawinan Dan Pencegahannya," *Al-Qadha: Jurnal Hukum Islam Dan Perundang-Undangan* 4, no. 1 (2017): 1–15, <https://doi.org/10.32505/qadha.v4i1.173>.



is submitted before the marriage contract takes place.<sup>26</sup>

The provisions of the marriage agreement contained in Law No. 1 of 1974 Article 29 after a material test are not in line with the opinion of scholars. According to the Ulama, the marriage agreement is only that which is carried out before or during the contract procession, while in the rules of the Law the marriage agreement can be made after the contract and during the marriage.

The marriage agreement regulation in article 29 paragraph (2) of Law No. 1 of 1974, provides limitations in making a marriage agreement, namely not violating law, religion, and decency:

- 1) Marriage agreement that does not violate the law

Marriage agreements are included in the scope of family law subject to the provisions of Book 1 of the Civil Code (KUHPer) concerning persons. An agreement as an agreement to bind oneself, capable of making an agreement, an agreement made on a certain matter and for a permitted reason, this is a condition of the agreement under article 1320 of the Civil Code. In making the content of the marriage agreement, it must not violate the boundaries stated in the Civil Code (KUHPer), namely; not violating the norms of decency or public order (Article 139), not prejudice to the rights of the husband and the agreement cannot be without the consent of the wife (Article 140 paragraph), in the agreement the husband and wife shall not waive their right to inherit the estate of their children (article 141), shall not enter into an agreement that one party will pay the debts of the other party (Article 142), and the agreement shall not be

appointed casually to foreign rules, customary customs, laws, statutes or local regulations that once prevailed in Indonesia (Article 143).

Based on Law No. 1 of 1974 concerning Marriage, an agreement in making a marriage agreement is the most important condition so that the validity of the marriage agreement must be made upon the agreement of the parties regarding the content of the agreement. There is a fiqihyah rule relating to this<sup>27</sup>;

الاصل في العقد رضي المتعاقدين و نتيجه ما التزمه بالتعاقد

The above rules indicate that a transaction or contract will be valid if there is a dispute between the parties because it is a principle. This is in line with the principles of the contract in Islamic Law, namely the principle of consensualism where if one of the parties is forced and deceived to agree on it, the contract is not valid.

- 2) Marriage agreements that do not violate religion

The marriage agreement made should not violate the sharia law, if this happens then the agreement is invalid and there is no obligation of the parties to fulfill the agreement. The content of the covenant is categorized as not violating religion if it does not contradict the Qur'an and covenants that do not aim to justify the haram and forbid the halal.<sup>28</sup>

As stated in His words:

وَلَا تَقْرَبُوا مَالَ الْيَتِيمِ إِلَّا بِالَّتِي هِيَ أَحْسَنُ حَتَّىٰ يَبْلُغَ أَشُدَّهُ  
وَآَوْفُوا بِالْعَهْدِ ۗ إِنَّ الْعَهْدَ كَانَ مَسْئُولًا

“And you shall not approach the property of the orphan, except in a better (beneficial) way until he grows up and fulfills the promise, indeed the promise must be held accountable” (Qs. Al-Isra': 34)

<sup>26</sup> Vevi Alfi Maghfiroh and Syaefullah Syaefullah, “Studi Pemikiran Ibnu Qudamah Tentang Nikah Bersyarat,” *Mahakim: Journal of Islamic Family Law* 3, no. 1 (2019): 69–86, <https://doi.org/10.30762/mh.v3i1.1326>.

<sup>27</sup> abidin nurdin, “Tujuan Hukum Islam Untuk Kemaslahatan Manusia: Penerapan Kaidah Fiqhiyah Dalam Bidang Ekonomi Dan Hukum Keluarga,” *El-Usrah: Jurnal Hukum Keluarga* 15, no. 2 (2022): 341.

<sup>28</sup> abidin nurdin.

Furthermore, like the hadith of Prophet Saw which reads;

عَنْ عَمْرِو بْنِ عَوْفٍ الْمَزْنِيِّ أَنَّ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ :  
المُسْلِمُونَ نَعَلَتْهُمُ رُطْبُهُمْ إِلَّا شَرْطًا أَحَلَّ حَرَامًا أَوْ حَرَّمَ حَلَالَ (رواه البخاري)

"It is from Umar ibn 'Auf al-Mazāni Ra that Rasūlullāh Saw said: The Muslims are (bound) to their (made) conditions, except the conditions for justifying the haram and forbidding the halal. (HR. Bukhari)<sup>29</sup>

The above hadith shows that a Muslim who makes a covenant must keep and carry it out, except for the covenant that justifies the haram and forbids the halal. For example, if a married couple has no children, when the husband dies the absolute inheritance falls on the wife, this kind of covenant violates the provisions of Shari'a and justifies the haram because in Islam if the spouse is not blessed with a child, not all of their property falls to the spouse but must also be shared with siblings and parents who are still alive. Treaties contrary to the Qu'an are legally void even though 100 conditions (treaties) have been made. In accordance with the words of Rasūlullāh Saw;

عَنْ عُمَرَ بْنِ الْخَطَّابِ وَسَعْدِ بْنِ أَبِي قَاصِمٍ وَمُعَاوِيَةَ وَعَمْرُو بْنِ الْعَاصِرِ صَلَّى اللَّهُ عَلَيْهِمْ قَالَ النَّبِيُّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ : كُلُّ شَرْطٍ لَيْسَ فِي كِتَابِ اللَّهِ فَهُوَ بَاطِلٌ وَإِنْ كَانَتْ أَلْفَ شَرْطٍ (رواه البخاري)

"From Umar ibn Khattāb, Sa'ad bin Abi Waqāsh, Mu'awiyah and 'Amru bin 'Ash may Allāh bless them, Rasūlullāh Saw said: Any condition that is not (in line with the law) that is in the Book of Allāh is void even though it is 100 conditions." (HR. Bukhari)

In Islam the agreements/terms in marriage are divided into two, namely the applicable conditions (shāhīh) and the non-applicable conditions (fāsīd). The valid condition is a condition that is in accordance

with the provisions of religion and provides benefits between husband and wife, while the conditions that do not apply are conditions that are not in line with the provisions of religion so that they do not have to be fulfilled.<sup>30</sup> In this case the Jurist gave his opinion as stated by the Hanafi School that the conditions in marriage are divided into two<sup>31</sup>, that is:

- The condition that is shahih, does not conflict with the law of syara' and in accordance with the contract as the wife requires not to live with the husband's family or other husband's wives then this kind of condition must be fulfilled.
- The conditions are fasid, contrary to the law of syara' and inconsistent with the contract as required khiyar (choosing) for one of the parties to annul the marriage within a certain period of time. The legal consequence of this requirement is that it is void, but the marriage contract remains valid.

The terms of marriage according to the Māliki School are divided into two kinds,<sup>32</sup> those are;

- There are two kinds of correct conditions (shahih), namely conditions that are makruh and conditions that are not makruh. The makruh conditions are those that can make it difficult for the husband but the conditions do not conflict with the purpose of the contract, for

<sup>30</sup> Istrianty and Priambada, "Akibat Hukum Perjanjian Perkawinan Yang Dibuat Setelah Perkawinan Berlangsung."

<sup>31</sup> Bing Waluyo, "Sahnya Perkawinan Menurut Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan," *Jurnal Media Komunikasi Pendidikan Pancasila Dan Kewarganegaraan* 2, no. 1 (2020): 193–99, <https://doi.org/10.23887/jmpppkn.v2i1.135>.

<sup>32</sup> Sulfan Wandī, "Eksistensi 'Urf Dan Adat Kebiasaan Sebagai Dalil Fiqh," *Samarab: Jurnal Hukum Keluarga Dan Hukum Islam Volume* 2, no. 1 (2018): 181–96.

<sup>29</sup> Abi 'Abdullah Muhammad bin Ismail al-Bukhari, *Op.cit.*, h. 135



example, the wife who requires not to be taken out of her country, not to be polygamous and so on. This condition does not have to be met by the husband unless accompanied by an oath to divorce and then it must be fulfilled. The conditions that are not makruh are those that are in accordance with the demands of the contract, such as the wife requires be giving a good living or treating well. Or the husband requires that the wife does not leave the house with her permission and always obeys the husband.

- b. Conditions those are broken because they are contrary to the contract and purpose of marriage. For example, the condition of the husband to marry a woman with a dowry in each month, this causes uncertainty in the dowry, a condition that imposes the divorce wife's livelihood on the guardian or the wife herself. Likewise, the condition of the wife is that the husband does not bring a schedule of overnight stays among his other wives. The law of conditions contrary to the purpose of this marriage is invalid.

Furthermore, according to the Syāfi'i School required in marriage there are two kinds as well, namely;

- a. Terms that are in accordance with the provisions of marriage are also called shahih conditions, such as giving a living or determining the livelihood of more than one wife.<sup>33</sup>
- b. The term fasid is a condition that violates the provisions of the marriage contract but does not violate the original intention of marriage, namely intercourse (wath'i). Such as the conditions proposed not to mix wives, not to take wives out of

the country, not to give a living to wives and so on.

In the kitab al-um Imam asy-Syāfi'i (d. 240 H) argues that the condition that the wife puts forward to the husband that the wife may leave the house whenever she wants, cannot take her out of her country, and the husband cannot mix and all conditions that have demands to be worked on or abandoned, then such conditions are void and the marriage contract may be (valid).<sup>34</sup>

Imam asy-Syāfi'i (d. 240 H) adheres to the hadith of Rasūlullāh Saw which invalidates any condition contrary to the sunnah of the Apostle or a condition that is not in the Book of Allah Swt;

عن عائشة رضي الله عنه قالت... كل شرط ليس في كتاب الله فهو باطل

*"Any condition that is not sourced from the Qur'an is a bathil. (HR. Bukhāri and Muslims)*

The conditions for marriage according to the Hambali School are of three types,<sup>35</sup> namely:

- a. The correct conditions are conditions that are in accordance with the purpose of the contract and conditions that are not appropriate but have benefits for one of the parties. Such a condition is allowed in Shari'a as long as it does not violate the main purpose of the contract. Like a man requires his future wife to be a virgin, beautiful, intelligent, and so on. Or the wife requires her husband not to mix her, not to take her out of her home or country, to give her a living and the condition to increase her dowry.

<sup>34</sup> Irma Yulianti, "Transformasi Fiqh Empat Madzhab Ke Dalam Kompilasi Hukum Islam Tentang Saksi Nikah," *ADLIYA: Jurnal Hukum Dan Kemanusiaan* 12, no. 1 (2019): 61-84, <https://doi.org/10.15575/adliya.v12i1.4490>.

<sup>33</sup> Wandu.

This kind of condition because it contains benefits and does not hinder the intention of marriage must be fulfilled,<sup>36</sup> in accordance with the words of the Prophet Saw;

عن عقبه بن عامر قال: قال رسول الله صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ: أَحَقُّ الشَّرُوطِ أَنْ يُؤْتَى بِهِ مَا سَتَحَلَّلْتُمْ بِهِ الْفُرُوجَ (رواه الجماعة)

*“From 'Uqbab bin 'Āmir said: The Messenger of Allah (Pbuh) said: Indeed, the condition you are most entitled to fulfill is the condition you use to justify the pubic. (HR. Pilgrims)<sup>37</sup>*

Marriage is a matter of prudence and the door is narrowest therefore the conditions in marriage are most entitled to be met. Imam Ahmad's opinion quoted by Ibn Taimiyah (d. 768 H) (d. 728 H) in the kitab al-Ikhtiyārat if the conditions agreed before or at the time of the contract so that the wife is not removed from the house or for the husband not to remarry and if it turns out that the husband remarries then the wife has the right to ask for talak then such a condition is valid. Likewise, if the husband requires that his future wife must be beautiful, virgin and then it is not the case then the husband has the right to reject her.

b. Conditions that are void but the contract is still valid, such as the condition of not giving a dowry or having given a dowry but asking for it back, not giving a living, the wife requires her husband not to have sex with her, doing azl during intercourse, the distribution of income to the wife is less than her husband's other wife, including if the wife requires that the husband divorce her other wife. All of these conditions are essentially void because they are contrary to the purpose of the contract and can abort the rights that must be fulfilled

because of the contract before its execution.<sup>38</sup>

c. Conditions that essentially annul a marriage such as mut'ah marriage<sup>39</sup>, nikah *muballib*<sup>40</sup> dan nikah *syigbar*. Syarat semacam ini batal dan akad nikahnya batal.<sup>41</sup>

Imam Ibn Qudamah (d.620 H) one of Imam Ahmad ibn Hambal's disciples who adhered to the Hambali School also argued about the requirements of marriage in his book al-Mughīthat the conditions that benefit him back to the wife such as not being able to take her out of her home or country, not taking her for long journeys and not being polygamous then the husband must meet this condition and if it is not fulfilled their marriage is void (fasakh).<sup>42</sup>

The opinion of Imam Ibn Qudamah (d.620 H) is in line with the opinion of Ibn Taimiyah (d. 728 H) and Ibn Qayyim (d.751 H) who affirmed the opinion of Imam Ahmad ibn Hambal (d. 241 H) that the conditions in marriage have a very large influence compared to the conditions in the lease, sale and purchase and other contracts. That is why it is obligatory to keep and qualify the right one more affirmed in this opinion. A marriage agreement that does not violate civility

The decency referred to here is not only limited to the sexual sphere but also includes things that are included in social rules that originate from the human conscience to regulate how to behave in social society. The marriage agreement is considered not to violate decency if the agreement does not violate the norms or customs that apply in the middle of society.

Article 29 of Law No. 1 of 1974 previously did not specify the content of the marriage agreement, but after the Constitutional Court (MK) issued its decision listed in article 29 paragraph (4), it was stated "During the marriage, the marriage agreement can be regarding marital property and other

agreements...". So, in addition to efforts to protect the property of the husband and wife, the marriage agreement is also an effort that provides benefits in order to create justice for both parties.

According to Damanhuri, a marriage agreement on joint property is a written agreement ratified by the Registrar of Marriages with the aim of uniting or separating personal property during the marriage with their respective agreements. The issue of the wife's relationship regarding the estate and the division of common property when there is a divorce between the two is one of the things that a marriage agreement is needed. Article 35 and Article 37 of Law Number 1 of 1974 have regulated the congenital property and joint property of the husband and wife after the divorce, namely if the husband and wife enter into a marriage agreement, the inherited property, property obtained by the husband and wife as gifts or inheritance and joint property after divorce will be regulated based on the agreed provisions, namely under their respective control or other provisions are made, as common property can be done the separation of property even against the property can be done deeds concerning their respective property<sup>43</sup>.

The issue of common property in Islam is not expressly addressed because it has become the husband's duty to make a living for his family, and the wife has the right to receive a living from the husband. The Imams of the School in the book of Fiqh only talk about sharing (syirkah), among which there are syirkah 'inan, syirkah mufawidhah, syirkah abdan and syirkah wujuh. About this common property there is a difference of opinion among Islamic Law experts in Indonesia, the first opinion; concerning common property or syirkah has been arranged in Islamic law, according to His word;

وَأَخَذْنَ مِنْكُمْ مِيثَاقًا غَلِيظًا...

"... And they (your wives) have taken a strong covenant (the marriage bond from you)" (QS. An-Nisa': 21)

The above verse suggests that common property is property obtained from the business of husband and wife, even if only the husband works or both work together. Second opinion; considers common property unknown in Islamic law except syirkah (sharing) between husbands and wives made before or during the marriage.<sup>44</sup>

Hasan Bangil expressed an opinion regarding common property although it is not affirmed in the Quran and hadith but based on customary law it is acceptable in Islamic law and is considered not contradictory. Based on the rule "The custom of custom is established as a law" with reference to the hadith of Rasūlullāh Saw; "What muslims see as good, then on Allah's side is also good"<sup>45</sup>

Married couples can change the contents of the marriage agreement at any time as long as they are still bound in marriage. After conducting a material test in 2015 by the Constitutional Court (MK), the rules in article 29 paragraph (4) not only provide an opportunity to change the marriage agreement but as long as it is mutually agreed upon and does not harm third parties, the marriage agreement can be revoked.

The marriage agreement can be revoked on condition of the consent of both parties and must be registered in the office of the clerk of the registrar of marriages. The revocation of the marriage agreement that has been registered is binding on the husband and wife from the date of registration but is not binding on a third party, since the revocation of the agreement comes into force if the husband and wife announce the registration of the revocation of the marriage agreement in the local newspaper.<sup>46</sup> The announcement of the revocation of the agreement must be made within a period of 6 months from the time it is

registered, otherwise the registration for revocation falls away by itself and is not binding on third parties.<sup>47</sup> In revoking the marriage agreement, it must not be detrimental to the agreement that has been made by the husband and wife with a third party.<sup>48</sup>

Islamic law forbids the revocation or cancellation of the treaty/ta'liq thalaq, because of the holding of this agreement for the benefit of husbands and wives. Ta'liq thalaq is a divorce that is dependent on something and is made and agreed upon at the time of the marriage contract. Violating something agreed upon is the reason for the divorce between husband and wife. That way in principle ta'liq thalaq is the same as the marriage agreement which can be the reason for the divorce.<sup>49</sup> The inability to revoke the covenant/ta'liq thalaq is stated in the book of Bughyatu al-Murtasyidīn, namely:

ولا طريق للرجوع عن الطلاق المعلق بل يقع عند وجود الصفة

*"And there is no way to retract from ta'liq thalaq, even fall ta'liq thalaq whenever there is a mu'allaq nature."*

Guided by this information, it can be seen that the marriage agreement or ta'liq thalaq that has been pronounced and made cannot be revoked. Moreover, ta'liq thalaq which aims to protect the wife, if it is possible to revoke it it will bring mudharat to the wife in the sense that the husband will act arbitrarily.

The revocation of the marriage agreement/ta'liq thalaq if noticed can be reversed by the person who cancels and revokes the grant he has granted, while the Prophet Saw has denounced the act based on the hadith;

عن ابن عباس قال: قال النبي صلى الله عليه وسلم: العائدة في

هبتها كالكلب يقيء ثم يعود في قيئمه (متفق عليه)

*"From Ibn 'Abbās said: The Prophet Saw said: the one who asks for his grant back is like a dog who vomits and then eats his vomit again." (Muttafaqun 'alaib)*

The above explanation enlightens that a covenant/ta'liq thalaq that has been made and spoken should not be revoked, because it is also based on the word of Allah Swt in His book to carry out and keep the promises that have been made. In Law No. 1 of 1974, revoking the marriage agreement is allowed with the consent of the husband and wife. As for marriage, revoking the marriage agreement has no effect at all.

## CONCLUSION

A marriage agreement is a word/deed by a husband and wife in which there is an element of promise to achieve benefits in marriage and for related third parties. In Article 29 of Law No. 1 of 1974 there are 4 paragraphs, which contain; a marriage agreement may be made before and when the marriage contract takes place, made in writing and ratified by the Clerk of the Registrar of Marriages provided that its contents do not violate the limits of law, religion and decency, enter into force the agreement between the husband and wife from the moment the marriage is held and it is possible to make changes to its contents upon the agreement of both parties. However, in 2015 paragraphs (1), (3) and (4) were expanded in meaning by the Constitutional Court in its decision No. 69/PUU-XII/2015.

In Islamic law, the time to make a marriage agreement is only before and during the procession of the marriage contract. The content of the agreement must be clear and have limitations, namely not contrary to legal boundaries which must be subject to the provisions of Book 1 of the Civil Code Article 139-143. It does not encroach on religious boundaries such as covenants to harm wives, contrary to Islamic law and the purpose of marriage. Marriage agreements must also not violate the boundaries of decency, violate the norms and customs prevailing in society. In general, the content of the marriage agreement regarding marital property which in Islam is

known as syirkah, and other agreements such as not doing not domestic violence and not doing polygamy, in this case the Hambali School, such as Ibn Qudamah and Ibn Taimiyah allow such conditions and must be fulfilled in order to achieve benefits in marriage. The agreement that has been made can be changed and even revoked based on the provisions of the law, but in Islamic law the revocation of the marriage agreement is prohibited because like the person who gave the grant and then withdrew the grant, the Prophet Saw circumsised this kind of person.

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