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**Stipulation of Rights in the Practice of *Nikāh Al-Khitbah*  
According to the *Fuqahā'* and the Islamic Family Law in Malaysia<sup>1</sup>**

**Penetapan Syarat di dalam amalan Nikah Khitbah menurut  
Fuqahā' dan Undang-Undang Keluarga Islam di Malaysia**

Miszairi Sitoris\*, Mustafa bin Mat Jubri @ Shamsuddin\*\* & Mohd Afandi bin  
Awang Hamat\*\*\*

**Abstract**

*Nikāh al-khitbah* or popularly known as *nikah gantung* became a choice of a handful of teenagers especially among university students in Malaysia due to financial constraints and educational reason. Such type of wedding practice raises a number of questions related to juristic issues. This is because the practice of *nikāh al-khitbah* involves establishing some limitation of rights that violate the purpose or intent of marriage. Among others, the spouses agree to defer some of their rights such as declining the right of *nafaqah* and the right of sexual intercourse which are against the original purpose (*muqtadā' aqd*) of marriage contract. This paper aims to study the opinions of jurists (*Fuqahā'*) regarding such limitation or agreement in marriage contract and their validity according to the Islamic Family Law in Malaysia. This paper relies on analytical study in discussing the opinions of the *Fuqahā'* and understanding the legal texts of the law related to the matter. This study found that marriage practice through *nikāh al-khitbah* is valid according to the majority views of *Fuqahā'*. Islamic family laws in Malaysia do not deny the validity of such marriage practices although there are some legal effects on the limitation of marriage rights.

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<sup>1</sup> The preliminary ideas of this paper are form our conference paper entitled “*Nikāh Al-Khitbah: Isu dan permasalahannya menurut undang-undang*” presented in the “International Seminar on Syariah and Law (INSLA 2018): Syariah & Laws As Catalyst For Global Peace” organized by Universiti Sains Islam Malaysia (USIM) on 10 November 2018, Movenpick Hotel and Convention Centre Kuala Lumpur, Putrajaya, Malaysia.

\* Assistant professor, Department of Fiqh and Usul al-Fiqh, (KIRKHS), International Islamic University Malaysia, Email: miszairi@iium.edu.my

\*\* Assistant professor, Department of Fiqh and Usul al-Fiqh, (KIRKHS), International Islamic University Malaysia, Email: mussham@iium.edu.my

\*\*\* Assistant professor, Department of Fiqh and Usul al-Fiqh, (KIRKHS), International Islamic University Malaysia, Email: mohdaffandi@iium.edu.my

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**Keywords:** Agreement in marriage contract, *nikāh al-khitbah*, permission by the *wali*, Islamic Family Law in Malaysia.

**Abstrak**

*Nikāh al-khitbah* atau lebih dikenali dengan *nikah gantung* menjadi pilihan segelintir remaja terutamanya di kalangan pelajar universiti di Malaysia atas faktor kekangan kewangan serta pelajaran. Amalan pernikahan ini menimbulkan beberapa pertanyaan berkaitan hukum *fiqh*. Ini adalah kerana di dalam amalan pernikahan secara *nikāh al-khitbah* melibatkan penetapan beberapa syarat tertentu yang menyalahi maksud serta tujuan pernikahan. Antaranya, pasangan suami isteri bersetuju untuk melepaskan hak mereka terhadap pasangan mereka, iaitu hak mendapat *nafaqah* dan hak melakukan hubungan kelamin, yang mana ianya bercanggah dengan matlamat asal atau *muqtadā* akad nikah. Objektif kertas kerja ini adalah untuk mengkaji pandangan para *Fuqahā'* terhadap pensyaratan atau perjanjian sebegini di dalam akad nikah dan keterikatannya menurut Undang-Undang Keluarga Islam di Malaysia. Kertas kerja ini menggunakan kaedah analisis di dalam membincangkan pandangan *Fuqahā'* dan di dalam memahami peruntukan undang-undang berkaitan dengan perkara tersebut. Kajian ini mendapati bahawa amalan perkahwinan secara *nikāh al-khitbah* adalah sah menurut pandangan majoriti *Fuqahā'*. Undang-Undang Keluarga Islam di Malaysia tidak menafikan kesahan amalan pernikahan tersebut walaupun terdapat beberapa kesan undang-undang terhadap syarat yang ditetapkan.

**Kata Kunci:** Pensyaratan di dalam akad nikah, *nikah al-khitbah*, izin wali, Undang-Undang Keluarga Islam di Malaysia.

**Introduction**

The desire towards different genders is innate in human according to Qur'anic perspective. Allah s.w.t. says:

*“Beautified for mankind is love of the joys (that come) from women and offspring; and stored-up heaps of gold and silver”*. (*Al-Quran*, 3:4).

In order to fulfill that natural desire, Islam ordains this to be realized via licit liaison through the institution of marriage. For that, Islam encourages men to get marriage if they have the ability to do so as Prophet Muḥammad s.a.w. says (Al-Bukhārī 2002, vol. 7, 3, hadith no. 5067; Muslim n.d., vol. 2, 1018, hadith no. 1400):

*“O young men, whoever among you can afford it, let him get married, for it is more effective in lowering the gaze and guarding chastity, and whoever cannot then he should fast, for it will be a restraint (wijā') for him.”*

It is highly recommended that the cost of marriage should not be high that burdening the people. It is reported by Aḥmad that Prophet

Muḥammad s.a.w. says (Al-Shawkanī 1993, vol. 6, 199, hadith no. 2732):

*“The most blessed marriage is the most affordable one.”*

Wan Ramizah and Mohd Farid (2018, 883) recommended that the cost of getting married should be low as it may reduce the incident of adultery.

However, due to many cultural factors and increasing demands of life expenses in contemporary time, the financial requirements of marriage has become the biggest stumbling block in realizing the dream and desire for marriage especially for young adults in Malaysia. Based on the study made by National Population and Family Development Board (LPPKN) shows that 56% of men did not married because of financial constraint (Norhafzan dan Saadiah, 2016). Kosmo (2013) reported that the reason why many men stay single due to the fact that the cost to get marriage is very high. This might be the reason that pushed some young sections of Malaysian society to opt for less financially taxing marriage especially students when they find their soul mates while still at the university, namely, *nikāh al-khitbah*. As to what does it mean; what are the juridical-legal issues which this type of marriage raises are questions which this paper endeavours to unveil.

### **The Origin of *Nikāh Al-Khitbah***

According to Miszairi and Mustafa (2018, 29), *Nikāh al-khitbah* is a combination of two Arabic words, namely ‘*al-nikāh*’ and ‘*al-khitbah*.’ In juridical term, the word *al-nikāh* means marriage, which is a contract that legalizes the relationship between a man and woman as husband and wife (Al-Sharṭāwī 1997, 25; Al-Ashqar 1997, 7). While the word *al-khitbah* means engagement, which is the consent or agreement to get married (Al-Sharṭāwī, 1997, 35). The term *nikāh al-khitbah* apparently does not sound familiar in the field of Islamic jurisprudence.

Perhaps the first writing mentioning *nikāh al-khitbah* is found in the work of Imām Mālik in his book *Al-Muwāṭṭa’*, in the chapter titled “Marriage for *al-mu’takif* (the person who is in state of retreat in the mosque)” (Mālik 1985, 318). In the book of *Sharh Al-Zarqānī ‘alā Al-Muwāṭṭa’*, Al-Zarqānī (2003, vol. 2, 315) comments that:

*“Mālik said: There is no harm in someone who is in i’tikāf entering into a marriage contract (i.e. ‘aqd), as long as there is no physical relationship (i.e. sexual intercourse, as it is not allow based on the saying of Allah s.w.t.: ((and do not associate with your wives while ye are in retreat in the*

### Stipulation of Rights in the Practice of *Nikāh Al-Khitbah*

According to the *Fuqahā'* and the Islamic Family Law in Malaysia (mosques)) *Al-Baqarah: 187*). A woman in *i'tikāf* may also be betrothed (engaged and solemnized with her) in the form of *nikāh al-khitbah*, as long as there is no physical relationship (which is prohibited)."

From the above quote, Imām Mālik is of the view that a man or woman can be betrothed and married simultaneously (*nikāh al-khitbah*) during *i'tikāf* with the caveat that there should not be any intimacy relationship without giving specific definition to the term.

In Malaysian culture, marriage with such arrangement is known as "*nikah gantung*". However, it is not done because they are in the state of *i'tikāf*. Hilal Ashraf (2015, 192) mentions that *nikah gantung* is an ordinary marriage contract that fulfills all the pillars and conditions, but both parties agree to suspend live together as husband and wife until a certain period. While Kamus Dewan Bahasa dan Pustaka (2014, 4<sup>th</sup> Ed.) defines "*nikah gantung*" as: "*a valid marriage contract but the couple are not yet staying together*". Whereas in the Arabs countries, they named it as "*'aqd al-qirān*" (Islam Web 2018).

### The Reasons for *Nikāh Al-Khitbah*

According to Datuk Dr. Zulkifli Mohamad Al-Bakri (2018), former Mufti of Federal Territories of Malaysia, among the prevailing attraction for the young adult, especially university students, to indulge in the practice of *nikāh al-khitbah* is because of the financial problem (*Irsyad al-Fatwa* 2020). This is because as university students, most of them are facing financial constraints to get married. But, with the increasingly sophisticated social media today, the desire to have a serious relationship with a girl of their liking is high. In *nikāh al-khitbah*, since they still live separately, the husband is not yet responsible to provide the maintenance and every one of them is bearing their own necessities and needs.

Another attractive reason given by the students who are interested to get married by way of *nikāh al-khitbah* is that it legalizes the existing relationship between the couple who are already in love as it saves them from living an immoral life by committing close proximity (*khalwah*) or adultery. Since *nikāh al-khitbah* is a valid marriage, it allows the couple to date, hold hands and walk together as husband and wife. Even if accidentally they involve in intimate relationship, it is not considered adultery and the child is a legitimate child (Hasanul Arifin 2008, 31; Miszairi and Mustafa 2018, 29).

### The validity of *Nikāh Al-Khitbah*

As for the juridical validity of suspending intimacy relationship, supporters of *nikāh al-khitbah* in the local scene may cite the marriage of the Prophet Muḥammad s.a.w. with ‘Āishah as reported by Imām al-Bukhārī (Al-Bukhārī 2002, vol. 5, 56, hadith no. 3896; Muslim n.d., vol. 2, 1039, hadith no. 1422):

*Narrated by Hishām's father: “Khadījah died three years before the Prophet (peace be upon him) departed to Madīnah. He stayed there for two years or so and then he married `Aisha when she was a girl of six years of age, and he consumed that marriage when she was nine years old”.*

The hadith indicates that Prophet Muḥammad s.a.w. married with Saydatina ‘Āishah r.a. when she was 6 years old, and they lived together as husband and wife but postponed the intimacy relationship with her until she reached the age of 9 years old. But the difference is that, the postponement of Prophet Muḥammad s.a.w. was due to the readiness of Saydatina ‘Āishah r.a. for consummation, while in the practice of *nikāh al-khitbah* is mostly due to financial constraint.

Therefore, further clarification and discussion need to be elaborated to understand the issue since it involves waiving the right of *nafaqah* and postponing the intimacy relationship. This is because such agreement is inconsistent with the purpose (*muqtadā*) of the marriage contract itself (Al-Sharṭāwī 1997, 135; Al-Ashqar 1997, 181).

In this regard, the Fuqahā’s have different opinions. The majority of the *Fuqahā*’s of the four schools of *fiqh* agreed that such condition is void (*mulghā*). However, it does not invalidate the marriage contract (Al-Dusūqī 1996, vol. 6, 41; Al-Sharbīnī 1994, vol. 6, 377; Al-Muqaddisī 1997, vol. 6, 385). But, according to some *Fuqahā*’s such as Shaykh Al-Islām Ibn Taymiyyah (1987, vol. 4, 81), in the view that marriage contract if accompanied with condition that opposes the purpose of the contract itself will invalidate the contract. Hence, based on the above opinion of the majority of the *Fuqahā*’s, *nikāh al-khitbah* is a valid marriage contract, but the agreement of suspension of *nafaqah* and intimacy relationship is void.

### The Stipulation of Rights in Islamic Family Law

Although *nikāh al-khitbah* is categorized as a valid marriage contract according to the majority of the Fuqahā’s, it has some legal issues or

consequences under the Islamic Family Law (Federal Territories) Act 1984.

***1. The stipulation against intimacy relationship***

Islamic Family Law (Federal Territories) Act 1984 (AUKIWP, 1984), does not specify any particular provision on the effect of putting any condition which is inconsistent with the purposes of marriage contract. According to AUKIWP 1984 however, to make a marriage contract valid, it must meet all the requirements as prescribed by the Act. In general, in section 1, invalid marriage (AUKIWP, 1984, s1), is defined as:

*[A marriage contract is void unless all necessary conditions are fulfilled, as prescribed by the Syariah Law, to make it valid.]*

In section 12, unregister-able marriage (AUKIWP, 1984, s12), are:

(1) *any marriage contract that contravene with this Act shall not be registered under this Act.*

(2) *Notwithstanding subsection (1) and without prejudice to subsection 40 (2), any marriage contract that was solemnized contrary to any provision of this Part but is otherwise valid according to Syariah Law be registered under this Act by order of the Court.]*

Section 2: Interpretation (AUKIWP, 1984, s2), explains the meaning of Syariah Law as:

*["Syariah Law" means any accepted rulings according to any recognized Legal School.]*

The above section implies that, any marriage contract conducted in accordance with the provisions of the Islamic Family Law in Malaysia or considered valid according to any recognized *Legal School*, even though contradicting any provision in Islamic Family Law can be accepted as valid and registered under this Act.

Since marriage by way of *nikāh al-khitbah* is categorized as a valid contract by the majority of the *Fuqahā'*, it can be registered under the Islamic Family Law in Malaysia. With regard to the agreement to suspend the intimacy relationship for a certain period of time, it is considered as invalid condition. The agreement has no legal effect under the law. So, it is not binding. Moreover, there is no provision in the Islamic Family Law that allows such condition.



The invalidity of this condition implies that if in the period of “suspension” the husband asks his wife to submit herself, it becomes an obligatory on her to obey it. If the wife refuses to do so, it can be considered as disobedience (*nusyūz*) as prescribed in section 129. A wife who disobeys her husband (AUKIWP, 1984, s129), is considered *nusyūz* (*nushūz* in Arabic):

*[Any woman disobeys the commandment of her husband which right according to Syariah Law is considered as making an offence and should be compounded not more than one hundred ringgits, for the second offence and it subsequently, compounded not more than five hundred ringgits.]*

Furthermore, since *nikāḥ al-khitbah* is considered a valid marriage contract according to the majority of the Fuqaha’s and Islamic Family Law, the children born out from such arrangement of marriage is legitimate as according to Zulkifli Mohammad Al-Bakri (2018) (Irsyad al-Fatwa 2020).

A question arises: If such a condition is not valid in the legal sense, what is it worth when the local custom makes it so? It is argued that although such a condition is not legally binding, but it is morally imperative as non-fulfillment of a promise is unethical in Islam. As reported by Abū Hurairah that Prophet Muḥammad, peace and blessings be upon him, said:

*“The signs of a hypocrite are three: when he speaks, he lies, when he gives a promise he breaks it, and when he is trusted he is treacherous”* (Al-Bukharī 2002, vol. 1, 16, hadith no. 33).

## **2. The Stipulation against Nafaqah**

As explained before, putting a condition not to provide *nafaqah* in a marriage contract is not in line with the purpose of the marriage contract. Such a condition in a marriage contract, according to majority of the *Fuqahā*’s, is categorized as *mulghā* or null, but it does not invalidate the contract itself (Al-Dusūqī 1996, vol.v6, 41; Al-Sharbīnī 1994, vol. 6, 377; Al-Muqaddisī 1997, vol. 6, 385). Hence, the contract is valid, but the condition is void.

This condition also contravenes the provision in the Islamic Family Law which authorizes the Syariah Court to order a husband to pay *nafaqah* to his wife. In section 59: Power of Syariah Court to order

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*nafaqah* to the wife, and the effect of *nusyūz* (AUKIWP, 1984, s59), it states that:

[(1) *Subject to the Syariah Law, the Court may order a man to pay maintenance to his wife or former wife.*]

In addition, there is no any provision in the Islamic Family Law that allows any condition or agreement to cancel the obligation to give *nafaqah* by husband to the wife, unless if his wife has been found to have committed *nusyūz*. As stated in section 59: Power of Syariah Court to order *nafaqah* to the wife, and the effect of *nusyūz* (AUKIWP, 1984, s59), that says:

[(2) *Subject to and confirmation by the Court, a wife shall not be entitled to maintenance when she is nusyūz or refuses to follow the lawful wishes or commands of her husband.*]

In the case of *nikāh al-khitbah*, even though there is an agreement that the husband does not have to provide the *nafaqah* during the period of “suspension”, the agreement is void according to Syariah Law. Hence, wife is still having the legal right to ask her *nafaqah* even before the end of the period. The husband is becoming obliged to pay the *nafaqah* if there is request from the wife.

The wife, however, does not entitle to claim the *nafaqah* of the previous months if there was an agreement of relinquishment of *nafaqah*. The wife however, has the right to claim future *nafaqah*. If the Court grant her the *nafaqah* and the husband refuses to pay it, it will be considered as debt and she has the right to claim from the Court (Abdul Malik, personal communication, April 7, 2020). It is because she is considered to have waived her right to *nafaqah*. The *nafaqah* is counted as outstanding if the husband does not pay the *nafaqah* after the request from the wife. The same principle is used in the event of divorce during the “suspension” period that the wife is only eligible to claim the outstanding *nafaqah* that cumulated after she had been granted by the Court.

After the order had been issued by the Syariah Court and the husband refuses to make the payment, he will be subjected to section 132, willfully neglecting order (AUKIWP, 1984, s132), which states that:

[(2) *The court may-*

(b) *in any other case, punish those who willfully fail to comply with an order made under subsection (1) to imprisonment not exceeding one year for any payment remaining unpaid.*]

Additionally, the husband is also subject to section 50 for divorce under *ta'liq* or promise (AUKIWP, 1984, s50), that says:

*[(1) a wife, if she has the right for dissolution of marriage through ta'liq that recited after the marriage contract, to ask the Court to declare that the dissolution of marriage has occurred.]*

The *ta'liq*, which is recited by the husband immediately after the marriage contract is solemnized, as stated in the case of *Arfah vs Mohd Bakiri* (Case 10005-054-0143-2006, 2018), reads as follow:

*[I admit that is if I am leaving my wife (name) for four months of hijrah continuously, intentionally or coercion, and me or my representative does not provide the maintenance for her during that time, or I am harming to her body, and then she complained to the Syariah Court and the Syariah Court accepts on my behalf ten ringgit, then at that point she is divorced by talāq khulu']<sup>2</sup>.*

The practice of reciting the *ta'liq* after the marriage contract is in line with the Letter of Instruction issued by the Department of Syariah Judiciary Malaysia, No. 8, year 2007 (Letter of Instruction No. 8, Year 2007).

Moreover, in a case where there was no recitation of *ta'liq* or the wife cannot prove that the *ta'liq* had taken place after the marriage contract, she may ask for dissolution of marriage for not providing the maintenance by the husband as prescribed in section 52 for order for dissolution of marriage or *fasakh* (AUKIWP, 1984), that states:

*[(1) Any woman married in accordance with Syariah ruling has the right to ask for dissolution of marriage or fasakh due to one or more reasons as follow: —  
(b) Husband had neglected or did not provide maintenance to his wife more than three months;]*

### **3. The Stipulation against Mahr**

Dowry (*Mahr*) is a mandatory payment from a husband to his wife resulting from a marriage contract. All *Fuqahā'* are of the opinion that it is encouraged (*mustahab*) to mention the amount of the agreed dowry (*mahr musammā*) during the solemnization of the marriage contract to prevent any future dispute, and it is not a must to be mentioned (Al-Sharṭawī, 1997, 98). If there is no agreement on the amount of the dowry, the amount will be based on the amount that is normally received

by the family of the father side of the wife (*mahr mithl*) (Al-Ashqar 1997, 268).

All *Fuqahā'* concluded that a wife has the right to receive full amount of the dowry agreed when her husband had consummated the marriage with her or when one of them had died (Al-Marghīnānī 1995, vol. 2, 207; Al-Sharbīnī 1994, vol. 4, 373). The Ḥanafī *madhab* and Ḥanbalī *madhab* added that the wife is also eligible for full amount of dowry when close-proximity (*khalwah ṣahīḥah*) has taken place (Al-Marghīnānī 1995, vol. 2, 199; Al-Kāsānī 1997, vol. 2, 581). This based on the verse of the Holy Quran (2:237):

*“And if you divorce them before you have touched them  
and you have already specified for them an obligation,  
then [give] half of what you specified.”*

If divorce took place before the intimacy relationship, the wife is entitled to receive only half of the agreed dowry (Al-Marghīnānī 1995, vol. 2, 201; Al-Muqaddisī 1997, vol. 6, 518).

But, if the dissolution of marriage occurred before the intimacy relationship due to the action of the wife such as when she became apostate or there is defect (*‘uyūb*) in her, or she is the one who asked for dissolution even though the *‘uyūb* comes from the husband, she does not have the right to receive anything from the dowry (Al-Sharbīnī, 1994, v4, 388; Al-Muqaddisī 1997, vol. 6, 533).

The *Fuqahā'*, however, have different opinions if the parties agreed that there is no payment of dowry involved in marriage contract. According to the majority of the *Fuqahā'*, a marriage contract that carries the agreement of no dowry is considered valid and *mahr mithl* will be imposed (Al-Ashqar 1997, 268; Al-Marghīnānī 1995, vol. 1, 199). While according to Mālikī *Legal School*, marriage contract with the agreement of no dowry is considered void and should be resolved before the consummation of marriage. But if they already consummated the marriage, the marriage continues, and the wife deserves to get *mahr mithl* (Al-Dardīr n.d., vol. 2, 238; Al-Qurṭubī 1980, vol. 2, 553).

In the case of Malaysia, it has been a practice that the dowry is always mentioned during the solemnization of marriage contract and becomes an administrative requirement (Mohd Hilmi, personal communication, April 8, 2020). There is no specific written regulation that the amount of dowry has to be mentioned in the solemnization of marriage, but it can be understood implicitly from the provision in the Islamic Family Law that says that the Registrar has to record the amount of the dowry

in every marriage registered in the state, as mentioned in section 21: Mas kahwin (dowry) and Pemberian (gift) (AUKIWP, 1984), that states:

*[(1) Dowry shall normally be paid by the groom or his representative to the woman or her representative in front of the person who solemnized the marriage, and at least two witnesses.*

*(2) The Registrar shall, in respect of every marriage to be registered by him, ascertain and record –*

*(a) the value and other particulars of the mas kahwin (dowry);*

*(b) the value and other particulars of any pemberian (gift);*

*(c) the value and other particulars of any part of the mas kahwin or pemberian or both that was promised but not paid at the time of the solemnization of the marriage, and the promised date of payment; and*

*(d) particulars of any security given for the payment of any mas kahwin or pemberian.]*

However, it is the right of the wife to defer the payment of the dowry to a later date after the ceremony and it is permissible according to the Syariah (Zaydān 1997, vol. 7, 84). Even though the dowry has been surrendered during the solemnization of the marriage contract, the wife is not legally having full right over the dowry until the consummation of the marriage or one of them passes away even before the intimacy relationship (Al-Marghīnānī 1995, vol. 2, 207; Al-Sharbīnī 1994, vol. 4, 373; Al-Shayrāzī n.d., vol. 2, 466). But if the reason of the dissolution of marriage comes from the wife, she does not deserve to get anything from the dowry (Al-Marghīnānī 1995, vol. 2, 201; Al-Muqaddisī 1997, v6, 518; Al-Shayrāzī n.d., vol. 2, 466).

In the Islamic Family Law, such details were not clearly mentioned in the provision as it only has a general statement in section 57: Right to dowry, etc., will not be affected, (AUKIWP 1984, s57) says:

*[Nothing contained in this Act shall affect any right that a married woman may have under Hukum Syara' to her mas kahwin (dowry) and pemberian (gifts) or any part thereof on the dissolution of her marriage.]*

The above provision of the Islamic Family Law that relates to the right of the wife towards her dowry is very general and does not reflect her rights as prescribed by the Jurists. It is recommended for an amendment to make the provision clearer to prevent any uncertainty or disputes.

***Nikāh Al-Khitbah* without the permission from the legal guardian (*walī*)**

*Walī* is one of the pillars of marriage contract according to the majority of the *Fuqahā'* except *Ḥanafī Legal School* (Al-Marghīnānī 1995, v1, 191). Without a *walī*, the marriage contract will not be valid. It is because a woman has no right to solemnize the marriage contract by herself according to them (Al-Qurṭubī 2004, vol. 4, 214; Al-Sharbīnī 1994, vol. 4, 239; Al-Muqaddisī 1997, vol. 6, 314). However, the authority to solemnize the marriage contract is shifted from kinsman *walī* (*walī nasab*) to authorized *walī* (*walī ḥākīm* or *walī sultān*) in the case of non-existence or disappearance of the *walī nasab*, or if the *walī nasab* lives more than 2 *marḥalah* of distance (about 89 kilometers) and it is difficult for him to attend the marriage ceremony (Al-Sharbīnī 1994, vol. 4, 261; Al-Muqaddisī 1994, vol. 6, 334).

In addition, a woman has the right to use *walī ḥākīm* in a situation where *walī nasab* refuses to solemnize the marriage contract without an acceptable or valid reason according to Syaria law. If the reason of the refusal is valid, *walī ḥākīm* has no right to solemnize the marriage contract without the permission of the *walī nasab*. One of the accepted reasons is that the man that his daughter wants to marry is not compatible (*non-kafa'ah*) with her. And one of the elements for compatibility is man's ability to provide the maintenance (*nafaqah*) to the wife (Al-Dusūqī 1996, vol. 3, 31-32; Al-Zuhaylī 2011, vol. 4, 81; Al-Sharbīnī 1994, vol. 4, 261; Al-Qurṭubī, 2004, vol. 4, 229; Al-Muqaddisī, 1994, vol. 6, 335).

According to *Ḥanafī Legal School*, however, the existence of a *walī* in the marriage contract is recommended and not a must except for the marriage of minor or insane. For them, a grown-up sane woman has the right to solemnize her own marriage contract without the permission from her *walī nasab* with the condition that the man that she wants to marry with is of equal status with her (Al-Marghīnānī 1995, vol. 2, 195; Al-Sarkhasī 1993, vol. 5, 10; Al-Mujāhid, 2016, 27).

In the case of *nikāh al-khitbah*, not many parents might agree to give their consent to it, considering that their children are still studying in the university. The main concern of the parents is that marriage will affect their study, especially in case of pregnancy as there is no guarantee that it will not happen. Whereas some of people refuse *nikāh al-khitbah* because it contradicts with the custom and tradition of the society (Siti Salehah, personal communication, April 10, 2020). Question of readiness emotionally and financially always become an issue when they are talk-

ing about marriage during study. Difficulty to obtain acceptance from parents becomes a reason for some university students to practice *nikāḥ al-khitbah* without the consent from their parents by running away from the *walī nasab*. Their idea is encouraged with the existence of service that offer wedding arrangement in Thailand at a cost as low as RM1500.00 (Nikah Siam 2018)

On the website page of the company (<http://nikah-kahwin.com/nikah-khitbah.php>, assessed on 19/3/2018; <http://www.nikahsiam-kahwinthailand.com/>, assessed: on 19/3/2018), it asserts that at the 52<sup>nd</sup> meeting of the Fatwa Committee of National Council for Islamic Religious Affairs Malaysia on 1<sup>st</sup> July 2002 it was stated marrying in Thailand is valid. The Fatwa Committee had decided that marriage contract conducted outside the country is valid with the following conditions:

1. *The marriage is fulfilling all the pillars.*
2. *The marriage is conducted more than two marḥalah.*
3. *No court decision that prevented her to get married on the ground of Syariah Law from where she lives.*
4. *The marriage contract is conducted by the walī ḥākim authorized in that place and the marriage contract is solemnized in the place where the wali ḥākim is authorized.]*  
(Kompilasi Muzakarah MKI 2018, 157)

The company also advertises the decision of the Fatwa Committee at the same meeting that explicitly mentioned that *kahwin lari* (elopement) in Thailand is valid if the marriage contract is solemnized by the authorized *walī ḥākim* and it is in accordance with Shāfi'i *Legal School* (Kompilasi Muzakarah MKI 2018, 158). With due respect to the decision made by the Fatwa Committee, it is not really proper to associate the decision with Shāfi'i Legal School. This is because, the *Fuqahā'* only allow the *walī ḥākim* to solemnize marriage if the *walī nasab* disappears or lives far away or has valid excuses not to be able to present in the ceremony (Al-Sharbīnī 1994, vol. 4, 260). But in the case of *kahwin lari*, the woman intentionally avoids her *walī nasab* to marry whom she wishes.

Moreover, the company also tries to justify the validity of *kahwin lari*, including *nikāḥ al-khitbah* in Thailand, by saying that, the right to solemnize the marriage contract changes to *walī ḥākim* if the *walī nasab* refuses to marry his daughter (<http://nikah-kahwin.com/wali-enggan.php>, assessed on 29/3/2018). It should be noted that the right of solemnization

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of the marriage contract changes to *walī ḥākim* if the *walī nasab* refuses to do so without a valid reason. Refusal due to inability of the husband to provide maintenance to his wife is a valid reason. So, to carry out *nikāh al-khitbah* using *walī ḥākim* in Thailand when the *walī nasab* refuses to solemnize the marriage contract because he is not compatible with the woman is questionable according to the Syariah law. It means *nikāh al-khitbah* can only be practiced with the permission of the *walī nasab*.

It is recommended that the Fatwa Committee to revisit the conditions to marry outside the country using *walī ḥākim* to put into consideration the status of the man to be compatible (*kafā'ah*) with the woman that he wants to marry. At the same time, to make the provision clearer in the Islamic Family Law with regards to the right of the *walī nasab* to refuse to solemnize the marriage contract of his daughter when the man is not compatible with her. The provision in section 13: Agreement is needed (AUKIWP, 1984, s13), mentions that:

*[A marriage shall not be recognized and shall not be registered under this Act unless both parties to the marriage have consented thereto, and either –*

*(a) the walī of the woman has consented thereto in accordance with Hukum Syara'; or*

*(b) the Syar'iah Judge having jurisdiction in the place where the woman resides or any person generally or specially authorized in that behalf by the Syar'iah Judge has, after due inquiry in the presence of all parties concerned, granted his consent thereto as walī Raja in accordance with Hukum Syara'; such consent may be given wherever there is no walī by nasab in accordance with Hukum Syara' available to act or if the walī cannot be found or where the walī refuses his consent without sufficient reason.]*

The provision that says “*if walī (nasab) refused to give his agreement without enough reason*” is ambiguous, that may lead to endless disputes. This is why it needs to be clarified by associating it with the condition of *kafā'ah* as prescribed by the *Fuqahā'*.

**Conclusions:**

From the above analysis, it can be concluded that the twin stipulations attached to *nikāh al-khitbah* by enabling a young man to get married while deferring the obligation of *nafaqah* to his wife and affording



both the couples to avoid pregnancy by restraining themselves from having coitus though being against the intended purposes of marriage are technically justified if we go by *tafīqī* views of the jurists and the provisions of the law in Malaysia. Nevertheless, to prevent its reckless practice, the authors have argued that there is a need from the legal perspective as well as fatwa management to detail its procedures.

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