

DETERMINING THE AGE OF MARRIAGE IN INDONESIA; FAMILY LAW REFORM ON *AL-MASLAHA* APPROACH

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Abstrac

Pemerintah Indonesia mengambil langkah reformatif dalam pembaharuan hukum keluarga yaitu dengan menambah usia perkawinan bagi perempuan, yaitu dari 16 tahun sebagaimana terdapat pada Undang-undang Nomor 1 Tahun 1974 menjadi 19 tahun sebagaimana terdapat pada Undang-Undang Nomor 16 Tahun 2019. Lahirnya ketentuan ini merupakan titik kulminasi dari perjalanan panjang upaya reformasi usia perkawinan. Ketentuan mengenai batas usia minimal dalam perkawinan ini didasari oleh kesadaran terhadap berbagai dampak negatif dari perkawinan pada usia anak yang dapat menimbulkan dampak negatif bagi tumbuh kembang anak dan akan menyebabkan tidak terpenuhinya hak dasar anak seperti hak atas perlindungan dari kekerasan dan diskriminasi, hak sipil anak, hak kesehatan, hak pendidikan, dan hak sosial anak.

Fakta yang tidak terbantahkan adalah bahwa Indonesia menduduki peringkat ke-7 di dunia dan ke-2 di ASEAN soal angka perkawinan anak tertinggi. Praktik perkawinan anak di Indonesia berdasarkan data Badan Pusat Statisti (BPS) tahun 2017 menunjukkan angka 25,2 persen. Artinya, 1 dari 4 anak perempuan menikah pada usia anak, yaitu sebelum mencapai usia 18 tahun. Sedangkan pada tahun 2018, BPS mencatat sebesar 11,2 persen, artinya 1 dari 9 perempuan usia 20-24 tahun menikah sebelum usia 18 tahun. Selain itu, ada 20 provinsi dengan prevalensi perkawinan anak di atas angka nasional. Langkah reformatif ini sejalan dengan konsep al-maslahah dalam Islam, terutama dalam hal memelihara jiwa (hifz nafs) dan keturunan (hifz nasl). Perkawinan anak di bawah umur dapat mengakibatkan kematian ketika melahirkan dan dapat pula ia melahirkan anak yang tidak normal.

Kata Kunci; Usia Pernikahan, *Al-Maslaha*, Pembaharuan Hukum

A. Introduction

On October 14, 2019, the Government issued Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage. Article 1 states that "Several provisions in Law Number 1974 concerning Marriage (State Gazette of the Republic of Indonesia Year 1974 Number 1, Supplement to the State Gazette of the Republic of Indonesia Number 3019) are amended as follows: Provisions in Article 7 are amended to read as follows: Article 7 (1) Marriage is only permitted if men and women have reached the age of 19 (nineteen) years.

The existence of the provisions regarding the marriage age limit is a step forward in the history of Muslim family law reform in Indonesia. The birth of Law Number 16 of 2019 certainly cannot be separated from the historical dynamics of the formulation of the law. Political configuration and social dynamics play an important role as the factors behind the birth of the law. Likewise, the determination of the age of 19 years for men and women as a minimum age requirement for a marriage cannot be separated from the impulses that arise in the government, legislative institutions, and also the elements of nation community.

Some of the government's considerations in setting provisions regarding the age limit for marriage include: a. the state guarantees the right of citizens to form a family and continue their descendants through a legal marriage, guarantee the rights of children to survive, grow and develop and is entitled to protection from violence and discrimination as mandated in the 1945 Constitution of the Republic of Indonesia; and b. that marriage at the age of the child has a negative impact on the child's growth and development and will result in not fulfilling the basic rights of the child such as the right to protection from violence and discrimination, the child's civil rights, the right to health, the right to education, and the child's social rights.¹

The birth of the marriage age regulation cannot be separated from the fact of child marriage in Indonesia. Indonesia is ranked 7th in the world and 2nd in ASEAN about the highest child marriage rate. Child marriage practices in Indonesia based on Badan Pusat Statistik (BPS) 2017 data show a figure of 25.2 percent. That is, 1 in 4 girl marriages at the age of the child, that is before reaching the age of 18 years. Whereas in 2018, BPS recorded 11.2 percent, meaning that 1 in 9 women aged 20-24 years married before the age of 18 years. In addition, there are 20 provinces with a prevalence of child marriage above the national rate.

Child marriage is a legal issue such as there is an increase in divorce rates due to low marriage.² Medically, socially, and economically, child marriages have been proven by many studies to be more harmful than beneficial. Child marriages are performed by young couples due to several factors namely 1. Tradition/custom, 2. Poor of education, 3. Arranged marriage, 4. Pre-marital sex.³

Besides that, another factor are: a. their own will, because both of them feel they have loved each other and so those who already have a partner or lover are influenced to have a marriage at a young age. b. economy, marriage at a young age because of family conditions that live in poverty, to ease the burden on his parents, his daughter is married to someone who is considered capable. c. education, the low level of education and the knowledge of parents,

and society, causes a tendency to marry off minors. d. family, because parents are not able to send their children to school so he is quickly married, also because of the lack of willingness of children to continue schooling and the fear of becoming a spinster, the only way out is to be married as soon as possible when there is a match. e. traditions, young marriages occur because they still consider it natural that marriages are performed at the age of children or teenagers, that it has become a tradition that is difficult to eliminate in the community.⁴

Child marriage is still a matter and subject of debate. The study area also covers various aspects and involves many parties, such as religious institutions, government institutions (executive and legislative), and mass media (online, print and television). In connection with this issue, Muslims are polarized into two groups, namely groups that allow and groups that forbid the existence of this marriage model. For example, the results of the 32nd Nahdhatul Ulama Conference in Makassar allowed under age marriage, based on the hadith that tells the story of Aisha who was married to the Prophet Muhammad. When he was 6 years old, even though he only lived together when he was 9 years old, the Muhammadiyah Council of the Tarjih considered that the marriage of the Prophet Muhammad with Aisha cannot be used as a basis for argumentation of permitting underage marriages. The hadith which states that Aisha was married at the age of 6 was considered odd and further research was needed. Muhammadiyah Tarjih Council tends to agree with Law No. 1 of 1974 concerning marriage and Compilation of Islamic Law/Kompilasi Hukum Islam (KHI).⁵

This paper is intended to look at the marriage age limit provisions in Law Number 16 of 2019 in terms of *al-maṣlahah* point of view so that the values of *al-maṣlahah* are found in this provision.

B. Age Limitation Indonesia; The Historical Perspectives

The issue of age in marriage has historical roots in Indonesia. The issue of underage marriage has become a major issue in the women's movement in Indonesia. After the third Indonesian Women's Congress in 1939, Miss Sri Mangunsarkoro envisaged the establishment of the Women's Protection Agency in Marriage/ Badan Perlindungan Perempuan dalam Perkawinan (BPPIP). The task of the agency is to collect materials for drafting the marriage law. The struggle to draft a law that protects women in marriages has begun since the second Indonesian Women's Congress in Batavia, 20-24 July 1935. The effort was halted during the Japanese era. Back continued in the era of independence. In 1950 at the insistence of the women's movement, the government resumed the drafting of the Marriage Law. For this

purpose, the government established the Investigative Committee for Marriage, Divorce and Referral Law Regulations. The two things most frequently debated on this committee are the interpretation of polygamy and the minimum age of the couple to get married.⁶

The women's movement which is incorporated in the confederation of the Indonesian Women's Congress (Kowani) proposes that the minimum age of the bride and groom is 18 years for women and 21 years for men. On December 1, 1952 the committee submitted the Marriage Bill.

The proposed plan aims to improve the state of the community with several important points, among others; 1. Marriage should be based on unanimous consent from both parties, to prevent coercion to be set at the age limit of 18 for men and 15 for women, 2. Husbands and wives have equal rights and responsibilities in domestic life and joint life within community. 3. Polygamy is permitted where permitted by religious law applicable to the person concerned and is so governed to the extent that it can meet the requirements of justice; 4. Property and property acquired during marriage become joint property; 5. Divorce is governed by a decision of the State Court, on certain grounds, in relation to divorce and referral under Islamic law; 6. Position of the child is valid or not, the acknowledgment of the child, the raising and ratification of the child, the rights and obligations of the parent to the child, the revocation of parental authority and custody. Specifically, the bill stated that the minimum age of marriage is 18 years for men and 15 years for women. The design is a result of compromises with various parties. According to Cora Vreede-De Stuers in *Sejarah Perempuan Indonesia: Gerakan dan Pencapaian* of the legal drafting committee is important in drafting a marriage rule that is common to all Indonesians without exception on the basis of Pancasila.

On April 1954 after going through various debates over minimum age and polygamy, the committee submitted a draft to the minister of religion. But the marriage bill was again stalled. On September 1957 Mrs. Soemarie as a member of the Legislative Council (DPR), has the initiative to bring the draft to parliament. The minimum age for marriage is 15 years for women and 18 years for men. Since 1957, the discussion of the Marriage Law has been stalled again. Plus the atmosphere of domestic politics that never subsided from the upheaval. After the regime changed from Sukarno to Suharto, the women's movement discussed it again. On 19 and 24 February 1973, Kowani figures including Maria Ulfah met with the DPR.

The hot issues at the hearing agreed that marriage should result from voluntary agreements between prospective husbands and wives. This avoids the possibility of forced

marriage from parties outside the couple. The age limit of marriage is agreed to be at least 21 years for men and 18 years for women. The participants of the meeting agreed that monogamy based marriage and the equality of rights in the filing of a divorce lawsuit both husband and wife.

After nearly 30 years of struggling to have a Marriage Act, finally on December 22, 1973, right on Mother's Day commemoration, the Parliament knocked the hammer of ratification of the Marriage Bill. On January 2, 1974, the Marriage Bill was passed into Marriage Law No. 1/1974. However, the Marriage Law does not accommodate proposals for the women's movement about the minimum age at marriage, which is 19 years for men and 16 years for women.

The minimum age requirement for marriage in the 1973 Marriage Bill was amended by the Marriage Law that was passed in 1974. There are several causes of this event (standard change). *First*, the completion of the theoretical study of the age of maturity between Muslims and countries that regulate the minimum age of marriage with the practice of marriage at that time. *Second*, the tendency of the community in the practice of marriage is still struggling with the understanding of *fiqh* or local culture. *Third*, the condition of traditional gender relations is still strongly embedded in society, making it difficult for the state to apply the minimum age of marriage in accordance with the initial ideals of the Marriage Bill. In other words, the issue of determining the minimum age for marriage is more a matter of debating the legal paradigm between Islamic traditions and State.⁷

At present, the Marriage Law has reached 45 years. The age is not short for a law and regulation. On this long time, the Government issued Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage. In essence, Article 7 (1) states that marriage is only permitted if men and women have reached the age of 19 (nineteen) years. Provisions regarding age in marriage are a new step in the history of the law on marriages in Indonesia.

If the marriage age in Indonesia compared with other Muslim countries, the step of Indonesia is more advanced compared to several countries as we can see in the table below:⁸

Countries	Male	Female
Aljazair	21	18
Bangladesh	21	18
Indonesia	19	16 (On 2019 be 19 years old)
Irak	18	18
Libanon	18	17



Libya	18	16
Malaysia	18	16
Maroko	18	18
Mesir	18	16
Pakistan	18	16
Somalia	18	18
Suriah	18	17
Tunisia	19	17
Turki	17	15
Yaman Selatan	18	16
Yaman Utara	15	15
Yordania	16	15

In the case of child marriage, Indonesia ranks 37th with the highest number of underage marriages in the world, and second in Southeast Asia. Certainly not something to be proud of because it affects population density, because it has the potential for high birth as well.⁹

Legal reform carried out by Indonesia is a strategic step in reducing the number of child marriages as well as efforts to create an ideal family as the goal of marriage itself. By increasing the age of marriage to 19 years, people who will get married will have biological readiness such as reproduction and psychological like maturity and maturity so that he will be better prepared in the marriage including overcoming various family problems.

C. al-Maṣlaḥah: Purpose of Law Establishment

On Islamic paradigm, the aims of Allah instruction for people are for their benefit. It's called al-maslaha. The study of maslaha is of concern to Islamic philosophers because knowing the purpose of law enforcement is very important in religion.

According to Islamic philosopher Al-Ghazali, *al-maṣlaḥa* means taking advantage and resisting harm in order to uphold the purposes of Islam.¹⁰ He argues that the adherence must be in accordance with the purpose of Shari'a, even though it is contrary to the purpose of man, because human happiness is not always based on the will of the Shari'a, but often based on the desires of the passions. Thus, the measure of well-being is a problem set by God and not the measure of success according to human judgment.

Implementation of Al-Ghazali the concept about maslaha in the legal product produced by man whether law, dustur, qanun, fatwa or any form must be in line with the God-ordained blessing. Therefore, the will of God should be a top priority in law enforcement.

In line with Al-Ghazali's point of view, Al-Syatibi explains that the ultimate purpose of the law is only one, that is to realize the *maslaha* or goodness and the well-being of mankind.

¹¹ All the laws and laws of God concern the good of man. He added that the observance can

be seen from two points of view, the first *maqāṣid al-syāri* 'and the second, *maqāṣid al-mukallaḥ*. The essence of the purpose of this Shari'a is limited to five things: *hifz ad-din* (maintain the religion/faith), *hifz an-naḥs* (maintain the soul), *hifz al-'aql* (maintain the intellect/brain), *hifz an-nasl* (maintain the lineage) and *hifz al-mal* (maintain the property). Everything that contains the care of these five things is called *al-maṣlaḥa* and everything that causes the loss of these five things is called *maṣḥada*.¹²

Izzuddin Abd al-Salam defines *al-maṣlaḥa* is all kinds of delicacies and pleasures and all that causes them and *maṣḥaḥ* covers all the benefits. While *al-maḥāṣid* covers all the disadvantage and danger.¹³ He also explained that the Shari'a was intended to eliminate human suffering and, to reject harmful things, to create harm for the slaves, to enable good things, and to ban the abominable, thus creating an evil for humanity at all times from the beginning until the end of his life. He added that the five elements of evil are at three levels, namely *al-ḍaruriyat*, *al-ḥajjiyat* and *al-taḥsiniyat*.¹⁴ Jalaluddin Abd Al-Rahman said that the rule of law was to create a humanitarian cause by taking advantage and resisting harm, thus establishing the purpose of human creation.¹⁵

Al-Thufi's view of *al-maṣlaḥa* stems from the *maqāṣid al-syari'a* that Islamic law is intended to bring universal happiness to mankind¹⁶. In this case it can be concluded that according to al-Thufi, *al-maṣlaḥa* is a language whose existence is to cause a harmony and does not cause immorality or *maḥarat* against anything and anyone, as has been exemplified, the ballpoint will be *al-maṣlaḥa* if used for writing while sword to cut.

Concerning the distribution of *maṣlaḥa* as practiced by the mainstream scholars of *fiqh* into *al-maṣlaḥah mu'tabarah* and *al-maṣlaḥa ḍaruriyah* and *ghoiru ḍaruriyah* namely *hajjiyah* and *taḥsiniyah*, a scholar named Najmuddin al-Thufi did not do such divisions.¹⁷ Al-Thufi holds that *maṣlaḥa* is the strongest proposition or argument as a legal basis.¹⁸ This view is based on four principles: a) استقلال العقول بادرارک المصالح و المفساد. There is a sense of independence (*istiqlāl*). The free mind determines happiness and goodwill in your field. b. المصلحة دليل شرعي مستقل عن النصوص. *Maṣlaḥa* is an independent proposition in determining the law. It is a separate proposition outside of *naṣ* (the Qur'an and Hadith). Therefore, *maṣlaḥa* should not be supported by the Qur'an and the Hadith, either in detail or universally. Therefore the benefit does not have to be supported by the Qur'an and Hadith, both in detail and universally. Everything depends on the reasoning of human reason. That is, the blasphemy of *maṣlaḥa* has no dependence on the text and vice versa. This view is also not in line with the views of the majority of scholars who say that *al-maṣlaḥa* must have a clear or



clear reference to the text. c. *مجال العمل بالمصلحة هو المعاملات والعادات دون العبادات* The scope of the *maslaha* is limited to *mu'amalah* issues and customs and tradition. d. *المصلحة اقوي ادلة الشرع*. *Maslaha* is the most powerful proposition. Therefore, when there is a conflict between *nas* or *ijma* with *maslaha*, the first thing to do is *maslaha* through the path of thesis and the town (specialization and explanation)¹⁹

According to Abd Wahab Khalaf, the existence of a *maslah* as a legal proposition cannot be done because it is impossible to capture the meaning of *maslaha*. On his opinion, *maslaha* or *maqashid al-syari'a* is a helpful tool for understanding the editorial of the Qur'an and Hadith, resolving conflicting arguments and setting laws against cases that are not covered in the Qur'an and Hadith.²⁰

D. Hifz al-Nasl and Hifz Nafs: Dimensions of al-Maslaha in Setting the Age of Marriage

Married at the age of less than 18 years is a reality that must be faced by some children throughout the world, especially developing countries. Although the Declaration of Human Rights in 1954 explicitly opposed child marriage, ironically, the practice of early marriage still takes place in various parts of the world and this reflects the protection of the rights of neglected young people. The implementation of laws is often ineffective and broken by the customs and traditions that govern the social norms of a community group.²¹

Children are a trust and trust in God that should be safeguarded, maintained in accordance with God's will, not human desire. Among the ways and efforts to preserve it are to establish the rules by which humans continue their descent through marriage. One of these rules is the age limit in marriage.

Medically, socially, and economically, child marriages have been proven by many studies to be more harmful than beneficial. The lower the marriage age, the more likely it is to do things that are not in line with the mission and purpose of the marriage, namely the existence of peace in the home based on love and affection. This goal is certainly difficult to achieve, as each bride is immature in spirit and spirit. Stable maturity and personal integrity will greatly influence each and every problem that arises in the face of household dangers and storms.

Marriage requires readiness on all dimensions. Marriage preparation covers various aspects, namely biological/ physical, mental/ psychological, psychosocial and spiritual. Marriage preparation marriage that includes physical/ biological aspects, among others: 1. The ideal age according to mental health and family planning programs, the age between 20-

25 years for women and ages between 25-30 years for men is the best time for married. Typically the age of men is more than the age of women, the difference in age is relative in nature. 2. The physical condition of those who want to have a family is highly recommended for maintaining good health, physical and spiritual health. Physical health includes health in the sense that the person does not have a disease and is free of hereditary diseases.²²

Marriage preparation which includes mental/ psychological aspects, among others: 1. Personality: this personality aspect is very important so that each partner is able to adjust to each other. Couples with a "mature" personality can provide mutual affection which is very important for family harmony. Indeed, each person does not have a perfect personality, but at least each partner already knows each other's strengths and weaknesses. 2. Education: the level of intelligence and education also need to be considered in finding a partner. Usually the level of education and intelligence of men is higher than women. This is also in accordance with the level of maturity of a man's soul, so that a man as a husband is more authoritative in the eyes of his wife, especially in his position as head of the household.

Marriage preparation which includes psychosocial and spiritual aspects, among others: 1. Religion: religious equality is important for household stability. Religious differences in one family can have a detrimental effect which in turn can lead to marital disfunction. The difference in religion between father and mother will confuse the child in terms of choosing his religion later, it can even happen that the child does not follow the religion of one of his parents. 2. Family social background, it is necessary to consider whether one of the spouses is from a good family or not (broken home). Because this family background affects the personality of the child he raised. In looking for business partners who come from good families (good offspring), socio-economic level which is equal or higher. 3. Association. In pre-marital relations should remember moral values, ethics also dress should continue to maintain courtesy and covered genitals so as not to cause sexual arousal (sexual). Chastity before marriage should be maintained, and do not allow sexual relations before marriage.

Medically the marriage of minors is very risky. Some health cases that occur at too young marriages are, the incidence of bleeding during labor, anemia, and complications during childbirth. In addition, women who become pregnant at a young age have great potential for the birth of children with low birth weight, malnutrition and anemia. There is a high correlation between the phenomenon of early marriage with high maternal mortality due to childbirth in Indonesia. At present the average maternal mortality rate in our country is quite high, namely 228 deaths per 100,000 live births. "If the average is calculated, on average

every hour there are two cases of maternal death. If accumulated in a year it reaches 17,520 cases.

Marriage is indeed part of individual rights that do not cause harm to others, but when marriage occurs at the age of children various problems arise including negative impacts on child growth and development and will cause non-fulfillment of basic rights of children such as the right to protection from violence and discrimination, children's civil rights, health rights, education rights, and children's social rights. The occurrence of early marriage at the age of children causes them to lose the right and enthusiasm to get and get an education, because their responsibility is no longer to study but after marriage they focus on building a household, plus usually the existing schools are reluctant to accept students who are married at this early age. In addition to the problem of education, health is also a big problem from this early marriage. According to World Health Organization (WHO), girls aged 10-14 years have a five times greater risk of dying in cases of pregnancy and childbirth than women aged 20-24 years, and globally deaths due to pregnancy are the main causes of death of girls aged 15-19 years. Besides education and health problems, there are also psychological problems. Studies show that girls who get married at an early age have a high risk of experiencing anxiety, depression, or thoughts of suicide, in part because they have no status, power, support, and control over their own lives. In addition they are also less able to negotiate safe sex, thereby increasing their vulnerability to sexually transmitted infections such as HIV aids. Other studies also show that child brides have a greater chance of experiencing physical, sexual, psychological, and emotional abuse, and social isolation, which is a result of their lack of status and power in their household.²³

The impact of child marriage or underage is very dangerous, both to the soul especially the soul of a mother who will give birth and dangerous to offspring. Among the effects that often occur are: 1. Teenagers who become pregnant will more easily suffer from anemia while pregnant and giving birth, one of the causes of high maternal and infant mortality. 2. Missing the opportunity to taste higher education. In certain conditions, children who engage in early marriage tend not to pay attention to their education, especially when getting married directly get offspring, he will be busy taking care of children and their families, so this can prevent him from continuing his studies to a higher level. But this can be minimized with full family support, and there is help in child care, will be able to minimize early marriage couples to be able to continue their studies. 3. Interaction with the peer environment is reduced. Narrow opportunities for employment opportunities that automatically perpetuate poverty (low family

economic status due to lack of education). In addition to the impact on the mother, the impact of child marriages on children born is 1. Birth with a low weight, as a major cause of high maternal and infant mortality 2. Birth injury 3. Birth complications that have an impact on the high mortality rate.²⁴

Looking for the impact of child marriage is extremely dangerous, Indonesia government has taken wright steps to increase the marriage age for women from 16 to 19 years old. The worst consequences are premature births for young mothers and the possibility that their offspring are abnormal.

The birth of a minimum term of marriage as prescribed by Law No. 16/2019 is a governmental effort to minimize and suppress the above two marital impacts and includes all of the aforementioned impacts. This is an important note, as the State is responsible for protecting its people including children as a nation's asset.

In the Islamic perspective, the minimum age requirement in marriage is in line with the theory of *maslaha*, especially in the case of *hifz nafs* (maintain soul) and *hifz nasl* (maintain posterity). What Al-Syatibi concludes about the five aspects of *maslaha*; *hifz al ad-din*, *hifz aql*, *hifz nafs*, *hifz nasl*, *hifz mal* are very relevant to be a perspective in analyzing the minimum age requirements of marriage in Indonesia. Thus, there is a substantial substance in the reform of Muslim family law in Indonesia.

E. Conclusion

The Indonesian government has taken a progressive step in renewing family law by increasing the age of marriage for women, from 16 years as stated in Law Number 1 of 1974 to 19 years as contained in Law Number 16/2019. The provision is a point culmination of a long journey to reform the age of marriage.

Provisions regarding the minimum age limit in marriages are based on awareness of the various negative effects of marriages at the age of children that can have negative impacts on child development and will lead to non-fulfillment of children's basic rights such as the right to protection from violence and discrimination, the child's civil rights, health rights, education rights and social rights of children.

This reformative step is in line with the concept of *maslaha* in Islam, especially in terms of preserving the soul (*hifz nafs*) and descendants (*hifz nasl*). Marriage of a minor can result in death during childbirth and can also give birth to children who are not normal. Of course no one wants that to happen.

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