

SHARIA AND HUMAN RIGHTS COMPATIBILITY IN DETERMINING THE AGE OF MARRIAGE IN INDONESIA

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Abstract: *This research aims to examine the interpretation of constitutional judges regarding the age limit for marriage, which is considered to contain compatibility and efforts to harmonize sharia and human rights principles in their decisions. This is motivated by child marriage tends to ignore the rights of children and women. Unfortunately, religious understanding and even state law often affirmed this practice. The research method used is normative juridical using secondary data. This research will analyze Constitutional Court Decision Number 22/PUU-XV/2017. This research will show the conflict between the interpretation of sharia -which has been the authoritative area of religious leaders- and the principles of Human Rights (HAM). Meanwhile, the interpretation of the judges of the Constitutional Court seems to contain discourse on the compatibility and harmony of sharia and human rights. This research reflects the Constitutional Court's approach and the petitioners' strategy to review the constitutionality of the minimum age for marriage as stated in the Marriage Law. The various approaches and arguments show that the applicant made a strategic decision by breaking a patriarchal culture and injustice before the Constitutional Court.*

Keywords: *Marriage Age Limit, Syariah, Human Rights, Constitutional Court*

The Introduction

April 20, 2017, a group of people (Wasrinah, Maryanti, and Rasminah) sued Article 7 of Law Number 1 of 1974 concerning Marriage to the Constitutional Court. The minimum age limit for marriage in this provision is considered to impact the prevalence of child marriages. Data from the Indonesian Child Protection Commission (KPAI) states that from 2011 to 2018, 101 children have been victims, 79 of whom are women (CNN Indonesia, 2018). This rule shows that the state seems to allow child marriages to occur, which tend to be discriminatory and detrimental to women and depriving children of the rights they are reserved. Article 7 of this marriage laws had also been proposed judicial review earlier by six (6) social organizations concerned with the defense of the rights of children and women. However, in the previous decision, the Constitutional Court rejected the request. However, one judge expressed a dissenting opinion of the nine constitutional judges.

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The Compilation of Islamic Law (KHI), a codified book of Islamic law in Indonesia, also strengthens the provisions in the Marriage Law above. The minimum age for marriage itself is not explicitly stated in Islamic tradition or sharia provisions. The provisions that generally apply are only the entry of age baligh (al-Jaziri, 2003: 313-314). Some jurists/Islamic jurists even argue that the provisions for baligh cannot be used as guidelines for determining the age limit for marriage. A person can be married with the consent of his parents, even though he is not yet an adult (al-Jaziri, 2003: 161). This view is mainly based on the history of Aisyah RA. married to the Prophet Muhammad Pbuh. at the age of 6 and started living with him at the age of 9. These events allegedly strongly cause the phenomenon of child marriage tradition rooted in the lands has a Muslim majority population, where the marriage of the Prophet Pbuh. with Aisyah being used as a model by some Muslims without paying attention to the situation and context of the event (Hanafi, 2016). Religious understanding and its embodiment into state regulations like this are significant factors causing the rise of child marriage in Indonesia (Rofiah & Kustini, 2013).

Sharia, which has been the area of an authoritative interpretation of religious leaders in this context, seems to have clashed with human rights principles protected in a democracy. Every country that has ratified the international convention on human rights has also ratified the convention on the child's rights into the rule of law of the country. In the Indonesian context, the protection of children's rights as part of human rights is affirmed in Law Number 39 of 1999 concerning Human Rights in Chapter III, Part Ten. In the provisions consisting of 15 articles, article 52 paragraph (2) states that children's rights are part of human rights recognized and protected by law (Copies of Law Number 39 of 1999 concerning Human Rights). Various constitutional rights of children listed in various laws and regulations have allegedly been violated by the provisions on the age limit for marriage.

By bringing this matter to the Constitutional Court, the petitioners in this case wants to break the injustice and patriarchal culture that has legality in state norms. Endang Wasrinah, the first applicant, was married at 14 to her parents. As a result, she was still in junior high school and had to drop out of school. Maryanti, the second applicant, was also married at 14. She could not even finish her education at the elementary school level. As for Rasminah, the third applicant, her parents married when she was 13 years old after graduating from elementary school (Copies of the Decision of the Constitutional Court Number 22/PUU-XV/2017). Due to the child marriage experienced by these three applicants, as a result, they do not get their rights as children and constitutional rights as citizens guaranteed by law, such as the right to get a proper education. In addition, the impact of health problems in the form of reproductive and mental health is also felt by them. These three applicants' judicial review is only a tiny part of the victims of child marriage who dare to speak out against the unfair and discriminatory treatment they experience.

The Constitutional Court's decision to grant the aforementioned requests is seen as hope during a frenzied debate contrary to religious norms and the rule of state law. As a consequence of the decision of the

Constitutional Court, Law Number 16 of 2019 was born, which changed the provisions of Article 7 of the Marriage Law. The minimum age for marriage which was previously 16 years for women and 19 years for men, is changed to 19 years for men and women in this provision (Copy of Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage). Therefore, this study is here to look at the interpretation of constitutional judges regarding the age limit for marriage which is considered to contain harmony and efforts to harmonize sharia principles and human rights in their decisions. This research is considered essential to contribute to the development of sharia and human rights discourse and discourse in Indonesia.

Research Methods

In this study, the researcher uses a normative juridical approach, which is a study that uses data taken from library materials, either in the form of books, judges' decisions, statutory regulations, journals, papers, etc. Researchers also use secondary data consisting of primary legal materials, secondary legal materials, and tertiary legal materials. Meanwhile, the researcher used literature study and document study for data collection.

Literature Review

Studies on the compatibility between sharia and human rights by using the Constitutional Court's decision on the age limit for marriage as a case study have never been done. Studies related to the discourse between sharia and human rights in Indonesia can be seen from a study conducted by Syamsul Arifin et al. (Arifin et al., 2018), entitled "The Intersection of Human Rights and Shari'ah in Indonesia." This study seeks to find the meeting point of the discourse on human rights (HAM) and shari'ah in Indonesia which is often contradicted, both as a concept and an instrument, which boils down to the human dimension. In addition, a study conducted by Abdul Latif (2012) entitled "Compatibility of Islamic Teachings with Human Rights." This study concludes that Islamic law is considered compatible with the universal declaration of human rights. According to this study, the conformity of sharia teachings and human rights can be seen in several human rights principles, which are also contained in the values of sharia teachings such as freedom of religion, freedom of soul, freedom of expression to the protection of property.

The study that examines the decision of the Constitutional Court, especially regarding the age limit for marriage, can be seen from the study conducted by Moch. Nurcholis (2020) entitled "Age of Marriage from the Maqashid Perspective of Marriage: A Study of the Minimum Age Requirements for Marriage After the Decision of the Constitutional Court Number 22/PUU-XV/2017". This study examines the theoretical basis for determining the legal age for marriage in Indonesia from Islamic law and the correlation between equalizing the marriage age requirements in Indonesia for men and women with maqashid marriage. Another study was conducted by Nurohman (2019) entitled "Juridical Analysis of the Minimum Age Limit

for Marriage (Study of Constitutional Court Decision Number: 22/PUU-XV/2017)". This study focuses on the juridical considerations of the panel of constitutional judges regarding the judicial review of article 7 of the marriage law. This study concludes that based on juridical analysis, according to KHI and Article 27 paragraph (1) of the 1945 Constitution, the difference in the minimum age limit for marriage is not discriminatory because it contains benefits. Impact experienced by the applicants cannot be said to be a result of the application of the provisions on the difference in the minimum age limit for marriage as stipulated in Article 7 paragraph (1) of Law no. 1 of 1974; therefore, the considerations made by the Panel of Judges are considered irrelevant.

Discussion and Results

Age Limit for Marriage in Classical Jurisprudence

In terms of determining the age of marriage (minimum age for marriage), the mazhab scholars do not agree (ijma') on this matter. The majority of scholars only agree that the condition of baligh is a sign of the ability to marry because baligh is an indication of one's maturity. The scholars of the madhhab agree that the condition of puberty in men is marked by a dream with the discharge of semen, while for women, it is marked by the discharge of menstrual blood. In the view of Hanafiyah and Malikiyah scholars, the condition of puberty is estimated to occur between the ages of 17 to 18 years. Meanwhile, according to the views of the Syafi'iyah scholars, the age of puberty usually occurs at the age of 15 years for men and nine years for women. In line with Shafi'iyah, Hanabilah scholars stated that the age limit for puberty is 15 years for men and women when they have menstruated, without mentioning a specific age limit (al-Jaziri, 2003)

As for the Imamiyah, puberty for men is fifteen years, and for women, it is nine years. The opinion of this group is based on a hadith from Ibn Sinan, which reads: "when a girl has reached the age of nine years, then her property is handed over to her, her business is considered permissible, and criminal law is carried out on her rights and against herself in full" (Ghazali, 2003: 56).

One of the foundations used by classical scholars, especially scholars of the Shafi'iyah school, in determining the age limit for marriage is a hadith narrated directly from Aisha, which reads: "The Prophet married me when I was six years old and he had sexual intercourse with me when I was six years old. nine years" (Narrated by Bukhari, Muslim, Abu Dawud, and An Nasa'i). This hadith is then famous among the Muslim community to this day. However, some scholars view marriage under age as between the Prophet Muhammad. Aisyah, still a child, could not be used as a general argument. In Ibn Hazm's view, a father cannot marry off his immature daughter. The incident that occurred between the Prophet SAW. with Aisha, according to Ibn Hazm, is a specialty for the Prophet. Ibn Hazm's opinion is based on one of the purposes of marriage, namely to continue the offspring. Marriage between immature people will not produce offspring, or in other words, if immature people carry out the marriage, it will not achieve its purpose

(Fatma, 2019: 120).

In line with Ibn Hazm, Ibn Subrumah stated that Islam forbids marriage early (age before puberty/adulthood). According to him, the essential value of marriage is to fulfill biological needs and perpetuate/care for offspring. At the same time, these two things are not fulfilled in children who are not yet adults. Ibn Subrumah approached this issue historically, sociologically, and culturally, looking at the context of the Prophet's marriage. With Aisyah, who was still a child at that time, she saw it as a special right that the Prophet had obtained his people could not imitate that. Ibn Subrumah considers various things that form the basis of this provision, including the principle of benefit, social reality, and paying attention to the weight of marital responsibilities (Hatta, 2016: 71-72). The difference in determining the age limit for marriage by the classical scholars above is due to the absence of a text in the Qur'an that clearly states this provision. The provisions in the Qur'an are only general and explain the eligibility of a person to marry (Asrori, 2015: 808). Among them is the letter al-Nisa verse 6, which reads:

وَابْتُلُوا النِّسَامَى حَتَّى إِذَا بَلَغُوا النِّكَاحَ فَإِنْ آنَسْتُمْ مِنْهُمْ رُشْدًا فَادْفَعُوا إِلَيْهِمْ أَمْوَالَهُمْ طَوَّلًا
تَأْكُلُوهَا إِسْرَافًا وَبِدَارًا أَنْ يَكْبُرُوا ۚ وَمَنْ كَانَ غَنِيًّا فَلْيَسْتَعْفِفْ ۚ وَمَنْ كَانَ فَقِيرًا فَلْيَأْكُلْ
بِالْمَعْرُوفِ ۚ فَإِذَا دَفَعْتُمْ إِلَيْهِمْ أَمْوَالَهُمْ فَأَشْهَدُوا عَلَيْهِمْ ۚ وَكَفَى بِاللَّهِ حَسِيبًا

"balagal-marriage" in the verse is then interpreted differently by scholars. Al-Syabuni in his interpretation of al-ahkam mentions this condition of puberty with physical signs (good dreams for men and menstruation for women) as explained by most scholars (al-Syabuni, 1999: 153).

In addition, there is also in the letter al-Nur, verse 32, which reads:

وَأَنْكِحُوا الْأَيَامَى مِنْكُمْ وَالصَّالِحِينَ مِنْ عِبَادِكُمْ وَإِمَائِكُمْ ۚ إِنْ يَكُونُوا فُقَرَاءَ يُغْنِهِمُ اللَّهُ مِنْ
فَضْلِهِ ۗ وَاللَّهُ وَاسِعٌ عَلِيمٌ

In his Tafseer, Ibn Kathir explains that this verse is the command to marry as the opinion of most of the scholars' compulsory marriage for those who can afford it. As for al-Maraghi, the sentence "washalihin" in this verse refers to the ability of a man or woman to marry and carry out their rights and obligations as husband and wife, such as being in good health, owning property, and so on (Mustafa, 2009: 22.)

Marriage Age Limits in Positive Law in Indonesia

In the New Order era (1965-1998), several state laws and regulations were produced from the provisions of Islamic law. One of them is the issuance of Law Number 1 of 1974 concerning marriage and its implementing regulations in Government Regulation Number 9 of 1975. In addition, Law Number 7 of 1989 of the Religious and Presidential Instruction (Instruction) Number 1 of 1991 concerning the Compilation of Islamic Law (KHI) is valid to this day (Fuad, 2016: 21).

Historically, the determination of the minimum age for marriage in the Marriage Bill, which was drafted in 1973, was 21 years for men and 18 years for women. However, due to the debate at the time, the discussion about it was finally postponed. Until finally the marriage law was passed, the standard for Marriage was finally lowered from 21 years to 19 years for men and from 18 years to 16 years for women. Moreover, if there are deviations from these provisions, the public has the right to apply for a dispensation to the court or other authorized official (Fuad, 2016: 25-26). Article 7 of the Law of the Republic of Indonesia Number 1 of 1974 concerning Marriage states that: "The conditions for obtaining a marriage permit are a minimum of 19 years for men and 16 years for women". This provision is further emphasized in the Presidential Instruction on the Compilation of Islamic Law in Article 15 paragraph (1), which states: "For the benefit of the family and household, marriage may only be carried out by the prospective bride and groom who have reached the age stipulated in Article 7 of Law No. 1974, namely the prospective husband is at least 19 years old and the prospective wife is at least 16 years old (Fadhilah & Rahmah, 2012: 54-56).

In Indonesian laws and regulations, the conception of a person's status as a child or an adult varies widely. In addition to the marriage law above, Law Number 23 of 2002 concerning Child Protection states that a child is not yet 18 years old, including those still in the womb. Meanwhile, suppose we look at Law Number 23 of 2006 concerning Population Administration article 63 paragraph (1). In that case, it is explained that a person who is required to have a resident identity card is if he is a resident of an Indonesian citizen and a foreigner who has a permanent residence permit which is 17 years old or has been married or has been married and a foreigner who follows the status of their parents who have a permanent residence permit and are 17 years old (a copy of the Law of the Republic of Indonesia Number 23 the Year 2006 concerning Population Administration).

After the decision of the Constitutional Court, which annulled Article 7 of Law Number 1 of 1974 concerning Marriage, in 2019 Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage was passed.

Syariah and Human Rights

Human rights are fundamental rights inherent in every individual since he was born on earth and are not gifts from humans or the State that must be protected by the State (Muladi, 2009: 39). In Indonesian legal norms, Law Number 39 of 1999 concerning Human Rights Article 1 explains that:

"Human Rights are a set of rights that are inherent in the nature and existence of humans as creatures of God Almighty and are His grace that must be respected, upheld, and protected by the State, law, government, and everyone for the sake of honor and protection of human dignity (Copy of Law of the Republic of Indonesia Number 39 of 1999 concerning).

Mashood A. Baderin views that the various challenges and problems of the modern age make Islamic/Syariah law methods require rejuvenation. The challenges of modernity caused by the increasingly intimate relationship between Islam and the West impact human interaction in various sectors, so Islamic law needs to expose itself to contemporary perspectives, including the human rights perspective (Baderin, 2010: 38-39).

Baderin argues that sharia should be seen as the source of various legal rules or favorable laws. According to him, in a narrow sense, sharia refers to the body of law revealed by Allah SWT. as contained in the Qur'an and the traditions (Sunnah) of the Prophet Muhammad." He agrees with what was conveyed al-Shatibi on the idea of Maqasid al-Sharia (the goal of sharia), which Imam Malik originally introduced. Baderin asserted that the principle of human well-being (maslahah) should be regarded as the most important norm. Although Baderin did not call this ethical principle, he supports an ethical interpretation of the universality of sharia (Namli, 2013: 155-156).

Sharia and human rights discourses are often contradicted each other. Human rights discourse is often considered a western product that is not by the principles of sharia, which is God's holy and sacred teaching. Sharia and Human Rights, in principle, fight for human values so that they always have a point of encounter. The intersection of the two naturally occurs because the basis for its development stems from different sources; sharia departs from God's revelation, while human rights come from human rationality. Human rights do not need to be seen as a contrary concept to Islam. Both are considered to have the same vision in voicing justice, peace, equality, and tolerance (Arifin et al.)

Many scholars and experts in Islamic law argue that the values of sharia are in line with the principles of human rights. Efforts to align sharia with international human rights law have become a concern and concern for politicians and statesmen in many countries. Several scholars and jurists have tried to analyze the debate about the compatibility of Islam with human rights from various perspectives, from history to politics, and to show a picture of the evolution and gradual improvement in the model of human rights in Islam. Islam is seen as a force that brings and produces positive changes in the Arabian peninsula in the seventh century, including the egalitarian rights model. Contribution Islam towards human rights can and should be seen in a historical, social, and political kaleidoscope (Rehman, 2014).

The ideas presented by the Muslim thinker from Sudan, Abdullahi Ahmed An-Naim, are relevant. An-Naim explained that human rights are universal ideals, and the General Declaration of Human Rights (UDHR) is a vital instrument to protect human dignity and to improve the welfare of everyone. He gave an example of the acceptance of Islamic law towards

human rights, namely the case of the abolition of slavery, which is based on the principle of equality and equality between human beings and contained in universal human rights. This is the acceptance of Islamic law, which refers to the Makkiyah verses, which are more egalitarian, without distinction of gender, religious belief, race, and others (an-Na'im, 2001).

Furthermore, in An-Na'im's view, there are three dimensions of the relationship between sharia and human rights. First, the form of the relationship is the broad linkages between local culture and human rights in terms of how people perceive and whether they accept or reject the moral and ethical foundations of these standards. This problem explains the extent to which a particular society accepts the universality of human rights (Islam) and the extent to which the international community accepts this particularity; secondly, the existence of previous legal linkages in the area of personal law for Muslims; and third, there is the impact of efforts to implement more comprehensive Islamic shari'ah, along with the re-emergence of Islamic revival.

Compatibility and Harmony of Sharia and Human Rights in the Decisions of the Constitutional Court

Marriage is one of God's sacred commands in Islam. Islam instills several basic principles or principles in marriage (Mughtar, 1974), which in essence emphasizes that there should be no coercion and discrimination. The relationship between husband and wife and between parents and children in a marriage should reflect good human relations, parallel to human dignity itself (Summa, 2005: 49). This respect for human dignity, according to Hashim Kamali, is Islamic teaching based on God's word that humans are created with glory and advantages (QS: 17/70) and are assigned to be leaders on earth (QS: 2/30).

Respect (to respect), protection (to protect), and fulfillment (to fulfill) human rights are respect for human dignity. So, why does child marriage, which often results in violence, discrimination, and deprivation of children's rights, occurs in a Muslim community whose religious teachings respect and protect human dignity?

The basis of the text used as an assumption to justify patriarchal doctrine is usually Surah An-Nisa' verse 34, which says "men are stronger than women." The concept of qiwama is often read textually, thus giving birth to an understanding that is not gender-friendly to various forms of injustice. According to Mufidah, manifestations of injustice can be shaped by stereotypes, subordination, marginalization, an excessive workload as well as gender-based violence (Mufidah, 2013). This subordination, marginalization, and gender-based violence after marriage are felt by many women, especially those who were married at a young age.

In terms of the age limit for marriage, Quraish Shihab said that the Qur'an and the Sunnah of the Prophet did not set this limit. This is by divine wisdom, which never includes details about things that can change the scriptures. The problems that he details are only those that are not accessible to human reason, such as problems metaphysical and things that cannot be changed from the human side (Copies of the Decision of the Constitutional

Court Number 22/PUU- XV/2017). In line with that, Larsen views sharia as a social construction that can change according to the context and needs of the times (Lena, 2019). This means that the age limit for marriage provisions is not absolute and cannot be contested. The determination is indeed necessary, and it even must be reviewed.

In its decision to annul the provision on the limit of marriage age for women, the Constitutional Court confirmed the existence of discrimination based on sex which resulted in the non-fulfillment of the rights of women and children. (Convention on The Elimination of All Forms of Discrimination Against Women (CEDAW) in article 16 paragraph (1) is stated that: (1) States Parties shall make special efforts to eliminate discrimination against women in all matters relating to marriage and family relations, which are based on equality between men and women, in particular ensuring the same right to marry. (the copy of the decision of the Constitutional Court Number 22/PUU-XV/2017).

The judge's argument is based on several things; first, the determination of the age of marriage in the marriage law shows that there are inequalities for men and women regarding mental and physical conditions; secondly, the provision enlarges the distance left behind by women; third, the magnitude of the health and death risks for women; fourth, state discrimination against women in fulfilling the right to education; and fifth, indications of child exploitation and marriage will be vulnerable to domestic violence.

Prohibition of discrimination, fulfillment of health and education rights, protection from all forms of exploitation and violence, and equality for men and women in the enjoyment of their rights is the primary point consideration of the judge. These points are part of the four main points of the UDHR and the human rights conventions that accompany it. The considerations of the Constitutional Court above show that the judges do not view this issue narrowly, although they still leave the implementation of the amendment to the article to the legislators because this rule is an open legal system in the Indonesian legal system. In the author's view, the Constitutional Court has succeeded in bringing about substantive justice in this matter. Justice is important here because, as Ibn Taimiyah said, it is only in the ideals of justice that a country can be expected to fulfill the goals for which the country was founded (Rachman, 2011: 72-73). Regarding the importance of justice, Mahmud Saltut also explained that justice is a universal command from God, without any discrimination. The principle of justice is God's objective rule so that humans as God's creation must get an equal share of justice, whether Muslim or non-Muslim, male or female (Rachman, 2011: 73). Therefore, fulfilling women's rights and children's rights without discrimination is a fundamental aspect of Islam. The child's right to life (Qur'an: 13/31), the child's right to receive care, care, and maintenance, and the child's right to receive an education (Qur'an: 13/36) must be fulfilled and protected, both by older people, society, especially by the state (Kosasih, 2003: 75-77).

In this context, Jasser Auda's offer in outlining the objectives of sharia (maqashid al sharia) is interesting to see. Auda divides maqasid into 3 levels:

1) General maqashid; 2) Partial maqashid; and 3) Specific maqashid (Auda, 2007: 3). In detail, Auda explained that general maqashid is aimed at the whole of Islamic law, which includes dzaruriyat and hajiyyat, with new goals, namely justice and facilities. In this concept, Auda makes a paradigm shift. If maqasid for more on protection and preservation, the concept of Auda, maqasid should also put more emphasis on human development and fulfillment of the rights, which are targeted for the benefit (Auda, 2007: 3). Thus, in Auda's view, the concept of protecting offspring (hifz al-nasl) should be more oriented towards protecting the family and caring for family institutions. Likewise, protecting the soul (hifz al-nafs) must emphasize the protection of human dignity and the fulfillment of human rights (Abdullah, 2012: 146).

Conclusion

Protection and fulfillment of human rights is a central issue in the issue of child marriage. The arguments built by both the applicant and the Constitutional Court show this. The decision taken by the Constitutional Court shows that the Court has returned to carrying out its duties as "the guardian of the constitution," being a bulwark guarding the constitutional rights of citizens. This paper concludes that the considerations based on realizing *maslahah* (good or benefit) and preventing more *mafsadat* (badness or damage) carried out by the Constitutional Court aim to provide justice. Justice is a universal basic principle of human rights and one of the core values of sharia. In this context, the Constitutional Court has succeeded in a dialogue between human rights and sharia, upholding respect for humanity.

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