

The Implementation of the Concept of Maslahat (Benefits) in Determining the Minimum Age of Marriage in Islamic Family Law in Indonesia and Jordan

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Abstract: *The Implementation of the Concept of Maslahat (Benefits) in Determining the Minimum Age of Marriage in Islamic Family Law in Indonesia and Jordan.* This study examines the development of Islamic Family Law (*al-Ahwâl al-Syakhsbiyah*) in modern Islamic countries, especially in Indonesia and Jordan. The aim is to gain a deep understanding of the phenomenon which has become a new strategic way to accommodate the idea of Islamic law reform into a more actual form. This research is descriptive-qualitative literature research. Qualitative research is a research procedure that produces descriptive data in the form of written speech, and observed behavior of research subjects. This study finds the fact that the concept of *maslahat* applied in marriage law in Indonesia and Jordan aims to achieve the general benefit, reject harm, preserve laws or regulations that have been in effect and are considered good, and develop them following Islamic law and the values of local wisdom that become characteristics of each country. Viewed from the other side, the phenomenon of family law reform that is developing in several Muslim countries today can be seen as the beginning of the process of transitioning fiqh law to positive law which is manifested in the form of national legislation.

Keywords: family law reform, marriage law in Indonesia and Jordan, minimum age for marriage

Abstrak: *Asas Manfaat dalam Penetapan Batas Minimum Usia Menikah dalam Hukum Keluarga Islam di Indonesia dan Yordania.* Kajian ini menelaah perkembangan Hukum Keluarga Islam (*al-Ahwâl al-Syakhsbiyah*) di negara-negara Islam modern, khususnya di Indonesia dan Yordania. Tujuannya adalah untuk memperoleh pemahaman yang mendalam tentang fenomena perkembangan hukum yang telah menjadi cara strategis baru dalam mewedahi gagasan reformasi hukum Islam ke dalam bentuk yang lebih aktual. Penelitian ini merupakan penelitian deskriptif-kualitatif kepustakaan. Penelitian kualitatif merupakan prosedur penelitian yang menghasilkan data deskriptif berupa tuturan tertulis, dan perilaku yang diamati dari subjek penelitian. Kajian ini menemukan fakta bahwa konsep *maslahat* yang diterapkan dalam hukum perkawinan di Indonesia dan Yordania bertujuan untuk mencapai kemaslahatan umum, menolak mudarat, melestarikan hukum atau peraturan yang telah berlaku dan dianggap baik, serta mengembangkannya sesuai dengan syariat Islam dan nilai-nilai kearifan lokal yang menjadi ciri khas masing-masing negara. Dilihat dari sisi lain, fenomena reformasi hukum keluarga yang berkembang di beberapa negara Muslim saat ini dapat dilihat sebagai awal dari proses transisi hukum fikih ke hukum positif yang diwujudkan dalam bentuk peraturan perundang-undangan nasional.

Kata kunci: reformasi hukum keluarga, hukum perkawinan di Indonesia dan Yordania, usia minimum menikah

Introduction

The demand for the codification and modernization of Islamic law has begun to echo in the decades leading up to the 20th century after Western civilization succeeded in penetrating almost all Islamic countries. This current Islamic law reform requires not only an adjustment of Islamic law to Western law but also changes in Islamic law through reasoning and reinterpretation of the Islamic legal tradition to keep up with the developments of the modern world.¹ Unfortunately, in responding to these demands, the scholars do not seem to have the readiness to realize the Shari'ah from fiqh books into a positive legal draft.²

In Indonesia, the spirit to codify Islamic law has also emerged, one of which is in the field of marriage law. Islamic marriage law in Indonesia has been running for a long time before the emergence of law number 1 of 1974 concerning marriage. This has been going on since the era of the Islamic kingdoms in the archipelago until the coming of the West to Indonesia (colonial era). In the colonial era there were three kinds of legal systems in force in Indonesia, namely the civil law code for people of European and Foreign Eastern descent, Christian ordinances for Indonesian Christians, such as those in Ambon and Minahasa, and Islamic law for Indonesians who are Muslim. After Indonesia's independence, Law no. 1 of 1974 concerning Marriage emerged, and then followed by the emergence of the 1991 Compilation of Islamic Law,

To codify fiqh into a positive legal draft, Islamic jurists must look to the basic principles of Islamic law, including the principle of *maslahat* (benefit). This is because the principle of Maslahat is one of the objectives of the application of the law; The law will work if it is following the principles of justice and refers to the benefit of the people.

Many researchers have conducted studies on the principle of benefit, including Dissertation Moh. Mukri, entitled "*Al-Gazzali's Maslahah*

¹ John J. Donohue & John L., *Islam dan Pembaharuan, Ensiklopedi Masalah-Masalah, Terj. Machnun Husein* (Jakarta: Raja Grafindo persada, 1995), p. 364.

² Thonthowi, 'Hukum Keluarga Islam di Dunia Islam Kontemporer', *Jurnal Studi Islam Mukaddimah*, 19, 2005, p. 359.

Thoughts: Enriching Contemporary Legal Studies".³ Mukri explained that *Maslahah al-Mursalah*, as a source of Islamic law, according to al-Gazzali, contains the aim of preserving religion (*hifz al-din*), soul (*hifz al-nafs*), reason (*hifz al-'aql*), offspring (*hifz al-nasl*), and human property (*hifz al-mâl*). All require *qat'iyyat*, *darûriyyat*, and *kulliyat* requirements. Another researcher, Busyro, through his dissertation entitled *Yusuf Qaradhawi's Contemporary Fatwas and Its Relation to Maqâshid al-Shari'ah*.⁴ examines Yusuf Qaradhawi's thoughts which are different from the thoughts of scholars in general, including al-Syâtibî. Busro concludes that 1) not all of Yusuf Qaradhawi's fatwas apply *maqâshid al-syari'ah* (sharia purposes) which are recognized as valid by scholars; 2) Yusuf Qaradhawi also does not make *maqâshid al-syari'ah* an independent science. 3) Yusuf Qaradhawi tends to prioritize human interests over other interests, 4), in his fatwa, Yusuf Qaradhawi also pays attention to the divine law, 5) the use of reason in interpreting the law is not carried out freely but remains in the corridor of texts.

Another study, as written by Abdul Basith Junaidy in his dissertation entitled *Arguments for Utilitarianism on Maslahat in Muhammad Abû Zahrah's Legal Thought*,⁵ concludes that Abu Zahrah places *maslahat* as a method of *istinbat* in Islamic law and uses it as an argument in favor of utilitarianism. Another researcher, Muhammad Ma'shum, through his dissertation entitled *Maslahat al-Tûfi (Application Studies in Polygamy)*, concluded that the principle of *maslahat al-Tûfi* can be applied to polygamy cases in the form of a mutual agreement upon the second, third, or fourth wife, along with the children resulting from that marriage, that they will not demand *nafaqah* (sustenance), or only accept mandatory wills without *waratsah* (inheritance) to realize domestic harmony as the ultimate goal.⁶ Sanuri, through his dissertation entitled

³ Moh. Mukri, 'Pemikiran Maslahah al-Gazzali Memperkaya Kajian Hukum Kontemporer', (Disertasi, Program Pascasarjana, UIN Sunan Kalijaga, 2010).

⁴ Busyro, 'Fatwa-Fatwa Kontemporer Yusuf Qaradhawi dan Kaitannya dengan *Maqâshid al-Syari'ah*' (Disertasi, Program Pascasarjan IAIN Imam Bonjol, 2014).

⁵ Abdul Basith Junaidy, 'Argumen Atilitarianisme Pada Maslahat dalam Pemikiran Hukum Muhammad Abu Zahrah' (Disertasi, Disertasi Program Pascasarjana UIN Sunan Ampel, 2013).

⁶ Muhammad Ma'shum, 'Maslahat Al-Tufi (Studi Aplikasi dalam Poligami)' (Disertasi, Pascasarjana IAIN Sunan Ampel, 2013).

Paradigmatic Shifts in Maqâsid al-Syari'ah Discourses (Jasser Auda's Study of Thought), concludes that there has been a paradigmatic shift and transformation of thought in social, political, and cultural realities in the contemporary era through the fiqh proposal approach.⁷

In contrast to the above studies, this research focuses on the application of the concept of *maslahat* (benefit) in the formation of marriage law in Indonesia and Jordan.

Method

This study aims to describe and examine in depth the application of the concept of *maslahat* in the legislation of Islamic marriage law in Indonesia and Jordan. Viewed from the aspect of procedure and nature, this research includes descriptive-qualitative literature research. This research is called descriptive because it reports and presents data according to the condition of the object under study; While qualitative because the analysis does not use quantitative (statistical) analysis methods, but uses non-numeric analysis based on speech, writing, and observed behavior of the research subjects.⁸ The aspect that becomes the focus of this research is the application of the *maslahat* principle in the formulation of Modern Islamic Family Law, specifically on Marriage Law in Indonesia and Jordan.

Renewal of Islamic Family Law in the Modern Era

Although in general, almost every existing legal product relies on the fiqh paradigm, the renewal of Islamic family law, especially in the modern era, does not always refer to the concept of fiqh. This can be proven in the modern Muslim family law reform which has some differences when compared to classical fiqh. The difference is not only at the methodological level, but also concerns the matter of legal

⁷ Faiqotul Himmah Zahroh Sanuri, 'Pergeseran Paradigmatik dalam Diskursus *Maqâsid al-Shari'ah* (Telaah Pemikiran Jasser Auda)' (Disertasi, Program Pascasarjana UIN Sunan Ampel, 2021).

⁸ Arief Furchan dan Agus Maimun Arief Furchan dan Agus Maimun, *Studi Tokoh Metode Penelitian Mengenai Tokoh* (Yogyakarta: Pustaka Belajar, 2005), p. 15.

material. On the method side, modern Islamic jurists tend to use the *istinbath* method which is different from the previous method, which can be grouped into four major groups, namely: 1) groups that use the *talfiq* method, namely by combining two or more opinions from the schools of fiqh. existing ones, whether the combined opinions come from among the scholars of popular schools of thought or one of them comes from the personal views of the figures; 2) groups that use the *takhayyur* method, namely by choosing one of the views of the priest of the school that is more in line with their needs; 3) groups that use the principle of *siyâsah syar'iyah* (referring to the public interest); 4) The group that reinterprets the text of the texts to suit modern needs and demands.⁹

In terms of legal material, differences of opinion that arise between classical and modern fiqh in the field of family law include: 1) Minimum age restrictions for marriage for men and women and age differences between the two pairs of prospective brides; 2) The role of the guardian in marriage; 3) Registration and registration of marriages; 4) Marriage finances such as dowry and wedding expenses; 5) Polygamy and wife's rights in the case of polygamy; 7) The problem of living for the wife and family as well as housing; 8) Divorce and divorce before the court; 9) The rights of women who have been divorced by their husbands; 10) The period of pregnancy and its legal consequences; 11) Rights and responsibilities of caring for children after divorce; 12) Inheritance rights for boys and girls, including for children of children who died first (inheritance rights of immediate family); 13) Wills for heirs; 14) The legitimacy and management of family waqf and others.¹⁰

Minimum Age for Marriage in Classical Fiqh

Marriage is obligatory for someone who has been able and fulfills the requirements. The purpose of marriage is to maintain honor, obtain tranquility, the legality of association, and obtain offspring, which has

⁹ Arief Furchan dan Agus Maimun, p. 3.

¹⁰ M.Atho Mudzhar, *Hukum Keluarga di Dunia Islam Modern* (Jakarta: Ciputat Press, 2003), p. 8.

implications for the rights and obligations of husband and wife. Marriages that do not comply with the provisions stipulated by law are considered unable to achieve the purpose of marriage, and can even bring harm; so the goal of religion is not achieved.¹¹

Regarding the issue of the minimum age for marriage, there is not a single verse argument that explicitly mentions that. Surah al-Nisa' verse 6, which is one of the legal basis for marriage, only mentions the word *bâligh* and the word *rushdan*. In the *tafsîr*, it is explained that a boy is said to be *bâligh* if he has dreamed and then *junub* (secrete cum), while for a girl, the characteristics are when she has started to experience *haidh* (menstruation).¹² Furthermore, for the word *rushdan*, the author of the *Tafsîr al-Misbâh*, defines it as the perfection of the mind and soul which makes it capable of acting and acting as accurately as possible.

Al-Marâghî, when interpreting Surah an-Nisa: 6, explains that if a person has a good understanding of how to use/spend wealth then he is called *bâligh al-nikâh*. Meanwhile, according to Rashid Rida, "*bâligh al-nikâh*" indicates that the age of a person to get married, that is to dream, at this age a person has been able to give birth to children and give offspring so that his heart is motivated to get married. He is also charged with religious law, such as worship and *mu'amalah*, and the implementation of *hudûd* (criminal law), because of the appropriateness of *tasharruf* (management).¹³ In *Tafsîr al-Munîr*, it is explained that the meaning of the phrase "*fain anastum minhum rushdan*" in Surah an-Nisa: 6 is "if you are good at managing wealth without being

¹¹ Muhammad Uqlah, *Nidhâm al-'Usrah Fi al-Islâm*, I (Amman: Maktabah al-Risalah al-Haditsah, 1989), p. 264.

¹² Muhammad Ali al-Shâbûny, *Tafsîr Âyât al-Ahkâm Min al-Qur'ân* (Beirut: Dâr al-Kutub al-'Ilmiyyah, 1999), p. 153; Muhammad Ardani, *Risâlah Haid* (Surabaya: al-Miftah, 1992), p. 11; Muhammad Nurruddin Banjar al-Makkî, *Fikih Darah Perempuan* (Solo: Era Intermedia, 2004), p. 13; Shaykh Ibrâhîm al-Bayjûrî, *Al-Bayjûrî* (Beirut: Dâr al-Kutub al-'Ilmiyyah, 2003), p. 143; Muhammad Ali Albar, *Penciptaan Manusia* (Yogyakarta: Mitra Pustaka, 2004), p. 1; Muhammad bin Abd al-Qadîr, *Haid* (Kediri: al-Fajr, 2002), p. 13; Masde al-Diwanta, *Panduan Smart Menjelang Pernikahan* (Banjar Negara: Aulia, 2010), p. 105.

¹³ LTN PBNU, *Solusi Problematika Aktual Hukum Islam, Keputusan Mukhtamar* (Surabaya: Khalista, 2010), p. 9.

wasteful and not weak from people's tricks".¹⁴ At that time, according to the author of the *Tabaqât al-Shâfi'iyah*, the prohibition on using the property was lifted from people who were mature and intelligent.¹⁵ Based on the interpretation of this verse it is clear that maturity can be indicated by dreams and *rushdan*, although between the two is sometimes difficult to determine; Because someone who has a dream is sometimes not *rushd* in action or, as mentioned in the Scientific Dictionary, is real maturity.¹⁶

Regarding the age number, the classical jurists also do not have the same opinion about it. As described in *Kitab al-Fiqh 'Alâ Madhâhib al-Arba'ah*, according to Hanafî the limit of a child's adolescence is usually marked by the year, but sometimes it is marked by a dream sign for boys and menstruation for girls; but if there are no signs for both then it is marked by the age of 18 years for boys and 17 years for girls. According to Imâm Mâlik, *bâligh* is characterized by some hair growth on the limbs; According to Imâm Shâfi'i, the minimum age for marriage is 15 years for boys and 9 years for girls. Meanwhile, according to Hanbalî, the limit for boys is 15 years, while for girls it is marked by menstruation. The Imâmiyah stipulates that the age of puberty for males is 15 years and for females 9 years.¹⁷ The age of *bâligh* above, in Hanafî's opinion, is the maximum limit, while the minimum age is 12 years for boys and 9 years for girls. Because at that age a boy can dream of releasing sperm, or releasing it outside of a dream and impregnating a girl, while for girls it can also be a dream of sperm coming out, being pregnant, or menstruating.¹⁸

¹⁴ Muhammad Nawawî al-Jâwî, *Al-Tafsîr al-Munîr (Marah Labid)* (Mesir: Maktabah Isa al-Halabi, 1314), p. 140.

¹⁵ Abu Bakar Ibnu Umar, *Tabaqât al-Shâfi'iyah al-Kubrâ* (Beirut: Alam al-Kutub, n.d), III, p. 47.

¹⁶ Pius A Partanto dan Muhammad Dahlan al-Barry, *Kamus Ilmiah Populer* (Surabaya: ARKOLA, 1994), p. 63.

¹⁷ Abd al-Rahman al-Jazîrî, *Kitâb al-Fiqh Alâ Madhâhib al-Arba'ah* (Beirut: Dâr al-Kutub al-Ilmiyyah, 2003), pp. 313–14.

¹⁸ Muhammad Jawad al-Mughniyyah, *Fikih Lima Madhab, (Trsl't by Afif Muhammad et. Al)*, (Jakarta: Lentera, 2004), p. 312; Abdul Rahman Ghazali, *Fikih Munakahat* (Jakarta: Kencana Pranata Media Group, 2003), pp. 56–67.

Normatively, the Muslim jurists conclude that the age limit for *bâligh* or the minimum age limit for marriage is 15 years based on the history of Ibn Umar, and 9 years based on the Prophet's marriage to Aisha. From a sociological perspective, this was possible because at that time, especially in Medina, the above age group was already considered an adult.¹⁹

As explained by Ahmad Rajafi, there are two contradictory thoughts in responding to the *hadîth* about the Prophet's marriage. Most of the scholars accepted but some refused, such as Ibn Shubrumah, Asghar, Hasbi, and others. For those who accept, the main basis is the absoluteness of the *hadîth* submitted by Imam al-Bukhari because his book is the best work of other *hadîth* books, and his standard of selection is very *tasyaddud* (strict) because the search is not only from what he found and heard but went straight to the sources of the *hadîth* issued.²⁰ As for those who reject underage marriage, like Ibn Shubrumah, they consider the marriage of the Prophet Muhammad pbuh with 'Aisha is a specialty owned by the Prophet and cannot be simply followed by his people.

In terms of consensus (*ijmâ'*), Imam al-Nawawi explained that there had been *ijmâ'* (agreement) among the Muslims regarding the permissibility of marrying underage girls and there is no *khiyâr* (option) for *faskh* (cancellation) for her when she reaches adulthood (*bâligh*). Such is the opinion Imam Malik, Imam ash-Shafi'i, and all jurists of the Hijaz. Meanwhile, the Iraqi fuqaha stated that she could do *khiyâr* if she had reached puberty.²¹ Thus, it can be understood that marriages carried out by minors are justified by *syara'* based on the *sharih* (clarity) of *hadîth* texts.

Ahmad Rajafi gave a special note on the *hadîth* about the marriage of the Prophet Muhammad with Aisyah ra. According to him, there

¹⁹ Ahmad Rofiq, *Hukum Islam di Indonesia* (Jakarta: Rajawali Pers, 1998), pp. 82–83.

²⁰ Ahmad Rajafi Ahmad Rajafi, *Nalar Hukum Keluarga Islam di Indonesia* (Yogyakarta: Istana Publishing, 2015), p. 106.

²¹ Imam an-Nawawi, *Al-Minhaj Syarh Sahih Muslim Bin al-Hajjâj* (Beirut: Dâr Ihya' at-Turas al-Arabi, 1392), p. 206.

is a discrepancy in facts in determining how old A'isha was when she married the Prophet. At-Tabari explained that 'Aisyah was proposed to by the Prophet when she was 7 (seven) years old and began to marry at the age of 9 (nine) years. This information, if examined further, is out of sync with the explanation he put forward elsewhere that Abu Bakr's children numbered 4 (four), including 'Aisyah who was born during the Jahiliyah period or before the arrival of Islam. If, as stated by at-Tabari, 'Ayesha was betrothed by the Prophet when she was 7 years old (620 AH) and married at the age of 9 years (623/624 CE), this means that 'Ayesha was born in 613 CE, or three years after the Jahiliyah period.²² As also mentioned by al-Tabari, 'Aisyah was born in the era of ignorance (610 AD), so that at the time of marriage, 'Aisyah should have been at least 14 years old.

Other evidence that also supports this is the calculation of the age difference between Asma' (Abû Bakr's eldest daughter) and 'Aisyah. Imâm ibn Kasir stated that their age difference was 10 (ten) years, and Asma' died in 73 H at the age of 100 years.²³ Thus, when the migration to Medina occurred (622 H), Asma's age was 27 or 28 years. If Asma's age difference is compared to Aisyah's, who is 10 years younger, then A'isha's age when she married the Prophet Muhammad was around 17 or 18 years. Moreover, if we look at the age difference between 'Aisyah and Fatimah, it is found that Fatimah was born when the Ka'bah was rebuilt, to be precise when the Prophet was 35 years old, Fatimah was 5 years older than 'Aisha. Fatimah was born when the Prophet was 30 years old. If the Prophet married 'Aisha a year after the *hijrah* (or when the Prophet Muhammad was 53 years old). This indicates that A'isha was 17-18 years old when she married him.²⁴ If this historical conclusion is true, then it should be agreed that the Prophet Muhammad's marriage with 'Aisyah should only be used as a historical document. In other words, the *hadith* can be accepted but cannot be used as a basis for justification/

²² Imam at-Tabari, *Tarikh al-Umam Wa al-Mamlûk* (Beirut: Dâr al-Fikr, 1979), iv, p. 50.

²³ Imam Ibnu Kasir, *Al-Bidâyah Wa an-Nihâyah* (Beirut: Dâr Al Fikr, 1933), VIII, pp. 371–72.

²⁴ Syihab ad-Din Ibnu Hajar al-'Asqalani, *Al-Isâbah Fi Tamyiz al-Sahâbah* (Riyad: Maktabah al-Riyad al-Hadis, 1978), IV, p. 377.

legitimacy of underage marriage (*maqbul-ghair ma'mul*-accepted but not applicable),²⁵ As ibn Syubrumah viewed, the marriage of the Prophet Muhammad pbu with 'Aisha is a specialty owned by the Prophet and cannot be simply followed by his people. Through scientific calculations, some scholars also think that the above *hadith* cannot be accepted by reason and, therefore, cannot be used as a religious argument. This means that the marriage of the Prophet is a special trait that cannot be followed by others.

In the perspective of normative law, the minimum age for marriage is *bâligh*, while the signs of *bâligh* can be identified through two indicators, namely: *bil-alâmat* (based on certain characteristics/signs) and *bi al-sin* (based on age numbers). For men, maturity is marked by a dream or discharging sperm, while for women it is marked by menstruation. As for the age number, according to Hanafî, 18 years for boys and 17 years for girls. Shâfi'î, mentions 15 years for men and 9 years for women; Hanbalî, 15 years for both males and females; While Mâlikî marks the growth of hair on the limbs. So, explicitly the jurists do not have an agreement on the minimum age limit for marriage because neither the Qur'an nor al-Hadith explicitly stipulates that limit.

Al-Marâghî interprets the word *wasâlihîn* as men or women who can marry and carry out the rights of husband and wife, including being in good health and having property. Ibn Katsir explained that the above argument is at the same time an order to marry those who can afford it.²⁶ Quraysh Shihab, as quoted by Musthofa, interprets that someone who is mentally and spiritually capable of building a household does not have to be religious; because the function of marriage requires material, mental, and spiritual preparation, but does not include religious qualities.²⁷

²⁵ Ahmad Rajafî, p. 112.

²⁶ al-Imâm Abî Fadâ' al-Hâfidz Ibnu Katsîr al-Damasqî, *Tafsîr Ibnu Kathîr* (Beirut: Dâr al-Kutub al-'Ilmiyyah, 2004), p. 269; see also Imâm al-Muhaqqiqîn wa Qadwah al-Mudaqqiqîn al-Qâdî Nâshîr al-Dîn Abî Sa'id Abdillâh bin Umar bin Muhammad al-Syayrâzî al-Baydâwî, *Tafsîr al-Baydâwî* (Beirut: Dâr al-Kutub al-'Ilmiyyah, 2013), p. 123.

²⁷ Mustofa, *Perbandingan Hukum Perkawinan di Dunia Islam* (Bandung: Pustaka al-

Furthermore, the jurists also view that the *bâligh* of a person does not necessarily indicate the quality of his maturity. In other words, the provisions of *bâigh* and adult, are not a matter that must be taken into consideration for whether or not a person is allowed to marry. Based on this idea, Imâm Mâlik, Hanâfi, Shâfi'i, and Hanbalî believe that it is permissible for a father to marry a daughter who is not yet mature, as well as her grandfather if the father is not present. But Ibn Hazm and Shubrumah believe that fathers should not marry off a young daughter unless she has reached maturity and is under her permission. In responding to this difference of opinion, the author is more inclined to the second opinion, because if it is reviewed in depth, Islam prohibits the practice of early marriage as the basic purpose of Islamic law is *li jalb al-mashâlih wa li daf'i al-mafâsid* (taking benefit and eliminating harm).²⁸

Application of the *Maslahat* Concept in Determining the Minimum Age for Marriage in Indonesia and Jordan

Indonesia and Jordan have some similarities as well as differences. Both of them occupy the same geographical area (the continent of Asia), and both have a population that is predominantly Muslim. But in the system of government and law, these two countries have differences. Jordan adheres to a monarchy system led by a Hashimiyah king who is a descendant of the Prophet Muhammad; Meanwhile, Indonesia adheres to a democratic government system, in which the head of state/government is not based on heredity but is democratically elected by the people. In addition, in Jordan, the Islamic paradigm has entered the order of the state government system, so that Islamic law becomes the source of state law.²⁹ Meanwhile in Indonesia, despite the majority of the Muslim population, Islamic law does not apply and is only positioned as a source of legal inspiration. Likewise, with the tendency

Fikriis, 2009), p. 22.

²⁸ Ahmad Rajafi, p. 112.

²⁹ Khoiruddin Nasution, *Hukum Perkawinan dan Kewarisan di Dunia Muslim Modern* (Yogyakarta: ACAdeMIA, 2012), p. 63.

of sects, Indonesia adheres to the Shâfi'i school, while Jordan adheres Hanâfi. Such is because before separating and becoming a sovereign state of its own, Jordan was part of the territory of the Ottoman Empire. Because Turkey at that time adhered to the Hanâfi school of law system, it was this school that ultimately influenced the content of Jordan's marriage law.

In the field of family law, Indonesia has a Marriage Law and the Compilation of Islamic Law (KHI) which represents *fiqh*. However, these two legal products are considered less accommodating to the needs of Indonesian Muslims, because they are not carefully explored from the local community's wisdom but are simply taken from classical *fiqh* with its Arabic nuances. If it is related to the development of modern society, many concepts in classical *fiqh* are no longer relevant, both materially and methodologically, because they are arranged in different eras, cultures, situations, conditions, and imaginations.³⁰

The government policy paradigm used during the New Order generally could not be separated from the principle of modernization which refers to economic growth and political stability. For this reason, all members of society, including women, are mobilized to pursue economic growth and political stability under strict supervision from the State, through various legal, institutional, and ideological policies.³¹ In the socio-cultural context, this policy has a major impact on women's lives; When the dominant values are patriarchy or gender ideology, the resulting policies and laws will reinforce or contain patriarchal biases and gender ideology. This condition ultimately affects the implementation and legal culture of the community.

Regarding the issue of the minimum age for marriage, Indonesia and Jordan have slight differences. Indonesia stipulates the minimum age for marriage for both grooms and brides is 19 years. While Jordan sets the minimum limit for both as 18 years. This age limit for marriage is an increase from the previous limit which was deemed no longer

³⁰ Khoiruddin Nasution, p. xviii.

³¹ Mahfud MD, *Membangun Politik Hukum Menegakkan Konstitusi* (Jakarta: Rajawali Pers, 2011), pp. 288–89.

appropriate to the situation and conditions of society. In Jordan, before 2010, there was *Qanûn al-Huqûq al-Ailah* (The Jordan Law of Family Rights) which stipulates the minimum age for marriage for men is 16 years and for women 15 years. This limitation then, through *Qanûn al-Ahwâl al-Syakhsiyyah* (the Jordanian Family Law Act) No. 36 of 2010, changed to 18 years for both men and women. The same thing happened in Indonesia. Before 2019, the minimum age for marriage was regulated in Article 6 of Law No. 1/1974 which stipulated a minimum age of 19 years for men and 16 years for women.³² After 2019, through Law number 16 of 2019, the limit was changed to 19 years and applies equally to men and women. This change is natural to adapt to the development of the current situation and conditions in society. After all, the level of maturity in a certain place or condition may not always be the same.

Especially for the rule of law in Indonesia which regulates the issue of the minimum age for marriage, there is one important note that must be observed, namely the provisions in Article 7 paragraph (1) of Law No. 16 of 2019 and the provisions of Article 6 paragraph (2) of Law No. 1 of 1974. Article 7 paragraph (1) of Law number 16 of 2019 states that marriage is only permitted if both prospective partners have reached the age of 19 years. This means that the age of 19 years is the minimum requirement for a person to be able to marry. However, Article 6 paragraph (2) of Law No. 1 of 1974, which was not amended, stipulates that a person who has not reached the age of 21 must obtain the permission of both parents to enter into a marriage. So, according to the existing provisions, even though a bride-to-be has met the minimum required age (19 years) but because that age is under 21 years old, permission from her parents is still required. As for a prospective bride

³² This minimum age limit for marriage, especially for women, has been proposed to the Constitutional Court by the Women's Health Foundation through case 30/PUU-XII/2014 and the Child Rights Monitoring Foundation through case 74/PUU-XII/2014 which requested an increase in the age limit from 16 to 18 years. However, the Constitutional Court Council refused. Read Kompas Cyber Media, 'MK Tolak Naikkan Batas Usia Perkawinan bagi Perempuan', *KOMPAS.com*, 2015 <<https://nasional.kompas.com/read/xml/2015/06/18/1620408/MK.Tolak.Naikkan.Batas.Usia.Perkawinan.bagi.Perempuan.>>.

who is less than 19 years old, then she can get married after obtaining permission from the court.

Determining the minimum age for marriage higher than the previous one is a real effort to reform *fiqh* and is *ijtihâdiyah*. This renewal is intended so that every prospective bride and groom when entering the household level are physically and mentally prepared so that the purpose of marriage can be realized and divorce can be avoided. By increasing the age limit higher than previously expected, the couple can produce healthy and quality offspring while reducing birth rates and reducing the risk of maternal and child mortality. With the increase in the minimum age, the rights of children to be able to grow and develop optimally can be fulfilled, as well as opening wider access to education as high as possible, as mandated in Law Number 23 of 2002 jo. Law Number 35 of 2014 concerning Child Protection.

Judging from the primary element (*al-kulliyât al-khamsah*), the prevention of early marriage is very relevant to one of the objectives of the Shari'ah (*Maqâsid al-Shari'at*) namely protecting offspring (*hifz al-nasl*). Marriage at an early age, as has been proven by many researchers, has the potential to cause a lot of harm, psychologically, medically, socially, and economically. Psychologically, early marriage affects the mental unpreparedness of husband and wife to build, organize, and maintain household harmony. Medically, underage marriages can affect the health of the wife and the unborn child; So the purpose of the benefit, namely maintaining offspring, is not achieved.

Adolescence is a progressive period, which includes: Juvenile (adolescantium), puberty, and nubility. Foreign terms that indicate adolescence include *Puberteit*, *Adolescentia*, and *Youth*. In Indonesian, this period is often called Puberty. The term puberty (English) or *puberteit* (Dutch) comes from the Latin *pubertas*. While the term *adolescentia* comes from the Latin word *adolescencia*, *adolescere*, *adultus* which means to become an adult or in development to become an adult.³³

³³ Panut Panuju, Ida Umami, *Psikologi Remaja* (Yogyakarta: Tiara Wacana, 1999), p. 2.

Adolescence is the starting point of the *bâligh* phase, which according to al-Ghazâli, is the '*âqil*' phase, where a person's intellectual level is in peak condition so that he can distinguish right and wrong behavior. According to the Ikhwan al-Shafa, this period is referred to as the second realm, where humans are required to actualize the agreements that were agreed upon in the first realm, namely the realm of spirits.³⁴ In this phase, teenagers' appreciation of religious teachings and religious behavior begins to appear, along with their physical and spiritual development.³⁵ This is in line with the development of total mental functions, namely through observation, thoughts, feelings, will, memory and lust. The fast or slow process of adolescent education depends on the education received in the previous period (children's phase). In other words, the childhood phase also contains distinctive psychological implications for adolescents called puberty and adolescence.³⁶

According to psychological theory, adolescence has two aspects of development, namely physical development and psychological development. In the aspect of physical development, adolescence is marked by the maturity of the genitals and the general state of the body, which has acquired a perfect shape and is functionally functioning perfectly. Whereas in the aspect of psychic development, at this phase a child begins to have full awareness of himself so that he can be given the burden of responsibility. When someone is in their teens, psychologists differ. According to Aristotle, the age range of adolescents is 14-21 years; According to F. J. Monte the age range of adolescents ranges from 12-18 years; Simanjuntak set between 15-21 years; Hurlock set between 13-21 years; Singgih Gursana set between 12-22 years, and Kartini Kartono set between 13-19 years. From the opinions above, it can be concluded that adolescence is in the age range of 12-21 years for women and 13-22 years for men.³⁷

³⁴ Abdul Mujib, Jusuf Mudzakir, *Nuansa-Nuansa Psikologi Islam* (Jakarta: Raja Grafindo Persada, 2002), p. 106.

³⁵ Jalaluddin, Ramayulis, *Pengantar Ilmu Jiwa Agama* (Jakarta: Kalam Mulia, 1998), pp. 39-41.

³⁶ M. Arifin, *Kapita Selekta Pendidikan* (Jakarta: Bumi Aksara, 1998), p. 215.

³⁷ A. Tafsir et al., *Cakrawala Pemikiran Pendidikan Islam* (Bandung: Mimbar Pustaka, 2004), pp. 75-76.

The ideal age for the bride and groom is an accumulation of physical, economic, social, mental, and psychological readiness, religion, and culture. Marriage does not only require biological or physical maturity but also psychological. Naturally, marriage is formed by the natural elements of human life itself which include biological needs and functions such as the need for affection and brotherhood, the need to become perfect members of society (*volwaardig*), bear offspring, raise children, etc.³⁸ One consequence of the marriage of minors is the incomplete implementation of the biological function to prepare offspring. Apart from that, underage marriage indirectly inhibits and even closes the development of the mindset to become a capable human being (*hifz al-'aql*), because they have been forced to grow up instantly and eliminate their instinctive traits as a child.

If the above perspective is related to the principle of benefit and then projected to the policies of the Indonesian and Jordanian governments in increasing the minimum age for marriage, it appears that it is in line with the principle of benefit as formulated by al-Syâtibî. First, setting the minimum limit does not violate *sharia*, because Islamic law also does not provide a definite age limit for marriage, but only limits one's maturity and ability to carry out obligations in building a household. Second, the limitation is logical and understandable, because it is still in a logical realm and is aimed at maturity and readiness in fostering a household. Third, the restriction contains the principle of ease and not difficulty because the Prophet encouraged providing convenience in marriage and vice versa to make it difficult and prevent divorce. So basically the concept to be achieved from the government policies of the two countries is to maintain the five principles in the goals of *syari'at*, namely guarding religion, guarding the soul, guarding reason, maintaining lineage, and guarding property.

³⁸ Titik Triwulan dan Trianto, *Poligami Perspektif Perikatan Nikah* (Jakarta: Prestasi Pustaka, 2007), p. 40. See also Abdul Qodir Zaelani, 'al-'Adalah fi Qadhiyah al-Ta'addud fi Nadzri al-Falsafiyah al-Qanuniyyah al-Mi'yariyyah, wa al-Nafsiyyah wa al-Ijtima'iyyah', *Al-'Adalah*, 12.2 (2015), 903-914.

Conclusion

The concept of *maslahat* applied in the marriage law legislation in Indonesia and Jordan is principally aimed at realizing benefit and rejecting harm through rules that are considered good. The concept of benefit to be achieved is to maintain the five principles in the goals of *shar'ia*, namely guarding religion, guarding the soul, guarding reason, maintaining lineage, and guarding property. Because the formation of Islamic family law legislation in Indonesia and Jordan is inseparable from the local wisdom possessed by each of these countries, the concept of benefit applied in Islamic family law legislation in each country has its characteristics.

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