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Efforts to Prevent Child Marriage Based on Philosophy of Islamic Law and Indonesian Positive Law

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Abstract: Children are the next generation of the nation who are expected to become ideal human beings, tough, superior, competitive and responsive to changing times, as well as being able to become a driving force for community and nation development to break down weakness, poverty and underdevelopment. The quality of Indonesian children greatly determines the existence and ability of the Indonesian nation to compete with other countries. This study uses the library research method (normative law) with an approach to law and philosophy of Islamic law. The data analyzed are legal rules contained in Islamic law and positive law. The research concluded that the fulfillment of children's rights is highly dependent on the government, society, the business world, and the media being present to be able to provide comprehensive protection. However, this will not be achieved because child marriage in Indonesia is still quite high. In global discourse, child marriage is considered a tradition that harms and protects human rights. The main negative consequences for girls are reduced risks of educational opportunities, reproductive health and increased risks of maternal and child mortality. Child marriage is also a source of psychological trauma and domestic and sexual violence. The results of this study indicate that the government has made efforts to reduce the number of child marriages with various regulations and policies, although they are considered not optimal, partly because there are no sanctions for perpetrators of child marriage. But there are still many who argue because in Islamic family law it is permissible to marry after puberty. Therefore, this article argues that from perspective of the philosophy of Islamic law, child marriage causes more harm, therefore prevention efforts must be supported by various elements, governments, family, legal actor and society.

Keywords: Prevention of child marriage, philosophy of law, Islamic family law, positive law

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Abstrak: Anak adalah generasi penerus bangsa yang diharapkan menjadi manusia ideal, tangguh, unggul, berdaya saing, dan tanggap terhadap perubahan zaman, serta mampu menjadi penggerak pembangunan masyarakat dan bangsa untuk mendobrak kebodohan, kemiskinan, dan ketertinggalan. Kualitas anak Indonesia sangat menentukan eksistensi dan kemampuan bangsa Indonesia untuk bersaing dengan negara lain. Penelitian ini menggunakan metode penelitian kepustakaan (hukum normatif) dengan pendekatan perundang-undangan dan filsafat hukum Islam. Data yang dianalisis adalah aturan hukum yang terdapat dalam hukum Islam dan hukum positif. Penelitian tersebut menyimpulkan bahwa pemenuhan hak-hak anak sangat tergantung pada pemerintah, masyarakat, dunia usaha, dan media yang hadir untuk dapat memberikan perlindungan yang menyeluruh. Namun, hal tersebut tidak akan tercapai sebab perkawinan anak di Indonesia masih cukup tinggi. Dalam wacana global, perkawinan anak dianggap sebagai tradisi yang merugikan dan melanggar hak asasi manusia. Konsekuensi negatif utama bagi anak perempuan adalah berkurangnya kesempatan pendidikan, risiko kesehatan reproduksi dan peningkatan risiko kematian ibu dan anak. Perkawinan anak juga menjadi sumber trauma psikologis dan kekerasan domestik dan seksual. Hasil penelitian ini menunjukkan bahwa pemerintah telah melakukan upaya untuk menekan angka perkawinan anak dengan berbagai regulasi dan kebijakan, meskipun dianggap belum maksimal antara lain karena tidak adanya sanksi bagi pelaku perkawinan anak. Namun masih banyak yang berpendapat karena dalam hukum keluarga Islam membolehkan menikah setelah baligh. Oleh karena itu, artikel ini berargumen bahwa dalam perspektif filsafat hukum Islam perkawinan anak lebih banyak mendatangkan kerugian karena itu upaya pencegahan harus didukung oleh berbagai unsur, pemerintah, keluarga, aktor hukum dan masyarakat.

Keywords: Pencegahan perkawinan anak, filsafat hukum, hukum keluarga Islam, hukum positif

Introductions

In the view of Islamic family law, marriage is human nature and is highly recommended for Muslims. Marriage is *ghorizah insaniyah* (human instinct) that must be fulfilled by the legitimate path to avoid seeking a misguided path that plunges into wrongdoing. Marriage orders in Islam are contained in the Qur'an and the Hadith of the Prophet Muhammad PBUH. Nevertheless, the issue of child marriage is often polemic and controversial in society because there is still an assumption that this is recommended in religion, encouraged and exemplified by the Prophet Muhammad PBUH.¹

¹Majid Khadduri, "Marriage in Islamic Law: The Modernist Veiwpoints," *The American Journal of Comparative Law* 26, No. 2 (1978). Mudofir Abdullah, "Marriage in Islam and the

The marriage bond is marked by a contract/strong agreement/*misaqan galizan* which is a contract or agreement that contains the meaning "*imsakun bil ma'rufaw tasrihun bihsan*", which means to behave to one another with kindness, or if one has to let go, then have to separate in a good way too.² The marriage contract is an agreement that involves God, thus not an ordinary agreement. Islam teaches that marriage is carrying out the teachings of Islam in fulfilling biological needs in a lawful manner and continuing hope through offspring based on affection and mutual love with partners.³

Marriage unites two people and binds a sacred covenant in the name of God that the bride and groom intend to achieve calm in domestic life, which is peaceful and filled with love and affection. However, to achieve family life ideals, it is not enough to look at marriage from the concept of Islam globally, because marriage is also directly related to state affairs. In the concept of the state, a new marriage can be considered valid if the laws of God contained in the Qur'an and Hadiths and state law have fulfilled its pillars and requirements.⁴

Marriage is only appropriate for adults because they can be held accountable for their actions. In addition, each adult married couple should have a more mature psychological development than those who married before adulthood. Consequently, couples who have not reached the mature stage of marriage find it difficult to think and act responsibly. Conversely, immature couples often still have difficulty thinking carefully and acting responsibly.

The following is a brief philosophy of marriage based on QS. Al-Rum verse 21, which can be formulated as follows.⁵ 1) Islam views marriage as sacred because it starts with a special agreement involving God. Thus, everything related to it is specially and wholly regulated; 2) Marriage is a way of legitimizing the relationship between the two opposite sexes that was initially forbidden; 3) Marriage is a way of sustaining human life on earth legally and responsibly because, without regeneration, the human population will be extinct; 4) Marriage has a profound psychological dimension because, by marriage, both individuals will have a relationship that is mutually caring, loving, and responsible for one

Problem of Gender Equality: A Philosophical Perspective," *Ulumuna: Journal of Islamic Studies* 22, No. 1 (2018). Kasjim Salenda, "Abuse of Islamic Law and Child Marriage in South-Sulawesi Indonesia," *Al-Jami'ah* 54, no. 1 (2016), p. 95–121.

² Imam Abu al-Fida Ismail Ibn Katsir Al-Dimisyqi, *Tafsir Al Qur'an Al-Azhim Tafsir Ibn Kasir* (Beirut: Daar al-Fikr, 2011). p. 423.

³ M Karsayudha, *Perkawinan Beda Agama Menakar Nilai-Nilai Keadilan Kompilasi Hukum Islam* (Banjarmanin: Antasari Press, 2006). p.51

⁴ Beni Ahmad Saebani, *Filsafat Hukum Islam*, II (Bandung: CV Pustaka Setia, 2011). p. 290.

⁵ Karsayudha, *Perkawinan Beda Agama Menakar Nilai-Nilai Keadilan Kompilasi Hukum Islam*. p.52-53.

another; 5) Marriage has a sociological dimension, which means that by marriage, a person has a new status and is considered a member of society as a whole.

Regulations that apply in Indonesia is a constitutional law. In 1974, the unification of marriage rules in Indonesia began, marked by the passing of Law No. 1 of 1974 concerning Marriage. Chapter 1 Article 1 of Law No. 1 of 1974 states that marriage is an inner bond between a woman and a man as a husband and wife with the aim of forming a happy and eternal family (household) based on Almighty God.⁶ One of the goals of marriage is to have children. Children are entrusted by God. Therefore, the fate and future of children are the responsibility of their parents. It is the parents who first have an obligation to nurture, educate, and raise their children in order to become capable and useful human beings later in society and to teach moral values and manners. The family is the first educational environment for the children because it is in this family that children receive education, guidance, and legal protection. Therefore, the family environment is responsible for the formation of moral and physical growth of children as well as their survival and future.

As entrusted by God, children must always be looked after and protected because, within themselves, their inherent dignity and rights as human beings must be upheld. Children's rights are part of human rights that must be upheld. These rights are contained in the 1945 Constitution of the Republic of Indonesia, Law No. 35 of 2014, on amendments to Law No. 23 of 2002 concerning Child Protection and the United Nations Convention on Children's Rights. Protecting children is our duty, including protecting their physical, psychological, and intellectual, as well as rights and dignity. Child protection includes complementing other rights and guaranteeing that children will receive what they need to be able to live, grow and develop.⁷

However, it is unfortunate that most of those who carry out child marriages are Muslims. One of the underlying factors is a common misconception that when a child reaches puberty (*baligh*), they are allowed to marry. Most villagers are Muslims who adhere to the Islamic teaching that marriage is the duty of all Muslims, and when one reaches the age of maturity (*baligh*), he or she must be ready to marry. In addition, if a woman had reached the age of 15-18 and were not married yet, she would become the subject of public gossip and be teased with the denial that there would be no more young men willing to marry that woman.⁸

⁶ Abdul Manan and M Fauzan, *Pokok-Pokok Hukum Perdata* (Jakarta: PT RajaGrafindo Persada, 2002). p. 149.

⁷ Aris Merdeka Sirait, *Menjaga dan Melindungi Hak Anak Sepenuh Hati* (Jakarta: Permata Aksara, 2021).

⁸ Bawono et al., "Low Education and Early Marriage in Madura: A Literature Review," *The Journal of Educational Development* 7, no. 3 (2019), p. 166–72.

The international human rights system has used 'child marriage, early marriage, and forced marriage' interchangeably to describe marriages where one or both parties are under 18. The underlying assumption is that anyone under 18 is categorized as a child; hence their marriage is forced. The establishment of a minimum legal marriage age is a pressing issue. Previously, marriage before the age 18 was considered normal in most parts of the world. However, after the industrial revolution and the rise of modernity, the idea of 'children as small adults' was replaced by the modern perception of childhood as having to do with 'preserving the lives of innocent children'. This shift in perception of childhood gradually gave rise to arguments about the minimum age at which it is appropriate to marry.⁹

Child marriage (marriage before 18) is an internationally recognized health and human rights violation that disproportionately affects girls globally. Although the practice of young girls' marriage has declined substantially over the past 20 years, it remains widespread in some areas of the world, particularly South Asia and Sub-Saharan Africa, where up to 50-70% of girls in some countries are married before 18. However, the practice is not limited to those mentioned areas. For example, parts of Latin America and Eastern Europe report that child marriage rates are over 10-20% among the female population and have even witnessed some cases of child marriage. Today, more than 60 million women and girls worldwide are affected by child marriage.¹⁰

Researchers have studied child marriage extensively over the past decade, mainly focusing on poverty, education, health and violence. However, the increased effect of premarital pregnancies on child marriage has not received significant scientific attention. If the pregnancy occurs before marriage, then child marriage is inevitable. Furthermore, the increasing level of promiscuity and weakening of sociocultural bonds has led to an increasing number of extramarital pregnancies, and forced marriages are inevitable to maintain social dignity. It was found that most married couples were not legally married until they had problems in their marriage and asked for a divorce.¹¹

⁹ Shamin Asghari, "Early Marriage in Iran: A Pragmatic Approach," *Journal of Human Rights Practice* 11, no. 2 (2019), p. 569–88.

¹⁰ Anita Raj, "When the Mother is a Child: The Impact of Child Marriage on the Health and Human Rights of Girls," *Archives of Disease in Childhood* 95, no. 11 (2010).

¹¹ Sastro Mustapa Wantu et al., "Early Child Marriage: Customary Law, Support System, and Unwed Pregnancy in Gorontalo," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 5, no. 2 (2021), p. 780–803. Kamaruddin, "The Early Marriage of Tolaki Konawe Community in The Perspektive of Cirritical Islamic Law," *Ijtihad: Jurnal Wacana Hukum Islam dan Kemanusiaan* 22, No. 2 (2022).

This study uses the library research method (normative law) with a statutory approach and Islamic legal philosophy.¹² The data analyzed are legal rules contained in Islamic law and positive law. This study is important because child marriage in Indonesia is quite high, therefore a solution is needed that can be used as a just and dignified solution.

Provisions on the Marriage Age based on the Philosophy of Islamic Law

The presence of the Compilation of Islamic Law as a standard guideline for judges at Religious Courts in making decisions has received a positive response from the public. In Law No. 16 of 2019 on amendments to Law No. 1 of 1974 concerning Marriage, the minimum marriage limit for women was made equal to that of men, which is 19. Article 7, Paragraph (2) states that in case of deviation from the age provisions, as referred to in Paragraph (1), the parents of the man or woman can request a dispensation to the court on the grounds of extreme urgency accompanied by sufficient supporting evidence. Later, the court must listen to the opinions of the two prospective parties who will marry. Permission for dispensation from the court is the basis for the Marriage Registration Officer to include on the NB sheet of marriage examination points II for prospective husband No. 16 lines 33, 34 and points III for prospective wife No. 16 lines 71,72. Thus child marriage is considered valid and has legal force.

In the context of legal positivism, the provisions on the marriage age as stipulated in Marriage Law No. 16 of 2019, on amendments to Law No. 1 of 1974 concerning Marriage, raises issues whose resolution is quite complicated. Problematic indication of the child's age in the marriage is about the dispensation whose authority is legally granted to the court or other officials appointed by both parents of the man or woman, considered to reduce the sacredness of marriage. One of the principles adopted by the Marriage Law is that the prospective husband and wife must already be mature psychologically and physically to be able to perform marriage to achieve a harmonious marriage and avoid divorce as well as obtain good and healthy offspring.

Islamic family law does not mention any specific marriage age; it merely mentions *baligh* as its requirement.¹³ Nevertheless, marriage is a legal event and, in the view of Islamic law, has an impact on the emergence of the rights and obligations of the husband and wife, meaning that marriage involves people who are mature enough. Therefore, apart from the consent/permission for marriage, it can be understood that marriage takes place with the consent of an adult.

¹² Faisar Ananda Arfa and Watni Marpaung, *Metode Penelitian Hukum Islam* (Jakarta: Kencana, 2016). Suteki and Galang Taufani, *Metode Penelitian Hukum: Filsafat, Teori dan Praktik* (Jakarta: Rajawali Press, 2018).

¹³ Amir Syarifuddin, *Hukum Perkawinan Islam Di Indonesia: Antara Fiqh Munakahat Dan Undang-Undang Perkawinan* (Jakarta: Kencana, 2009). p. 66.

This aspect of the moral crisis is highly implicated in the marriage age. It cannot be denied that the economic aspect is also important, accompanied by the maturity of the prospective husband and wife, then they will be more assertive in controlling the wheels of the household and understanding the meaning of marriage. Provisions regarding the rights and obligations of husband and wife in marriage are contained in Article 30—34 of Law No. 1 of 1974, which states that the husband and wife have a noble obligation to uphold the household, which is the foundation of society. The rights and position of the wife are equal to that of the husband in married and social life in society, and each party has the right to take legal action.

The term limitation on child marriage is still a polemic among *jurists*. However, most scholars believe that children have not reached *baligh* if they have never experienced a wet dream and have not yet menstruated. Islam does not limit a certain marriage age, but implicitly, the Shari'a requires that the people who are going to marry must be mentally and emotionally mature and understand that marriage is a part of worship.

Analysis of Child Marriage from the Perspective of Indonesia's Positive Law

Indonesia has long faced problems related to child marriage. Early marriage is not only a family issue in a small scope but includes the government, civil society organizations, and Indonesian youth themselves. Indonesia has witnessed a growth in online campaigns spearheaded by conservative Muslim youth promoting early marriage to prevent adultery and fornication. Previously, the practice of early and child marriage was closely linked to the countryside, poverty, patriarchal norms, family honor, and low access to education. Nowadays, early marriage is not only associated with low socio-economic populations in rural areas; on the contrary, the emerging trends suggest that middle-class young people in urban areas who claim to return to the right path from their religion also tend to vote for early marriage. This tech-savvy generation is aligning honor with piety to justify the decision to marry young, impacting the ongoing battle against early marriage in the country.¹⁴

There are significant differences in the settings related to the age of children in Indonesia. There are several rules governing the age limit of children.

1. Civil Code of 1847 Article 330 Paragraph (1) "A person cannot be considered an adult if the person is not yet 21 years old unless the person is married before age 21".
2. Indonesian Penal Code Article 45 "a child is a person who has not reached 16 years old".

¹⁴ Eva F. Nisa, "Battling Marriage Laws: Early Marriage and Online Youth Piety in Indonesia," *Hawwa* 1, no. 2 (2020), p. 76–102.

3. Law No. 4 of 1979 concerning Child Welfare, Article 1, Paragraph (2), "a child is a person who has not reached 21 years old and has never been married".
4. Convention on the Rights of the Child was issued in 1989, "a child is any human being who is 18 years old unless the basis that applies to the child is determined that the age of adulthood is reached earlier".
5. Law No. 3 of 1997 concerning Juvenile Justice, Article 1, Paragraph (1), "a child is a person who in the case of a juvenile delinquent has reached the age of 8 but has not reached the age of 18 or has never been married".
6. Law No. 25 of 1997 concerning Manpower Affairs Article 1, Paragraph (20), "a child is a man or woman who is less than 15 years old".
7. Law No. 39 of 1999 concerning Human Rights, Article 1, Paragraph (5), "a child is every human being aged 18 years".
8. Law No. 16 of 2019 concerning marriage, "marriage is only allowed when men and women have reached 19".

The regulation of marriage limitations in Indonesia's positive law is specifically regulated in Law No. 16 of 2019 on amendments to Law No. 1 of 1974 concerning Marriage. Based on Indonesian law, child marriage can be conducted either by one party or both the bride and the groom. The limitation of marriage for some people does not comply with the laws in force in Indonesia. This country has regulated the age limit for marriage in such a way. Therefore, child marriage is a violation of existing regulations, which violate Law No. 16 of 2019 concerning Marriage, and Law No. 23 of 2002 concerning Child Protection, which states that parents are obliged and responsible for: a) caring, nurturing, educating, and protecting children, b) developing children based on their interests, talents and abilities, and c) preventing child marriage. Besides, child marriage also violates Law No. 21 of 2007 PTPPO. The mandate of this law aims to protect children; hence every child shall have the right to live, grow and develop and shall have the right to be protected from acts of violence, exploitation, and discrimination. Indonesia's positive law strictly prohibits child marriage, but this law allows deviations from the age requirements through Article 7 Paragraph (2), which states that in the event of deviations from Paragraph (1), one can request a dispensation to the court or other officials appointed by both parents of the man or woman.

Child Marriage in the Perspective of Islamic law

Islamic teachings do not explicitly state the minimum age limit to marry. Thus, maturity issues in a marriage are included in the domain of *ijtihad*. In the Islamic concept, the pillars of marriage are the terms and conditions for a marriage to be valid, and the age of maturity for marriage is not included in the pillars of

marriage¹⁵. There are five pillars of marriage: the presence of the prospective groom, the prospective bride, the guardian, the witnesses and the *shigat* (*ijab qabul* or consent in marriage).

Meanwhile, classical Islamic jurisprudence does not solidly regulate early marriage and only provides a limitation on *baligh*: for men when they have wet dreams and for women when they get menstruation. These restrictions are not the pillars of marriage but only the terms of marriage. For example, Abu Hanifah argues in the Book of Bada'i that the marriage of a young child can be done with *ijbar* or consent from the father based on several arguments; it was common for a father to marry off a woman—whether she is a teenager or an adult—as Abu Bakr decreed marriage between young children, the same also happened in the case of Aisyah, and the Prophet Muhammad PBUH. Another case is Sayyidina Ali, who arranged his daughter's marriage, Umm Kalsum, with Umar bin Khattab.¹⁶

In the Qur'an and Hadith, marriage is seen from the ability of men and women, whose majority is seen from their maturity. The limits of maturity in Islamic jurisprudence, also called *baligh*, is taken from Arabic *balagha*, which means reach or achieve, indicating the end of one's limitations as a child and reaching the age of adulthood. This also marks the beginning of Shari'a law obligations (*taklif*) as the legal key to the validity of all human actions in conducting worship and transaction (*muamalat*), such as prayer, fasting, buying, selling, and other similar things.¹⁷ Age limitations in Islamic jurisprudence are called *baligh*, and it is based on several signs such as menstruation for women, wet dreams that cause ejaculation for men and age restriction in general.¹⁸ Thus, the level of maturity for a man in Islamic law, *baligh*, is determined when he has wet dreams and for a woman when she gets her first period. There are differences of opinion among scholars regarding the age limit, but the majority of scholars argue that the age limit for men and women is 15 years old.¹⁹ According to Imam Ghazali, when reaching the *baligh* phase, a person's intellectual level is in prime condition so that he or she can distinguish types of behavior between right and wrong, good and bad.²⁰

¹⁵ Kamal Muchtar, *Asas-Asas Hukum Islam Tentang Perkawinan* (Jakarta: Bulan Bintang, 1974). p. 93.

¹⁶ Fatum Abubakar, "Islamic Family Law Reform: Early Marriage and Criminalization (A Comparative Study of Legal Law in Indonesia and Pakistan)," *Al-Ahkam: Jurnal Ilmu Syari'ah Dan Hukum* 4, no. 2 (2019), p. 97–118.

¹⁷ Muhammad Ibn Husen ibn Ali At-Thowari, *Takmilah Al-Bahr AR-Ro'iq Juz 2* (Beirut: Daar al-Kutub al-Ilmiyyah, 1997). p 153.

¹⁸ M Ardani, *Risalah Haid* (Surabaya: al-Miftah, 1992). p. 90.

¹⁹ Ibnu Hajar Al-Asqalani, *Fathul Baari Juz 21* (Jakarta: Pustaka Azzam, 2009). p. 204.

²⁰ Abdul Mujib and Jusuf Mudzakir, *Nuansa-Nuansa Psikologi Islam* (Jakarta: Raja Grafindo Persada, 2002). p. 106.

Regarding the limitation on *baligh*, the four madhabs of scholars agree that *baligh* is characterized by *ihtilam* or wet dream for boys that causes the discharge of semen and menstruation for women.²¹ However, scholars of different madhabs have different opinions in determining the age limit of adulthood or *baligh* to marry; among them are Imammiyah, Maliki, Shafi'i and Hambali, who argue: "the growth of armpit hairs is proof of one's *maturity*." Hanafi rejects this opinion because armpit hair is similar to other hair on other parts of the body. On the other hand, he argues that the condition where men reach *baligh* is 18/19 years, meanwhile for women is 17 years (if the sign *baligh* is not found and they never experience menstruation and pregnancy).²² According to some Malikiyah scholars, the age limitations of *baligh* for men and women are the same. That is when they reach the age of 17 or 18, suppose there are no signs mentioned earlier.²³ Shafi'iyah scholar states that *baligh* in terms of age is 15 years for boys and nine years for girls (suppose they have not menstruated or are pregnant yet).²⁴

Based on the above scholars' opinions regarding differences in age limits of one's puberty, thus, the most decisive opinion is from Shafi'i and Hanabilah, someone is categorized as *baligh* when he or she is 15 years old. This is based on Hadith narrated by Ibn Umar, who mentions that the Prophet Muhammad PBUH permitted Ibn Umar to join the war when he was 15 years old, which afterwards underlies scholars' opinion that the age of 15 is the limit that distinguishes either someone is a child or an adult. As for women, some scholars adhere to the hadiths of Sayyidah Aisyah when Prophet Muhammad PBUH married her at the age of 9, which becomes a reference for the limit of *baligh* for women when there are no other signs found.²⁵ Furthermore, the Prophet Muhammad PBUH also explain in one of the Hadiths in the Book of Shohih Muslim by Muslim Ibn Hujjaj Abu Hasan Al-Qusyairi An-Naysabury²⁶ that 15 years old is the beginning of adulthood for boys. Usually, at this age, boys experience a wet dream that causes them to ejaculate. As for women, when they reach nine years old, they are considered to have maturity in areas such as Madinah, which is based on the

²¹ Muhammad Husin, *Fiqh Perempuan* (Yogyakarta: LKIS, 2001). p. 90.

²² Abu Bakar Muhammad Ibn Abi Sahl As-Sarhani, *Al-Mabsuth Juz 6* (Beirut: Daar Ma'rifah, 1986). p. 53.

²³ Abu Abdullah Muhammad Ibn Muhammad ibn Abdurrahman Al-Maliki, *Mawahib Al-Jalil'ala Syar Mukhtashar Khalil Juz 5* (Beirut: Daar al-Kutub al-Ilmiyyah, 1995). p. 56.

²⁴ Abu Abdullah Muhammad Ibn Idris Ash-Shafi, *Al-Umm* (Beirut: Daar al-Fikr, 1983). p.170.

²⁵ Muhammad bin Ismail Al Bukhari, *Sahih Bukhari* (Beirut: Dar Ibn Kathir, n.d.).No. 2664, Juz 3. p. 177.

²⁶ Muslim bin al Hajjaj bin Muslim bin Kausyaz al-Qusyairi An-Naisaburi, *Sahih Muslim* (Dar Al Mughni, 1998). No. 1422.

Hadith about the age when Sayyidah Aisyah married the Prophet Muhammad PBUH.²⁷

However, some scholars argue that the marriage between the Prophet and Sayyidah Aisyah cannot be used as a general proposition. One of them is the opinion of Ibn Syubramah, which states that historic marriage is also related to historical, sociological, and cultural aspects. Some narrative mentions that the Prophet Muhammad married Sayyidah Aisyah when she was seven and lived together when she was nine. This is seen as a special right for the Prophet Muhammad, which His people could not immediately follow, such as his ability to marry more than four people.²⁸

The view of Islamic jurists on child marriage in the *ijma'* decision of the Indonesian Fatwa Commission III of 2009 is stated in the literature of Islamic jurisprudence, and there is no explicit provision regarding the age limit for marriage, both minimum and maximum age limits. However, the fatwa commission established several legal provisions, i.e.:²⁹

1. Islam does not provide an absolute minimum age limit for marriage. Instead, the eligibility age relies on acting and receiving rights as provisions.
2. Child marriage is legal as long as the requirements and pillars of marriage are fulfilled, yet it is illegal if it brings harm.
3. Maturity is one of the indicators for achieving the goals of marriage, namely the benefit of household and community life as well as security and pregnancy guarantees.
4. In order to realize the benefits of marriage, marriage provision is returned to legal age as stipulated by Law No. 16 of 2019 concerning Marriage.

Essentially, Islamic teachings do not prohibit child marriage or age limitation when one is married. Still, Islam does not encourage or approve of child marriage that is not supported by physical, psychological, and mental readiness and children's rights.³⁰ The term age in Islamic jurisprudence points out that all age levels can marry on the basis of being physically, biologically, and mentally capable.

For Muslim groups who completely reject child marriage, it also has a Shari'a basis, such as the fatwas of Shaykh Yusuf al-Qardhawi, and Shaykh Abdul Muhsin al-Abikan. According to the Shari'a expert, *taqyid al-mubah* is

²⁷ Ahmad Rofiq, *Hukum Islam di Indonesia* (Jakarta: Raja Grafindo Persada, 1998). p. 83

²⁸ Yusuf Hanafi, *Kontroversi Perkawinan Anak di Bawah Umur* (Bandung: CV Mandar Maju, 2011), p. 13.

²⁹ Kharron Sirrin, *Fiqh Perkawinan Di Bawah Umur* (Jakarta: Ghalia Indonesia, 2009), p. 35.

³⁰ Abdurrahman Al-Jaziri, *Kifayatul Akhyar Juz II* (Beirut: Daar al-Kutub al-Ilmiyyah, 2003), p. 53.

permissible (for the sake of convenience). This means that limiting the marriage age may necessarily be done as long as it is for the benefit of the people. The groups that agree on child marriage put forward the arguments or textual verses and Hadiths. Meanwhile, the other groups that do not approve of child marriage use more logical principles, historical reports, and classical *ijtihad* as arguments that what the support group views as *qath'i* are, in fact, probable arguments which do not necessarily indicate the permissibility of child marriage.³¹

An Analysis of the Combination of Islamic and Positive Law in Indonesia

Legal reform in Indonesia, particularly regarding family matters, is considered to be slower than in other Islamic countries since the reform was only carried out in the 1970s with Law No. 1 of 1974 concerning Marriage. Nevertheless, the reform has led to some significant progress. One of them is the limit on the marriage age that influenced law establishment banning child marriage.³²

In congruence with Law No. 1 of 1974 Article 6 Paragraphs (2), (3), (4), and (5), the Compilation of Islamic Law in Indonesia also clearly repeats Article 15 Paragraph (2), namely that candidates who have not reached 21 must obtain permission to marry. Certainly, classical Islamic jurisprudence (*fiqh*) has not addressed this issue. Since Islam has no specific age restriction for marriage, this is considered unique to Indonesia, where couples who have not reached 21 are possible to marry on condition of dispensation from the court or other officials (Nasution 2009a). This is stated in Article 7 Paragraph (2) of Law No. 1 of 1974 concerning Marriage, referring that: "in the event of any deviation against Paragraph (1) of this article, (the couple) may request a dispensation to the court or other officials appointed by either the prospective husband or authorized parties, such as the girl's parents".

Child marriages are increasingly prevalent, and this is a concern for both the government and the public due to their health, psychological, social and physical impacts. Indonesia ranks 7th in the world and 2nd in ASEAN regarding the highest number of child marriages. This affects the Human Development Index (HDI), which further affects the Gap Index, especially the Poverty one. The government, in this case, the Ministry of Women Empowerment and Child Protection (henceforth *Kementerian PPPA*), has indeed tried to reduce the child marriage rate. Among such efforts is the collaboration with the United Nations Population Fund (UNFPA) in holding the workshop "Formulation of Child Marriage Prevention Strategy Model in Selected Regions," which presented best

³¹ Fadli Andi Natsif, "Problematika Perkawinan Anak (Perspektif Hukum Islam dan Hukum Positif)," *Al-Qadāu: Peradilan dan Hukum Keluarga Islam* 5, no. 2 (2018), p. 175–86.

³² Fatum Abubakar, *Islamic Family Law Reform...*, p. 97–118.

practices on child marriage prevention from several regions. It is hoped that other regions in Indonesia will adopt these practices in the future.

Child marriage often occurs when a young girl is engaged to a man who is either: economically privileged, of a higher social stratification, religious, or a close kinship. It is difficult to decline the engagement since the prospective couple's families regard it as a blessing to be proud of and respected. They are supposed to be happy as if it is a kind of destiny (considered grace and luck). As a result, low-economic families tend to marry their daughters off to ease economic responsibilities, but in most cases, they marry them off to someone from the same clan to strengthen their kinship ties. Thus, refusing a close relative's engagement is considered '*siri*', and the parents often marry their daughters off without consent.³³

The fundamental problem in child marriage is the early age of the husband and wife. Some children under 16 who are already married choose to live together straightly, but on the other hand, some wait to be old enough to settle in one house or live together. Child marriage cases are often found in remote areas where children who just hit puberty or *baligh* are married off by their parents upon the arrival of the harvest season. Such a phenomenon is common because it has been practiced for generations (habit). These people, the majority of whom are Muslims, do not consider marriage to violate any religious law because the requirements of marriage—according to Islamic law—have been fulfilled.³⁴

Child marriage is still practiced due to an interpretation of a conservative Muslim in dealing with teenagers' sexuality, where marriage is considered to be the mean of controlling one's lust. Despite the Indonesian government's official agreement with international goals and policies aimed at abolishing child marriage and the efforts of human rights bodies and civil organizations, the national discourse on the issue is still dominated by conservative Islamic perspectives. Moderate religious voices, women's and children's rights, and progressive issues are not recognized in this discourse. A recent judicial review of the Law of 1974 concerning Marriage in the Constitutional Court—instigated by women and youth organizations—to raise the minimum marriage age was rejected. During the hearings, the opinions of all major religious organizations were presented. Unfortunately, the judges seemed to ignore the views of moderate Islamists and non-Muslims about the negative consequences of child marriage for

³³ Kasjim Salenda, *Abuse of Islamic Law and Child Marriage...*, p. 95–121.

³⁴ Kusmayanti, Hazar, and Dede Mulyanto, "Cultural problems of Child Marriage in Indramayu In a Legal and Cultural perspective," *Jph: Journal of Legal Reform* 7, no. 2 (2020), p. 116–27.

girls and only referred to the regulations of Islamic *akil baligh* (puberty in Islam).³⁵

This is a good example illustrating the power of conservative Islamic political discourse in Indonesia. The tension between how the Indonesian government presents itself and this dominant national discourse is visible both in the law-making process and in the existing legislation. The early drafters of the Law of 1974 concerning Marriage had to compromise because of the resistance from some Islamic political parties. Meanwhile, from the existing national law, such as the Law of 1974 concerning Marriage, the Law of 1999 concerning the Human Rights Act and the Law of 2002 concerning Child Protection, many contradictions also come to the fore. Judges sometimes allow child marriages through their discretion provided by a set of state laws. They do so with reference to both the state and Islamic law.

Any marriage with a prospective couple still categorized as a child—either one or both—violates children's rights. Subsequently, the violation of children's rights is also a violation of human rights. Child marriage, in addition to threatening the success of the Sustainable Development Goals (SDGs) and affecting the Human Development Index (HDI), also has a positive correlation with the Poverty Gap Index. In terms of education, many under-aged married children are assumed to drop out of school, and most do not continue their schooling. Further, it also poses impacts on maternal and children's health. Pregnant minors are exposed to a greater health risk, particularly of maternal and child mortality, compared to adults due to the vulnerable uterus. Meanwhile, regarding its economic impacts, the emergence of child labor has been one of them. These children must work to provide for their families with only diplomas and lack skills and abilities, so they will have difficulty adjusting and are also paid low wages. It has been realized that the impacts of child marriage not only concern mental readiness to face the problematic domestic life but also it is possible to cut career opportunities, subsequently hindering efforts to develop Indonesia's economic potential.

Various efforts and strategies for change have been employed by the *Kementerian PPPA* since 2010. One of the strategies undertaken was collaborating with The United Nations Population Fund (UNFPA) to document best practices related to child marriage prevention in 5 districts in Indonesia, namely Rembang, Gunung Kidul, North Lombok, Maros, and Pamekasan. These districts were selected because they could reduce child marriage cases and show the best preventive efforts. The report showed that the five districts are highly

³⁵ Mies Grijns and Hoko Horii, "Child Marriage in a Village in West Java (Indonesia): Compromises between Legal Obligations and Religious Concerns," *The Asian Journal of Law and Society* 5, no. 2 (2018), p. 453–66.

committed to preventing child marriage, as demonstrated by both the local government and the community. The regencies of Rembang, Gunung Kidul and North Lombok made child marriage prevention programs one of their regional priorities and thus must be implemented by the regional apparatus; child protection groups also support it at the village and the district level. This prioritization is further supported by allocating regional and village budgets for relevant programs. Rembang Regency also took steps to collaborate with the Family Learning Centre (*Pusat Pembelajaran Keluarga, PUSPAGA*) and Religious Courts to prevent child marriages in Rembang, resulting in great success.

An excellent breakthrough was also made by Pamekasan Regency, a religious area with a considerable number of Islamic boarding schools (*Pesantren*), where religious leaders became important figures in efforts to prevent child marriage. In addition, some *Pesantren* add another year of learning period for students to complete a module about family. Meanwhile, the Maros regency continues to emphasize regional policies towards child protection. Another government effort to prevent the increasing child marriage rates is through the enactment of Law No. 16 of 2019, on the amendment to Law No. 1 of 1974 concerning Marriage.

The 1945 Constitution of the Republic of Indonesia Article 28 Paragraph B states that (1) every person shall have the right to establish a family and to procreate based upon lawful marriage. (2) every child shall have the right to live, to grow and to develop, and shall have the right to protection from violence and discrimination. Further, Law No. 23 of 2002 on the First Amendment of Law No. 35 of 2014 concerning Child Protection explains that the state, government, family and society are obliged to provide optimal fulfillment of the rights and protection of children. Article 26 Paragraph (1) point C even mentions that preventing child marriage is one of the parent's obligations.

Protecting and fulfilling children's rights in Indonesia has been decent enough to ensure that 87 million Indonesian children can grow and develop properly according to their age. Some programs by the government have put efforts into preventing child marriage. For example, the *Kementerian PPPA* with the Family Learning Centre (*PUSPAGA*) program, the National Population and Family Planning Board (*BKKBN*) with the *Generasi Berencana* program (*GenRe*), the Ministry of Health with the *Keluarga Sehat* program, and the Ministry of Religious Affairs with the *Keluarga Sakinah Mawaddah Warahmah* program. However, despite the efforts, such programs have not been effective in preventing child marriage. The central and local governments need to work with the communities to conduct effective and efficient prevention programs.

Breaking the cycle of child marriage is a task for all of us. Therefore, efforts in sharing the best experiences of child marriage prevention should be

further encouraged, and this should be turned into our first defense to save the HDI, as well as women and children in general. Through the *Kementerian PPPA* and UNFPA, the government will strive to progress further by formulating a model strategy for preventing child marriage using various approaches and utilizing best practices carried out by the five regions mentioned above. Unequivocally, to be successfully adopted, it is expected that the formulation of the model strategy will be in accordance with the needs, conditions, and approaches of each region in Indonesia.

On the other hand, these efforts seem to be in direct contradiction with the existing marriage dispensation. Another fundamental issue related to the legal protection of child marriage in Indonesia can be observed in the nation's Law concerning Marriage. Article 7 Paragraph (2) on Marriage provides a way for early marriage to happen. The article states that parents can apply for a dispensation to the courts in the event that one of the parties to marry has not reached the legal age to do so. Early Marriage Dispensation in Indonesia can be requested to the Religious Court for Muslims and the District Court for non-Muslims. In principle, the court can grant or reject the request for such a dispensation. According to an article in *Tribune News Indonesia*, the number of applications for Early Marriage Dispensation continues to increase each year. In fact, from 2013 to 2015, the percentage of applications for Early Marriage Dispensation increased by 15-70% each year.³⁶

Take early marriage dispensation from the Ambarawa Regency Religious Court as an example. As seen in Decree No. 0010/Pdt.P/2014/ PA.Amb., judges permitted early marriage with the mentioned considerations. However, the above document of the court's ruling shows that the judge's reference for granting dispensation is very superficial. Judges in such cases only considered simple and general facts. For example, one judge argued that the bride was ready to become a good housewife only on the basis of a written statement. They explicitly did not consider whether there may be fundamental rights of the bride that may have been violated or reasons as to why the bride made her statement. Considering the points discussed above, there is clearly a serious problem with the effectiveness of Indonesian legislation in regulating child marriage. Moreover, the possibility of dispensations to permit child marriage seems to contradict international conventions such as CEDAW (Convention on Elimination of All Forms of Discrimination Against Women) dan ICESCR (International Covenant on Economic, Social and Cultural Rights). Indeed, CESCRCR suggests that the Government of Indonesia work to prevent child marriage from ever happening to ensure the effectiveness of legal control of child marriage. Therefore, the

³⁶ Rizki Irfano Aditya and Lisa Waddington, "The Legal Protection Against Child Marriage in Indonesia," *Bestuur* 9 (2021), p. 126–134.

possibility of dispensation in child marriage is a hindrance or a fatal error that undermines all the good faith and commitments of the Indonesian government to abolish it.³⁷ Child marriage rates can be reduced through studying (intracurricular) and self-development activities (extracurricular), including disseminating knowledge and information to school students about the negative impacts of child marriage. When children are educated, they can think critically about the best option for their future.

Schools may also collaborate with related parties or agencies, such as the nearest Public Health Center (*Puskesmas*). This further includes utilizing the Young Red Cross Society (*PMR*), School's Health Clinic (*UKS*), the Scouts community, etc. The schools, together with parents/guardians of students and the community through religious and social organizations and religious instructors, can work hand in hand to minimize child marriage cases.

The key to success in reducing child marriage rates lies in the role of parents and local communities. This is because although the permit to marry is on the parents, the local culture influences the decision to allow these marriages. One of the efforts made by the government to prevent child marriage is by cancelling child marriage instances and subsequently declaring them illegal. An example of this happened in Tapin Regency, where two teenagers aged 13 and 15 were initially married by the local religious instructor but were eventually ruled invalid religiously and by the state.

Another solution to cut off child marriages is through a cultural approach. This culture-based approach means that the government and society need to offer alternative narratives to deconstruct and reconstruct society's understanding of the ideal marriage age for women. It must be noted that in some communities, there is still a view that girls need to get married sooner to avoid undesirable instances, such as extramarital pregnancy or being gossiped about by their neighbours. Hence, building a new narrative that examines long-term interests and providing opportunities for girls to pursue their higher studies undoubtedly will result in a much better future for the girls themselves, as well as for the family and the nation.

Interpretation of the state law in many villages is another obstacle to child marriage prevention. More than ever, there is a greater need to provide insights for teenagers with actual data on the current extramarital pregnancies in Indonesia and early marriage; to prepare the younger generations in planning for healthy reproductions in generations to come. Various studies have shown that programs offering incentives and empowering girls can effectively prevent child marriage and encourage (relatively) rapid changes. The issue that has not been fully addressed in these studies is when these early marriages become social

³⁷Rizki Irfano Aditya and Lisa Waddington, *The Legal Protection Against...*, p. 126-134.

transmission means, especially concerning norms related to roles and gender rights after marriage.³⁸

Textually, Islam does allow women to marry as long as they have hit puberty. However, contextually, it is necessary to realize that delaying marriage for girls until they reach 19 has more chances of them achieving a better future.

Governments, local authorities, parents and communities need to take a closer look at the 2016 UNICEF and Indonesian Statistical Agency (BPS) 's report that recommended five steps to help ensure that the decline in the prevalence of child marriage in Indonesia, which has been stagnated, can be accelerated again. These are 1) increasing interventions in the protection of 19-year-old girls, with a primary focus on (at least) completing secondary school; 2) addressing social and cultural norms that accept or perpetuate child marriage by collaborating with parents, teachers, extended families, and religious leaders; 3) addressing the vulnerability that comes out of poverty by creating more opportunities for girls to access higher education and training on economic skills; 4) focusing on provinces, districts, and sub-districts with the highest prevalence and rate of child marriage; and 5) supporting further research on the issue. It is hoped that all our efforts in fulfilling rights and providing protection for children will be maintained to provide the best options for Indonesian children. This includes providing knowledge, skills, and relevant practical opportunities related to parental care (good parenting) for parents, in hopes that these can be the main defense in protecting and fulfilling children's rights.

The problem of child marriage is more or less related to the existing difference in views on the substance of rules regarding child marriage, both from the perspective of *fiqh* (Islamic law) and positive law. In *fiqh*, each jurist has *nash* as their legal foundation, justifying their (different) views. From a positive law perspective, there are different age restriction rules between Marriage and Child Protection laws. The age limit for women is 16, and men are 19 according to Law concerning Marriage, while the Law concerning Child Protection rules 18 as the age limit to be categorized as children. In addition to the different age limit problems, child marriage has a negative impact resulting from the unprepared psychological and intellectual (mind) of the child who marries before 18.

In Islamic law, child marriage is not in accordance with the common goal of marriage, which is to have a happy and harmonious life, due to its rampant negative consequences. There are two considerations in Islam that lead to disapproval of child marriage; (1) there is no valid textual Islamic teaching (Islamic dogma), and (2) the consideration of social and historical context. As

³⁸ Setiadi, "Getting Married Is a Simple Matter: Early Marriage among Indonesian Muslim Girls in Rural Areas of Java," *The Walisongo Sociology Journal* 5, no. 2 (2021), p. 143–54.

explained earlier, Muslim scholars generally believe child marriage should be prevented. They prefer to see it in a holistic approach because it concerns health issues and socio-economic ones in the future, including education and employment. According to progressive Islamic scholars, Islamic doctrine must be integrated with contemporary contexts. If child marriage causes many problems (*mafsadat*) for the people and society, then Islam never supports it. Therefore, efforts to prevent child marriage must be supported by various legal elements, not only positive law but also an explanation from Islamic law so that conservative communities can be more critical of the issue.

Conclusion

Due to the widespread adverse effects of child marriage, Islamic family law regards it as incompatible with the shared objective of marriage, which is to live happily and harmoniously. Islamic family law forbids child marriage due to two factors: (1) the absence of any reliable textual Islamic doctrine (Islamic dogma); and (2) the importance of taking social and historical context into account. As previously stated, Muslim scholars largely agree that underage marriage should be outlawed. However, they like to view it holistically because it affects future socio-economic difficulties like education, employment, and current health issues. Progressive Islamic legal thinkers argue that the current situation must be incorporated into Islamic legal philosophy and that Islamic law never supports child marriage if it leads to various problems (*mafsada*) for the ummah and society. Hence, in order for conservative societies to be more critical of the issue, attempts to prohibit child marriage must be supported by multiple legal elements, including both the positive law and an explanation of Islamic family law. The government has worked extensively to prevent child marriage by adopting laws that forbid it. However, the absence of penalties and the ability to obtain a court's dispensation nevertheless give rise to the possibility of child marriage. The inconsistency in the child's age limit in the various rules set in Indonesia is another considerable problem. Indonesia clearly prohibits child marriage, but there are no penalties, so it shows no persistence in implementing it. In establishing rules for the common good, sanctions must be applied, dispensations must be tightened, and they should be granted more selectively. Integrated cooperation between government, family, legal actors, society is necessary for the expected future direction. These efforts must continue to be made in order to achieve the true purpose of marriage.

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