

## Juridical Study of the Constitutional Court's Decision No. 22/PUU-XV/2017 Regarding Restriction of Marriage Age from the Perspective of *Maslahah* Theory by Muhammad Sa'îd Ramadhân Al-Bûthî and Gender Equality in Islam

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**Abstract:** This article examines the legal considerations of Constitutional Court's Decision No. 22/PUU-XV/2017 concerning the minimum age for marriage for women in light of Muhammad Sa'îd Ramadhân al-Bûthî's *maslahah* theory and the theory of gender equality in Islam. This research is normative juridical research. The results of this study conclude that: First, the judge's legal considerations in canceling the minimum marriage age limit in Decision No. 22/PUU-XV/2017 were based on considerations of discrimination, child exploitation, health interests, education, minimum marriage age in various countries, and demands determining the age of marriage. Second, judging from al-Bûthî's *maslahah* theory, the Constitutional Court's Decision regarding equalizing the marriage age between men and women is not a benefit, because it does not meet the five criteria required by the *maslahah* theory. Third, judging from the theory of gender equality in Islam, it can be concluded that the Constitutional Court's Decision is also not in accordance with the theory, because the meaning of equality in Islam does not have to be equal but rather the fulfillment of rights according to the level of need.

**Keywords:** Constitutional Court Decision, minimum age for marriage, *maslahah*, gender

**Abstrak:** Artikel ini menelaah pertimbangan hukum Hakim Mahkamah Konstitusi dalam putusan No. 22/PUU-XV/2017 tentang batas minimal usia menikah bagi perempuan yang ditinjau dari teori *maslahah* Muhammad Sa'îd Ramadhân al-Bûthî serta teori kesetaraan gender dalam Islam. Penelitian ini bersifat penelitian juridis normative. Hasil dari kajian ini menyimpulkan bahwa : *Pertama*, pertimbangan hukum Hakim dalam membatalkan batas minimal usia menikah pada putusan No. 22/PUU-XV/2017 didasarkan pada pertimbangan diskriminasi, eksploitasi anak, kepentingan kesehatan, pendidikan, usia minimal perkawinan di berbagai negara, dan tuntutan penetapan usia perkawinan. *Kedua*, ditinjau dari teori *maslahah* al-Bûthî, maka putusan MK tentang penyamaan usia perkawinan antara laki-laki dan perempuan bukan merupakan suatu kemaslahatan, karena tidak memenuhi lima kriteria yang diinginkan oleh teori *maslahah*. *Ketiga*, ditinjau dari teori kesetaraan *gender* dalam Islam dapat disimpulkan bahwa putusan MK juga tidak sesuai dengan teori tersebut, karena arti kesetaraan dalam Islam tidak harus sama rata akan tetapi lebih kepada pemenuhan hak-hak sesuai dengan kadar kebutuhannya.

**Kata Kunci:** Putusan MK, batas minimum usia perkawinan, *maslahah*, jender

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## Introduction

One of the regulations implemented by the government on marriages is the marriage age limitation. concerning the issue of marital age restrictions, Indonesia is one of the countries that pay attention to marriages with the acceptance of Indonesian Law No. 1 of 1974 concerning Marriage (Law on Marriage), which is legally becoming a national regulation governing marriage in Indonesia.<sup>1</sup>

Article 7 Paragraph (1) of Law No. 1 of 1974 concerning Marriage mentioned, that:

“Marriage is only permitted if the man has reached the age of 19 (nineteen) years and the woman has reached the age of 16 (sixteen) years”.

The existence of these restrictions is aimed to realize the goals of marriage, to avoid divorce, to give birth to a good and healthy offspring, and to inhibit the high rate of birth and population growth.<sup>2</sup>

In connection with Article 7 Paragraph (1) of the Marriage Law, various kinds of responses, opinions, and proposals began to emerge and consequently made the provisions on marital age restrictions in the Marriage Act to be revised. In this regard, the Constitutional Court on December 13th, 2018 has decided the case for a petition for Judicial Review related to the Marriage Law article 7<sup>3</sup> to increase the minimum age for women to marry. The petitioners requested to make the minimum age for women in marriage as same as the minimum age for men or 19 years old, to achieve equality between men and women in the law as stated in Article 27 paragraph (1) of the 1945 Constitution of Republic of Indonesia (UUD 1945).

If the reasons presented by the petitioners are examined and become the consideration for the judge in deciding the case, it leads to two (2) things, namely; benefit and gender equality.

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<sup>1</sup> Kaharuddin, *Nilai-Nilai Filosofi Perkawinan Menurut Hukum Perkawinan Islam Dan Undang-Undang RI Nomor 1 Tahun 1974 Tentang Perkawinan*, (Jakarta: Mitra Wacana Media, 2015), p. 4.

<sup>2</sup> Ahmad Rofiq, *Hukum Perdata Islam Di Indonesia* (Jakarta: Rajawali Press, 2013), p. 59.

<sup>3</sup> R. Subekti dan R. Tjitrosudibi, *Kitab Undang-Undang Hukum Perdata*, 15 (Jakarta: Pradnya Paramita, 1982), p. 551. Lihat juga Putusan Mahkamah Konstitusi No. 22/PUU-XV/2017.

Regarding the *maslahah* principle, Muhammad Sa'îd Ramadhân al-Bûthî through his doctoral dissertation entitled *Dhawâbith al-Maslahah fî al-Syari'ah al-Islamiyah*, tried to re-restrict the use of the *maslahah* theory in Islamic law. Since then, many people consider applying *maslahah* is to spin around Islamic law. Whereas the *maslahah* that violates these limitations is not considered a real *maslahah* which worth consideration in the determination of law. In the introduction to his book, he said, the truth is that *maslahah* in Islamic law from all sides have clear boundaries of reason and do not leave the slightest difficulty in understanding it. *Maslahah* in Islam does not allow contradictions between its parts and is built on a very strong basis and visible intent and source of origin. Thus, nobody can manipulate this problem.<sup>4</sup>

In addition to the *maslahah* theory above, the issue of gender equality also becomes an interesting subject to be carried by a group of people. They understand that the concept of gender equality is when men and women are placed on the same social level by getting the same amount in the same quantity. This understanding has been widely adopted from Western ideas about gender equality.<sup>5</sup> Meanwhile, the Islamic perspective differs from the Western Idea on equality of men and women because it is conflicting with natural law. Men and women are both human beings who have their own characteristics.<sup>6</sup> Therefore, if they are equated in all aspects, then it can result in the violation of God's will since they were born differently. From this explanation, the authors can conclude that gender justice (equality) in Islam does not always have to be equal but rather to fulfill the rights according to the degree of need.

From the description above, the author is interested in examining the Constitutional Court's Decision in the granting of Judicial Review of

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<sup>4</sup> Muhammad Sa'îd Ramadhân al-Bûthî, *Dhawâbith Al-Maslahah Fî al-Syari'ah al-Islâmiyyah* (Damaskus: Mu'assasah al-Risâlah, 1973), p. 76.

<sup>5</sup> Muhammad Sa'îd Ramadhân al-Bûthî, *Perempuan Antara Kedzaliman Sistem Barat Dan Keadilan Islam*, (Karangsem: Era Intermedia, 2002), p. 106.

<sup>6</sup> Paizah Ismail, 'Status Wanita Dalam Islam: Antara Prinsip Syariah Dan Ijtihad Fuqaha', *Jurnal Syariah*, 11.2 (2019), 61–72.

Article 7 paragraph (1) No. 1 of the Marriage Law of 1974 concerning the minimum marriage age for women, which then analyzed through the perspective of the *Maslahah* theory by Muhammad Sa'îd Ramadhân al-Bûthî and gender equality in Islam.

Although the discussion related to the provisions on marital age restrictions has been widely studied and researched, however, this research will be different from the earlier studies because the author observes the provisions on marital age restrictions from the results of the latest decision of the Constitutional Court No. 22/PUU-XV/2017 by using the *maslahah* theory by Muhammad Sa'îd Ramadhân al-Bûthî and gender equality in Islamic perspective. Consequently, it can be revealed whether the Constitutional Court's Decision has been effective and relevant to be applied in this country or need further correction.

From the aforementioned explanation, the writer can formulate the research questions as follows; a) How was the Judicial Judgment obtained in the Constitutional Court's Decision No. 22/ PUU-XV/2017 concerning the Minimum Marriage Age for Women?, b) How was the Constitutional Court's Decision No. 22/PUU-XV/2017 concerning the Minimum Marriage Age for Women viewed from the Perspective of the *Maslahah* Theory of Muhammad Sa'îd Ramadhân Al-Bûthî?, C) How was the Constitutional Court's Decision No. 22/PUU-XV/2017 concerning the Marriage Age for Women in the Perspective of Gender Equality Theory in Islam?

Research is a type of legislation study, which was applying comparative method, while data collection techniques are fulfilled through library research. Finally, the data were analyzed using the content analysis method of judges' consideration in a decision.

### **The Theory of *Maslahah* by Muḥammad Sa'îd Ramadhân al-Bûthî**

Al-Bûthî in one of his books argues that Allah SWT in creating people—male or female—is according to His will, by giving them their own characteristics. Allah SWT knows the pleasure of women is different from what men like most as well as the advantages and characteristics of

both sexes. As a result, rules are distinguished according to differences in their character and preference.<sup>7</sup>

“Al-Buthi seems disagree” with the equalization of the minimum age between men and women in marriage. Since both of this gender have their respective functions or are known by “Fate” or “Natural tendency”, therefore, it is required a differentiation. This divergence does not constitute discrimination against women but rather acts to treat women as their fate. Precisely by increasing the minimum age of women to be equal with men is an act of discrimination because it does not treat women as they should.

Al-Bûthî defines *maslahah* as the benefits intended by Allah SWT for the benefit of His servants, whether in the form of care for their religion, soul, intellect, descent or wealth according to a certain order contained in the maintenance category<sup>8</sup>. According to his opinion,, *maslahah* is not an independent verse such as the arguments of other *syara'* verses, namely the Qur'an, Hadits, Ijmâ, and Qiyâs, which incidentally can be made the basis for the arguments against the *juz' iyyât*<sup>9</sup> (*furû' iyyah*) law as it is stated and formulated by several researchers. *Maslahah* is the general meaning contained in a set of *juz' iyyât* laws based on the arguments of *syar'î*. Therefore, in determining the *maslahah*, it is required a criterion to limit the generality of the *maslahah* contained in the *juz' iyyât* laws and then relates it to the *tafsilî* verses of these laws, so that the generality combination of *maslahah* with its *juz' iyyât* is perfect.<sup>10</sup> The existence of changes in law is due to changes of *maslahah* in society.<sup>11</sup> However,

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<sup>7</sup> Said Ramadhan al-Buthi, *Perempuan Dalam Pandangan Hukum Barat Dan Islam* (Yogyakarta: Suluh Press), p. 2005.

<sup>8</sup> Muhammad Sa'îd Ramadhân al-Bûthî, *Dhawâbith Al-Maslahah Fî al-Syarî'ah al-Islâmiyyah*, p. 27.

<sup>9</sup> Or a law that must be firstly relied on to other shari'ah sources such as Al-Qur'an, Hadits, Ijma' and Qiyas. See Alaidin Koto, *Ilmu Fiqh Dan Ushul Fiqh* (Jakarta: Raja Grafindo Persada, 2004), p. 160.

<sup>10</sup> Muhammad Sa'îd Ramadhân al-Bûthî, *Dhawâbith Al-Maslahah Fî al-Syarî'ah al-Islâmiyyah*, pp. 115–16.

<sup>11</sup> Muḥammad Musthafâ Syalabî, *Ta'âlil Al-Ahkâm*, (Beirut: Dâr al-Nahdhah al-'Arabiyyah, 1981), p. 307.

not all forms of *maslahah* can be used as an argument to change a law, particularly in religious law.

According to *usûl fiqh* theory, specifically seen from religious recognition, the *maslahah* is divided into three types. First, *Maslahah al-Mu'tabarah*, or a *maslahah* which is explicitly recognized by religion and its existence has been determined based on the verses of the al-Qur'an, hadîts, *ijmâ'*, or *qiyâs*. This type of *maslahah* that returns to the five principles of shari'ah, namely *hifzh al-dîn*, *hifzh al-nafs*, *hifzh al-aql*, *hifzh al-nasl*, and *hifzh al-mâl*. This category is the true problem and can be the basis of analogy (*qiyâs*).<sup>12</sup>

Secondly, *Maslahah al-Mulghah*, a *maslahah* which is not recognized by religion, even is rejected and considered vanity by religion. It is considered as a *maslahah* by the mind, nonetheless, it is rejected since it contradicts the *nas* (Qur'an's verse).<sup>13</sup>

Thirdly, *Maslahah al-Mursalah*, a *maslahah* which religion does not prescribe the law to make it happen, also no evidence shows the recognition or cancellation.<sup>14</sup>

Furthermore, the *maslahah*, in terms of its strength and influence, is categorized into three types. The first is *Maslahah Dharûriyyah*, or all things that become the joints of the existence of human life that must exist for their benefit through the care and maintenance of the five principles of shari'ah (*maqâsid al-syarî'ah*)<sup>15</sup>.

The second is *Maslahah Hâjiyyah*, everything that is needed by humans to eliminate difficulties and reject all obstacles. It means, that the absence of this aspect of *hâjiyyah* does not threaten the existence of human life, but only causes difficulties<sup>16</sup>.

<sup>12</sup> Abû Hâmid Muhammad al-Ghazâlî, *Al-Mustasfâ Min 'Ilm al-Usûl* (Baghdâd: Musannâ, 1970), p. 415.

<sup>13</sup> Sa'd ibn Nâsir al-Syatsrî, *Syarh Qawâ'id Al-Usûl Wa Ma'âqid al-Fusûl*, 1st edn (Riyad: Dâr Kunûz Isybîliyâ, 2006), p. 351.

<sup>14</sup> Abdul Wahhâb Khalâf, *Ilm Usûl Fiqh Wa Khulasah Al-Tasyrî' al-Islâmî*, (Kairo: Dâr al-Fikr al-'Arabiy, 1996), p. 80.

<sup>15</sup> Muhammad Sa'id Ramadhân al-Bûthî, *Dhawâbith Al-Maslahah Fi al-Syarî'ah al-Islâmiyyah*, p. 119.

<sup>16</sup> Wahbah al-Zuhailî, *Usûl Al-Fiqh al-Islâmî*, (Damaskus: Dâr al-Fikr, 1986), pp. 1022–23.

The last is *Maslahah Tahsîniyyah*. It means that if this aspect is not realized, then human life will not be threatened as chaotic and dangerous as if the *dharûriyyah* aspect is not realized, and also it will not bring distress as the aspects of *hâjjiyyah* are not fulfilled. However, the absence of this aspect will cause a condition that is less harmonious in the view of common sense and customs, violates propriety, manners, and causes significant difficulties in human life. This type of *maslahah* occupies the level of tertiary needs.<sup>17</sup>

*Maslahah*, in term of its content, can be divided into two kinds.<sup>18</sup> First, *Maslahah al-Âmmah*, or *maslahah* related to the interests of many people. The public benefit does not mean for the benefit of all people, but can be in the form of the interests of the majority of the people or most people. Like keeping the country from enemies and people from division. Second, *Maslahah al-Khâssah*, *maslahah* related to the interests of certain people. Like the rules in socializing (*mu'amalah*) both in the household or in a contract (buying and selling, etc.).

According to al-Bûthî, the ultimate *maslahah* must be supported by other sharia propositions or at least do not contradict the *syari'ah*. Otherwise, it cannot be called as a *maslahah*, since the value of the *maslahah* will disappear by itself. Al-Bûthî argues that the independent mind will not be able to find the benefit of humans in particular matters.<sup>19</sup>

To be considered as an essential *maslahah*, al-Bûthî limits it to five conditions; One is related to the disclosure of the universal meaning of the *maslahah*, while the other four are limited only by connecting to detailed legal arguments.<sup>20</sup> The five conditions are as follows: (1) *Maslahah* must be within the scope of the objectives of the Shari'a; (2) *Maslahah* does not contradict al-Qur'an; (3) *Maslahah* does not conflict with al-Sunnah; (4) *Maslahah* does not conflict with Qiyâs; (5) *Maslahah* does not contradict the higher *maslahah*.

<sup>17</sup> Wahbah al-Zuhailî, *Usûl Al-Fiqh al-Islâmî*, p. 1023.

<sup>18</sup> Wahbah al-Zuhailî, *Usûl Al-Fiqh al-Islâmî*, p.1028

<sup>19</sup> Muhammad Sa'îd Ramadhân al-Bûthî, *Dhawâbith Al-Maslahah Fî al-Syari'ah al- Islâmiyyah*, p. 117.

<sup>20</sup> Muhammad Sa'îd Ramadhân al-Bûthî, *Dhawâbith Al-Maslahah Fî al-Syari'ah al- Islâmiyyah*, p. 118.

## The Theory of Gender Equality in Islamic Perspective

Generally speaking, gender is defined as a form of differentiating the roles and responsibilities of men and women as the result of socio-cultural construction that is not permanent, can be learned, and can be exchanged according to time, place, and certain cultures from one sex to another.<sup>21</sup>

Gender following the above definition is contrary to the teachings of Islam, because the division of tasks, roles, and responsibilities of women and men both in the family (domestic space) and in the community (public space) is based on Allah's revelation, and not all of them are cultural products. Some roles change, but the rest of the roles remain unchanged. What determines the role is not culture, but Allah's revelation, which has been exemplified by the implementation of the Prophet Muhammad. The reason is that Islam is indeed a religion of revelation, which teachings are determined through Allah's revelation, not based on the social or cultural consensus of a particular society.

Generally, gender equality is defined as the equality of conditions and positions for women and men to get the opportunity to access, participate, control, and obtain development benefits in all areas of life.

Additionally, this common concept of equality also contradicts the Islamic concept of equality, where men and women cannot be equalized in all respects. Adian Husaini also considered that gender equality when understood in this way would be a form of oppression and tyranny against Muslims who obey the teachings of their religion.<sup>22</sup>

The Islamic teachings, which existed since 15 centuries ago, has substantially eradicated discrimination between men and women. Islam views women as having the same position as men, even if there are differences. It is due to the main functions and tasks that religion imposes on each sex so that differences do not result in one feeling superior to the

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<sup>21</sup> Dina Martiany, 'Pro Dan Kontra RUU Kesenjangan Dan Keadilan Gender (KKG)', *Info Singkat Kesejahteraan Sosial*, 2012, p. 10 <[https://berkas.dpr.go.id/puslit/files/info\\_singkat/Info%20Singkat-IV-10-II-P3DI-Mei-2012-62.pdf](https://berkas.dpr.go.id/puslit/files/info_singkat/Info%20Singkat-IV-10-II-P3DI-Mei-2012-62.pdf)>.

<sup>22</sup> Dina Martiany, 'Pro Dan Kontra RUU Kesenjangan Dan Keadilan Gender (KKG)', p. 10.

other, rather they complement and help each other.<sup>23</sup> This is confirmed in the word of Allah SWT in Surah al-Nisa' verse 32 which reads:

وَلَا تَتَمَنَّوْا مَا فَضَّلَ اللَّهُ بِهِ بَعْضَكُمْ عَلَى بَعْضٍ لِّلرِّجَالِ نَصِيبٌ مِّمَّا  
 كَتَبُوا وَلِلنِّسَاءِ نَصِيبٌ مِّمَّا كَتَبْنَ وَسَأَلُوا اللَّهَ مِنْ فَضْلِهِ إِنَّ اللَّهَ  
 كَانَ بِكُلِّ شَيْءٍ عَلِيمًا ﴿٣٢﴾

*And do not be jealous of what Allah has given to you more than any other part. (Because) for men, there is a part of what they are trying to do, and for women (even) there is a part of what they are trying to do, and ask Allah for some of His gifts. Indeed, Allah is All-Knowing everything.*

Etymologically, the term gender equality consists of two words, the first is equality, derived from the word equal, and the second is the word of gender. In terms of etymology, the word “equal” or “same” comes from the Arabic word *kafâ'ah*, usually interpreted as proportional or same, as the *fulan* is equal to the *fulan*, meaning comparable. While in terms of terminology, according to the majority of fuqahâ', equality is comparable in terms of religion, freedom, and profession.<sup>24</sup> This explanation is in the chapter “Equality (*Kafâ'ah*) in Marriage”. The scholars themselves have examined the equivalent words contained in the Qur'an, and there are only principles of equality, not concepts, terms, and ideological values of gender equality.<sup>25</sup> The principle of equality found in the Qur'an includes: (a) In terms of service, Islam does not differentiate between men and women in service, the difference being the measure is only devotion; (b) In terms of the status of events, Al-Qur'an explains that women and men were created by Allah in the same degree; (c) In terms of being tempted, in al-Qur'an it is stated that the temptations and seduction

<sup>23</sup> Huzaemah Tahido Yanggo, *Fikih Perempuan Kontemporer*, (Bogor: Ghalia Indonesia, 2010), p. 83.

<sup>24</sup> Wahbah Al-Zuhaili, *Al-Fiqh Al-Islâmi Wa Adillatuh*, 2nd edn (Suriah: Dar al-fikr, 1985), ix, pp. 213–14.

<sup>25</sup> Huzaemah Tahido Yanggo, *Pandangan Islam Tentang Gender* (Surabaya: Risalah Gusti, 1996), p. 156.

of the devil apply to men and women as does Adam and Eve'; (d) In terms of humanity, al-Qur'an rejects the view that distinguishes men and women, especially in the field of humanity; (e) In terms of ownership and management of assets, al-Qur'an abolishes all traditions imposed on women in the form of prohibitions or restrictions on the right to spend their possessions; (f) In terms of inheritance, al-Qur'an gives inheritance rights to men and women; (g) Legal equality regarding divorce.

From the earlier explanation, it can be concluded that Islam has placed women in such a noble position far from the word of oppression as well as stated by the author regarding the rights granted by Islam to women who uphold their dignity and honor. Islam also does not differentiate between men and women but for several conditions and the presence of certain factors such as differences in abilities, circumstances, and innate traits that exist in the personalities of both men and women. However, this distinction is not a discriminatory factor but a noble and just nature that intends to put something in its place and accordance with its content/portion.

### **Judge's Legal Considerations in Determining the Minimum Age of Marriage in Constitutional Court's Decision No. 22 / PUU-XV / 2017**

As the stated argument above, this case is intended for a petition on Judicial Review Article 7 (paragraph 1) of Law No. 1 of 1974 concerning Marriage. The author aimed to examine the basic considerations of the court in deciding cases in the decision of the Constitutional Court No. 22/PUU-XV/2017. The description of the case is mentioned as follows: *First*, the existence of differences in the minimum age of marriage has led to discrimination and real losses for women. *Second*, there is the latest research that states that the age of 16 years is susceptible to health problems, especially in the reproductive organs, namely during the process of pregnancy. *Third*, the difference in the minimum age of marriage has led to discrimination against girls in obtaining the right to education. *Fourth*, the difference in the minimum age of marriage has also caused girls who marry at the age of children to be at risk of child exploitation. *Fifth*, there is an equal age of minimum marriage for men and women in various countries.

## **Analysis of *Maslahah* Theory by Sa'îd Ramadhân al-Bûthî on the Minimum Age of Married for Women in the Constitutional Court's Decision No. 22/PUU-XV/2017**

By referring to the previous discussion, the equalization of the minimum age of marriage for men and women in the Constitutional Court's decision can be classified as *maslahah al-mulghâh*, *maslahah tahsîniyyah*, and *maslahah al-khâssah*. It is called *maslahah al-mulghâh*, as it is not recognized by religion and it contradicts the *Nas*. It is called *maslahah tahsîniyyah* because the absence of this aspect does not cause human life to be threatened with chaos and danger. Finally it is called *maslahah al-khâssah* because it is only related to the interests of certain people.

From the explanation above, the researcher sees that the judges' legal considerations in the Constitutional Court's ruling can not be included in the category of essential *maslahah*, because their status is still classified as the *maslahah al-mulghâh*, *maslahah tahsîniyyah*, and *maslahah al-khâssah*, where their existence is in contradiction with the *nas* and its absence do not result in the chaotic and dangerous of human life, plus, the benefits are only related to certain people. This can be seen in rural communities or the children of community leaders and *kiai*, especially in Java, who has got into a marriage at a young age and can live happily far from the things that are feared by the applicants for Judicial Review in the reasons which are then used as legal considerations in the Constitutional Court's Decision.

The detailed explanation related to the Constitutional Court's Decision from the perspective of the five conditions of al-Bûthî's *ijtihad* has resulted in several essential issues as follows: *First*, *Maslahah* must be within the scope of *Maqâsid al-syarî'ah* which revolves around five cases namely *hifzh al-dîn* (preserving religion), *hifzh al-nafs* (preserving the soul), *hifzh al-'aql* (preserving reason), *hifzh al-nasl* (looking after descendants), and *hifzh al-mâl* (looking after property).

1. In term of *hifzh al-din*, the change in the minimum age of marriage for women to 19 in the Court's Decision No. 22/PUU-XV/2017, can be comprehend that the government has made it difficult for its citizens who are physically and mentally prepared to get married

although they are still below the specified limit. This is certainly different from Islamic law which calls on people to get married when they feel there is a capacity. This is as mentioned by the Prophet Muhammad.

عَنْ عَبْدِ اللَّهِ بْنِ مَسْعُودٍ رَضِيَ اللَّهُ عَنْهُ قَالَ قَالَ لَنَا رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: (يَا مَعْشَرَ الشَّبَابِ مَنِ اسْتَطَاعَ مِنْكُمُ الْبَاءَةَ فَلْيَتَزَوَّجْ فَإِنَّهُ أَغْضُ لِلْبَصْرِ وَأَحْصَنُ لِلْفَرْجِ وَمَنْ لَمْ يَسْتَطِعْ فَعَلَيْهِ بِالصَّوْمِ فَإِنَّهُ لَهُ وَجَاءٌ)

*From 'Abdullah bin Mas'ûd said, Rasulullah SAW said to us, "O young generation, those of you who have a family get him married because he can subdue his views and support the campaign. Anyone incapable seeks fasting because he can support you. (H.r. Muslim)<sup>26</sup>*

2. In terms of *hifzh al-nafs*, the existence of the Constitutional Court's Decision in increasing the minimum age of a woman to 19 years, has provided the protection and safety of the soul of the wife and offspring later. Because marriages carried out at a young age, especially teenagers give an impact on reproductive health.
3. In terms of *hifzh al-'aql*, the Constitutional Court's Decision is considered to give a right for women to get the same opportunities as men in pursuing a high level of education, because marrying a child at school-age often cause the loss of their right to education as mandated in Article 28C paragraph (1) of the 1945 Constitution of Republic of Indonesia.

Preservation of mind is not merely by maintaining the ability of reason to not becoming crazy or drunk, but the fulfillment of intellectual rights for every individual in society is also included in the category of maintenance of mind from ignorance'.<sup>27</sup>

4. In terms of *hifzh al-nasl*, the Constitutional Court's Decision was

<sup>26</sup> Muslim bin Hajjâj, *Sâhib Muslim*, 4th edn (Jeddah: Dâr al-Minhâj, 2003), p. 128.

<sup>27</sup> Jamâluddîn 'Athiyyah, *Nahwa Taf'îl Maqâsid Al-Syari'ah* (Damaskus: Dâr al-Fikr, 2001), p. 149.

considered to help reduce cases of infant death and maternal death, because pregnancy under the age of 19 years has a high risk, including difficulties during pregnancy, illness, disability, maternal / infant death. BKKBN also explained that the age below 18 years would indicate some health problems such as cervical cancer in the future.

5. In terms of *hifzh al-mâl*, the existence of the decision was also considered to have supported in regulating economic or financial aspects in the family.

However, in the researcher's point of view, the above reasons are the only concern, while many women get married at a young age and their lives run normally without any disturbance from the risks of concern as explained above.

*Secondly, Maslahah* must not contradict the Qur'an. As explained earlier that al-Bûthî (based on the analysis of the author from his statement) disagrees with the equalization of the minimum age limit between men and women in Marriage. Men and women have their respective functions commonly referred to as fate or natural tendency, so it demands a difference. This notion is according to the word of Allah SWT in surah al-Nisâ' verse 34 saying:

الرِّجَالُ قَوَّامُونَ عَلَى النِّسَاءِ بِمَا فَضَّلَ اللَّهُ بَعْضَهُمْ عَلَى بَعْضٍ وَبِمَا أَنْفَقُوا مِنْ أَمْوَالِهِمْ فَالصَّالِحَاتُ قَنَاطٌ لِّعَيْبِ مَا حَفِظَ اللَّهُ

*Men are leaders for women, because Allah has exalted one of them (men) over another (women), and because they (men) have spent part of their property. Therefore, a godly woman, who is obedient to God, takes care of herself when her husband is not there...*

According to the above verse, it can be understood that there are differences between men and women. Allah SWT exceeds men over women, meaning that he (a man) will later become her leader and judge who can lead his wife back when she (wife) is not in the path of Allah SWT.<sup>28</sup> Researchers assess the existence of differences in the minimum

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<sup>28</sup> Al-Sayyid Mahmûd al-Âlûsî, *Rûh Al-Mâ'ânî Fî Tafsîr Al-Qur'an al-'Azhîm Wa al-Sab' al-Matsânî*, 2 (Beirut: Dâr al-Kutub al-'Ilmiyyah, 1994), p. 41.

age of marriage for men and women is a form of law that is appropriate for the fate of both. Considering the sacredness of marriage, a rule is required to prepare a husband and wife to undergo the relationship, one of which is to provide different opportunities between men and women to realize the purpose of marriage.

*Thirdly, Maslahah* must not contradict al-Sunnah. After experiencing a trace, the author did not get the *hadīts* that contain and support the equalization of the age of marriage either explicitly or Implicitly. On the contrary, it can be found for the adversaries who mentioned differences in the minimum age for marriages for men and women, as in the following *hadīts*:

عَنْ جَابِرِ بْنِ عَبْدِ اللَّهِ رَضِيَ اللَّهُ عَنْهُمَا قَالَ: هَلَكَ أَبِي وَتَرَكَ سَبْعَ بَنَاتٍ أَوْ تِسْعَ بَنَاتٍ فَتَزَوَّجْتُ امْرَأَةً ثَيِّبًا فَقَالَ لِي رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ: تَزَوَّجْتَ يَا جَابِرُ فَقُلْتُ نَعَمْ. فَقَالَ: بِكْرًا أَمْ ثَيِّبًا قُلْتُ: بَلْ ثَيِّبًا، قَالَ: فَهَلَا جَارِيَةً تُلَاعِبُهَا وَتُلَاعِبُكَ وَتُضَاحِكُهَا وَتُضَاحِكُكَ، قَالَ فَقُلْتُ لَهُ: إِنَّ عَبْدَ اللَّهِ هَلَكَ وَتَرَكَ بَنَاتٍ، وَإِنِّي كَرِهْتُ أَنْ أَجِيهَنَّ بِمِثْلِهِنَّ، فَتَزَوَّجْتُ امْرَأَةً تَقُومُ عَلَيْهِنَّ وَتُصَلِّحُهُنَّ. فَقَالَ: بَارَكَ اللَّهُ لَكَ.

*From Jâbir bin 'Abdillah said: My father died, and left 7 or 9 daughters, and I will marry a widow, then the Messenger of Allâh SA said to me: "Have you married O Jabir? Then I answered: true, Rasulullah SAW asked: girl or widow? I replied: widow, Rasulullah SAW said: "Why is not a girl, so that you can joke with her?, then I answered: Indeed Abdullah (my father) has died and left many daughters, and in fact, I am reluctant to have a wife like them (virgins ), then I marry a widow so that she can care for them, then the Messenger of Allah said: "May Allah give blessings to you". (H.r. Muslim)<sup>29</sup>*

<sup>29</sup> Muslim bin Hajjâj, *Sâhib Muslim*, p. 176.

From the above *hadîts*, it can be understood that there is an implicit suggestion to the husband to look for a young wife (girl) to maintain family Harmony as the young wife (girl) can add love<sup>30</sup> and intimacy.<sup>31</sup>

*Fourthly, Maslahah* must not contradict *al-Qiyâs*. Al-Bûthî argues that every *qiyâs* will certainly consider the problem, but not every maintenance of *maslahah* is called *qiyâs*. After searching for legal issues of marriages that were resolved by using *qiyâs*, researchers did not find any *qiyâs* that conflicted with an increase in the minimum age of marriage for women.

*Fifthly*, the *maslahah* is not in conflict with the more urgent *maslahah*. When looking at the fifth requirement here, the author considers that the Constitutional Court's Decision in increasing the minimum age of marriage for women is included in the category of *maslahah tahsîniyyah*, since the absence of this aspect does not cause human life to be threatened with chaos and danger. Because it is a *maslahah tahsîniyyah*, it should not conflict with a more urgent *maslahah*, namely the *maslahah dharûriyyah*.

The thing that is classified as the *maslahah dharûriyyah* is to keep from falling into adultery. The existence of the Constitutional Court's ruling on increasing the age limit of marriage gives the impression of delaying marriage to adolescents who already feel able to build a marriage relationship because the age is still below the minimum limit set. The existence of this Constitutional Court ruling is very dangerous because it can lead women to adultery since sex is a human need.

Regarding the results of the above analysis, it can be concluded that the equalization of the minimum age of marriage for men and women in the Constitutional Court's Decision is not a *maslahah*. Such because the five essential conditions of al-Bûthî's *maslahah* cannot be fulfilled.

### **Analysis of Gender Equality Theory in Islam on the Minimum Age of Marriage for Women in Constitutional Court's Decision No.22/PUU-XV/2017**

Generally, The concept of gender, as a form of differentiating the roles and responsibilities of men and women, is the result of socio-

<sup>30</sup> 'Alî al-Qârî, *Syarh Musnad AbiHanîfah*, 1 (Beirut: Dâr al-Kutub al-'Ilmiyyah, 1995), p. 254.

<sup>31</sup> Abû Hâmid al-Ghazâlî, *Ihyâ' 'Ulûm al-Dîn*, 1 (Beirut: Dâr al-Ma'rîfah, 2010), p. 394.

cultural construction that is not permanent, can be learned, and can be exchanged according to time, place, and certain cultures from one sex to another.<sup>32</sup>

As the author explained at the beginning of the discussion, gender in this sense is contradicted to the teachings of Islam because the division of tasks, roles, and responsibilities of women and men both in the family and in society is based on the revelation of Allah, and not all of them are a cultural product. Some roles change, and others remained unchanged. What determines the role is not culture, but Allah's revelation, which has been exemplified by the implementation of the Prophet Muhammad. This is because Islam is indeed a religion of revelation, whose teachings are determined based on Allah's revelation, not based on the social or cultural consensus of a particular society.

Gender equality is defined generally as the equal conditions and positions for women and men to get the opportunity to access, participate, control, and obtain development benefits in all areas of life.

This concept of equality also conflicted with the concept of equality in Islam, where men and women cannot be equalized in all respects. Adian Husaini also considered that gender equality when understood in this way would be a form of oppression and tyranny against Muslims who obey the teachings of their religion.<sup>33</sup>

Following the words of Adian Husaini, in one of his books, *Al-Bûthî* argues that Allah SWT created His servants, both men, and women according to His will, which gives them their characteristics. Allah SWT knows that women's pleasures are different from men's pleasures. Even with the advantages and characteristics of men, which is different from the strengths and characteristics of women. Therefore, rules are distinguished according to differences in their character and love.<sup>34</sup>

Prof. Huzaemah Tahido Yanggo, in one of her books, also explained that the Islamic teachings that was sent down in the 15th century ago,

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<sup>32</sup> Dina Martiany, 'Pro Dan Kontra RUU Kesetaraan Dan Keadilan Gender (KKG)', p. 10.

<sup>33</sup> Dina Martiany, 'Pro Dan Kontra RUU Kesetaraan Dan Keadilan Gender (KKG)'

<sup>34</sup> Said Ramadhan al-Buthi, *Perempuan Dalam Pandangan Hukum Barat Dan Islam*, p. 15.

had substantially eliminated discrimination between men and women. Islam views women as having the same position as men, even if there are differences, then it is due to the main functions and tasks that religion imposes on each sex so that differences do not result in one feeling superior to the other, rather they complement and help each other.<sup>35</sup>

Al-Qur'an in addressing differences between men and women also recognizes the distinction between men and women, but the difference is not discrimination that benefits one party and harms the other party. The distinction is intended to support the basic mission of the Qur'an, namely the creation of a harmonious relationship based on compassion (*mawaddah wa rahmah*) in the family environment, as a forerunner to the realization of an ideal community in a country that is peaceful and full of Allah's forgiveness (*baladun thayyibatun wa rabbun ghafûr*). This can all be realized when there is a pattern of balance and harmony between the two.<sup>36</sup>

From the description above, it is clear that the concept of gender equality in Islam looks more at the aspect of fulfilling the rights of each individual based on the revelation of Allah SWT brought by the Prophet Muhammad.

Based on the description above, the author considers that the Constitutional Court's Decision No. 22/PUU-XV/2017 which mentioned that: *"The reason for raising the minimum age of marriage for women is to eliminate acts of discrimination in terms of fulfilling the constitutional rights of citizens. This is because the petitioners argue that the existence of article 7, paragraph 1 No. 1 The Marriage Law of 1974 which has distinguished the minimum age of marriage between men and women are considered to have discriminated against women and lead to gender inequality, so the need for equalization of age"* is contrary to the concept of gender equality in Islam. Since the religion of Islam recognizes the differences between men and women. The existence of this difference requires a difference in age limits in marriage (as the Marriage Law before it was revised) to

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<sup>35</sup> Huzaemah Tahido Yanggo, *Fikih Perempuan Kontemporer*, p. 83.

<sup>36</sup> Nasaruddin Umar, *Argumen Kesetaraan Jender Perspektif Al-Qur'an* (Jakarta: Paramadina, 1999), p. 305.

maintain family harmony and foster love as expressed by Imam Ghazali in the book of *Ihyâ' 'Ulûm al-Dîn*.

The difference could not be interpreted as an act of discrimination, because there are certain factors behind the distinction. As a consequence, equalization is frequently taken place to have an impact on discrimination. Thus, the equalization of the age limit of marriage this discriminates against women because it violates the nature of being a woman whose process of maturation is faster than men. Therefore, differences in age at marriage are very compatible with gender equality in Islam.

## Conclusion

Judge's legal considerations in canceling article 7 paragraph (1) of Law No. 1 of 1974 related to the minimum age of marriage based on several reasons that relate to: (1) Act of discrimination: (as it has been regulated by the provision No. 028-029/PUU-IV/2006 and Article 1 number 3 of Law No. 39 of 1999 concerning Human Rights); (2) Health aspects: (Law no. 35 of 2014 concerning Child Protection); (3) Educational aspects: (Article 28 C of the 1945 Constitution of Republic of Indonesia (UUD 1945) and Article 31 paragraph 2 of the UUD 1945). (4) the exploitation of children: (Article 4 letter d of the UUD 1945, article 26 paragraph (1) and Article 13 of the Child Protection Law). (5) Minimum age requirement for marriages in various countries: (The 2030 agenda for sustainable development goals (SDGs); (6) Policy demands to marriage age: (Article 16 paragraph 1 CEDAW).

Seen from the perspective of the theory of *maslahah* by Sa'îd Ramadhân al-Bûthî, It is clear that the alignment of the minimum age of marriage between men and women in the Constitutional Court Decision No. 22/PUU-XV/2017 Is not based on *Maslahah*. Such is because it fails to fulfill the five conditions of *Maqosid shari'ah* (*hifzh al-dîn, hifzh al-nafs, hifzh al-'aql, hifzh al-nasl, hifzh al- mâl*). In term of gender equality in Islam, it also shows that the Constitutional Court's Decision No. 22/PUU-XV/2017 concerning the equalization of the age limit of women and men is not in line with the theory. This is because it violates the nature of women which, incidentally is different from men. What is

required in the the age restriction is a distinction, instead of leveling which only causes discrimination, as it prevents each of women and men to follow their nature.

### Author Contribution

The three writers each made the following contribution to the study: *Machrus Ali Syifa'* initiate the study by conceptualizing the study, designing the research methodology, and conducting data analysis. *Ahmad Tholabi Kharlie* was instrumental in data collection, literature review especially in comprehensive understanding *Muhammad Sa'id Ramadhân al-Bûthî's* masalah theory, and drafting the initial manuscript. *Mualimin Mochammad Sahid* contributed significantly to data analysis and interpretation, translation, as well as in refining the manuscript. All three authors collectively reviewed and improved the paper.

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