

## EARLY-AGE MARRIAGE IN PERPECTIVE OF INDONESIAN ISLAMIC FAMILY LAW

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### *Abstract*

*The article below tries to describe early age marriage according to contemporary Islamic Family law. Actually the substance of Islamic family law is to create a social merit for people in the present and the future. Islamic law is humane and always brings mercy to the world. It intends to make the Islamic law remain up to date, relevoant and able to respond to the dynamics of the times. The government prohibits early-age marriages by several considerations. Even though, the religion does not limit the age of marriages, but it also has a positive value. Such a problem is quite a dilemma. Therefore, in such a context Islam is a mercy to the universe, including Indonesia, the grounding of Islamic law in the faces that follow the movement of the people of Indonesia to follow the motion flow of the Indonesian people to be a necessity. Thus, in the view of the author, in the Indonesian context, the grounding of values of Islamic law, or, more precisely, the adaptation of Islamic law in the social change of Indonesian people. It can be used as a counter towards the practice of early-age marriages that are in fact still be mistaken by most Indonesian society. Thus, the assumption that early-age marriages are permitted by religion but not permitted under the law is wrong and is the form of ignorance about the history of the building concept of the establishment of syari'ah law in general, the history and formation as well as the enactment of the Act No. 1 in 1974 in particular, as well as the understanding and dissemination of the concept and application of the Indonesian Fiqh.*

**Keywords :** Marriage, Early Age, Islamic Family Law, Contemporary, and Indonesia.

### ملخص البحث

تتناول هذه المقالة قضية الزواج تحت السن القانوني من منظور أحكام الأسرة الإسلامية المعاصرة، وذلك في إطار الوعي بالهدف الحقيقي من تشريع أحكام الأسرة في الإسلام، والمتمثل في دعم الرخاء الاجتماعي سواء في المدى القصير أو الطويل. أحكام الأسرة الإسلامية ذات نزعة إنسانية رحيمة تهدف لإيجاد الحكم الإسلامي الملائم في أي زمان ومكان، وذات قدرة على تلبية الحاجات العصرية. تتعرض المقالة لمنع كثير من الحكومات للزواج في السن المبكر عارضة لاعتبارات ذلك. ومع أن الدين الإسلامي لم يحدد سن الزواج إلا أن هذا

التحديد له أثر إيجابي فيما يخص القيم الإسلامية نفسها. وفي هذا السياق تطرح المقالة القيمة الأهم بأن الإسلام هو دين الرحمة للعالمين بما فيها إندونيسيا، بما يتضمنه ذلك من استيعاب الإسلام لحركية المجتمع الإندونيسي وحاجاته. تبدو هذه القيمة مهمة في مقام مقاومة رفض الكثيرين لتحديد سن الزواج معتمدين على فهم حرفي خاطئ للأحكام الإسلامية، فهما يغفل عن تاريخ تشكيل الأحكام الشرعية عموماً، وتاريخ تقنين وتنفيذ القانون الزواج رقم ١ سنة ١٩٧٤ خصوصاً، كما تناقش المقالة ما يطرح باعتباره 'فقها إندونيسياً' من جانب بعض العلماء الإندونيسيين.

الكلمات الدالة: الزواج، السن الباكر، قانون الأسرة الإسلامية، المعاصر، إندونيسيا.

## Introduction

Early-age marriage is understood as the practice of marriage conducted by one or both bride and groom that do not correspond to the age of marriage, both in religion and law that is 18 or 21 years old. Many reasons are given by some Moslems who perform early-age marriages, one of which refers to the Prophet's marriage to 'Aisyah, which is popularly recorded in the history when she was 9 years old. From this moment, early-age marriage has become a tradition and widespread until today. The research data shows that the early-age marriages in Indonesia reach an enough high number. An early-age marriage case that some time ago became a debate in various circles of society is the marriage of Pujiono Cahyo Widiyanto (often called Syaikh Puji), a rich man and also the owner of *pesantren* (Islamic boarding school), with Lutfiana Ulfa. The marriage between the 43-year-old man with a young girl aged 12 years invites a strong reaction from the National Commission for Child Protection. Even the observers compete to give cornering opinions. The comments are generally negative, including MUI that finally has issued a *fatwa* about early-age marriage ban. Huzaimah Tahido Yanggo from the Indonesian Ulema Council (MUI) also confirms that:

"MUI has issued a *fatwa* that the Moslems in this country comply with the provisions of the law on marriage age limit as stipulated in the Marriage Act of 1974. The minimum age limit is 19 years for men and 16 years for women. Islam does not limit the age of the person to marry, but Islam also has a principle that if something contains a danger, then avoids it".<sup>1</sup>

<sup>1</sup> Editors of Official Site of the Social Welfare, «MUI Has Affirmed the Age Limit of Marriages According to the Marriage Law», in <http://www.menkokesra-go-id>, 3 of November 2008.

The polemics of early-age marriage does not just stop at the cycle of religionists. Some activists and legal experts also discuss this case; even discuss it specifically in some forums. The problems of early-age marriage in Indonesia are slammed on the unfinished provision of the child's age that is different one another between the Acts No. 1 of 1974 with the Child Protection Acts. Age of marriage has been regulated in Chapter IV of Compilation of Islamic Law (KHI) Article 15, which states that "For the blessing of a family and a household, a marriage should only be carried out by the prospective bridegroom who has attained the age specified in Article 7 of the Acts (UU) No. 1 of 1974, in which the prospective groom is at least 19 years old and the prospective bride is at least 16 years old. Thus, according to state law, a marriage performed by those under the age becomes invalid.

This problem becomes controversial when viewing the religious law that indirectly permits it. A case often used as an example is the marriage of Aisyah to the Prophet. But does it contain *maslahah*?

Of course such a mistaken assumption needs to be clarified, because basically there is no separation between the concept of Islamic marriage and the concept of marriage that has been regulated in the form of laws as contained in the Acts No. 1 of 1974 on Marriage in Indonesia. In this context the concept and *syarah* of Indonesian *Fiqh* are much required as a new explanation in order to encounter the skewed opinion causing unrest and divisions within the Moslem community in Indonesia. Thus, the focus of this paper is the explanation of how the Indonesian *Fiqh* answers the phenomenon of pros and cons of early-age marriage by first restoring the initial regulations associated with marriage age limit in the Acts No. 1 of 1974 on Marriage.

The description begins by describing how the Acts No. 1 of 1974 on Marriage is purely a "collective creation" of the competent elites (*Ahl Hall wa al-Aqd*), which becomes the main element of Indonesian *Fiqh*. Then it continues by explaining how the concept of marriage in the acts, including the rules on age limit for marriages and the phenomenon of early-age marriage. Furthermore, the exposure to the theoretical building of Indonesian *fiqh* is a necessity as the basis of paradigm building that later is refined by looking at the reorientation of Indonesian *Fiqh* from concept to application of how early-age marriage is directly highlighted so it will be right on target of discussion as the conversation consent.

### **Act No. 1 of 1974 on Marriage as a "Collective Ijma'" of the Indonesian Moslems**

No one denies that Indonesia is a big country that is very pluralistic. Its society consists of various ethnics, languages, customs, and even religions. In

this regard, Indonesia is really *bhinnekaalsotunggal ika* under the auspices of the Constitution of 1945. The text of the Constitution of 1945 itself is the result of a compromise of the different views on the basis of the Indonesian state. With a broad outlook and insight, the Indonesian Moslems finally received the Constitution of 1945 as the Constitution of the State.

One thing that also cannot be denied is that the history and process of establishing the Constitution of 1945 forming proves that the Indonesian people who design, construct and assign the Constitution of 1945 are mostly Moslems. Most of them are known as *ulama*, others known as the nationalist Moslems and the Moslem nationalists. Therefore, basically, their agreement (collective *ijma'*) represents and binds all Moslems and the entire nation of Indonesia, including the Acts No. 1 of 1974 on Marriage that basically is also a collective product that is applicable for all Indonesian Moslems.

One of the regulations stipulated in the Acts No. 1 of 1974 on Marriage is the age limit for marriages, where the men should be at least 19 years old and the women should be at least 16 years old to be able to get married. The age limit for marriages under the acts later would give the term early-age marriage, which is defined as marriages held by under-age couples who have been regulated in the Acts of marriage. However, at the next level it develops a misperception from most of the Indonesian Moslem community that early-age marriage is actually permitted by the religion (Islam) but is not by the law (the Acts No. 1 of 1974 on Marriage).

In the colonial period in the Middle East countries, the applicable law at the time was the West law both private and public, except for family law (*ahwal ash-syaksliyyah*), it still applied the Islamic law as a whole. However, after the occupation had ended, the former colonized countries had been trying to form a national legal system by means of transforming it.

Similarly in Indonesia, after getting free from the colonialism, there had been a rapid social change. The social change regarded the position of women. Hence a strong pressure to set up a national marriage law arose, then some marriage Bills were arranged to submit to the Parliament in 1974. Not long after that, the strong reaction came from the Moslems and the Islamic party because the Bill reduced the authority of Islamic institutions and more increased the role of civil administration. Among the reactions was broadcasting the writings in newspapers such as *Abadi*, *Nusantara*, and *Pedoman*.<sup>2</sup>

It is different from *Sinar Harapan* and *Kompas* that broadcasted the writings

<sup>2</sup> Amrullah Ahmad et.al, *Dimensi Hukum Islam dalam Sistem Hukum Nasional*, (Jakarta: Gema Insani Press, 1996), p. 7.

of expecting the draft laws receipt as the full support for Golkar to design it by proving that the drafters believed in Golkar political culture, as has been exemplified by Ali Murtopo through his book "*Akselerasi Modernisasi*". As for the attitude of NU in facing the renewal pressure of marriage in 1973, it reconciled with the renewal. This attitude was in accordance with NU attitude in responding to the renewal. A reconciliation to the renewal of marriage law at the time was the practice of the *talfiq* method. This was implicitly reflected in the decision of the great *ulama* in Jombang, under the leadership of KH. Bishri Samsuri. The decision referred to them demanded:

1. Marriages for Moslems should be done religiously and not civilly.
2. The *iddah* period (the waiting period) must be in accordance with the provisions of Al-Qur'an.
3. Marriages after pregnancy outside marriage are not permitted
4. Adopted children do not have the same rights as biological children.
5. Elimination of a proposed section of the Bill stating that the difference of religion is not a hindrance of marriage.

Of the decision, the *ulama* of NU implicitly received the marriage law renewal, they did not demand that divorce should be made before the court, the marriage must be based on the approval of the bride and the groom, and the determination of the minimum age limit.

Finally, the marriage Bill was revised by removing the articles that were not approved concerning marriages between people of different religions, engagement and its consequence, adoption, marriage and divorce procedures. The result was then a revision of the Acts No. 1 of 1974. Thus, the substance of the marriage law is the result of the *ulama* efforts to transform the Islamic law into the national marriage law that seems to believe in *mazhab* Syafi'i.<sup>3</sup>

However, the key point that should be underlined from the above description is, that the Acts No. 1 of 1974 on Marriage is purely the result of *ijtihad* and a mutual agreement of the experts and institutions of the state with all the considerations and methods that can be accounted for. Thus, in this section the author intends to show that the Acts No. 1 of 1974 on Marriage is basically a representation of the Indonesia *Fiqh*, which is of course inspired by the Indonesian local spirit, a continuation of the grounding of Islamic values, particularly the values associated with the Islamic law that is said to be *rahmatan li al-'alamin*.

<sup>3</sup> Khoiruddin Nasution, *Hukum Perdata (Keluarga) Islam Indonesia Dan Perbandingan Hukum Perkawinan Di Dunia Muslim: Studi Sejarah, Metode Pembaruan, Dan Materi & Status Perempuan Dalam Hukum Perkawinan/Keluarga Islam*, (Yogyakarta: ACAdeMIA & Tazzafa, 2009).

### Marriage in the Act No. 1 of 1974

Article (1): marriage is a physical and mental bond between a man and a woman as husband and wife with the aim of forming a family (household), which is happy and everlasting based on *Ketuhanan Yang Maha Esa* (God the Almighty). The consideration is as a state based on Pancasila in which the first precept is *Ketuhanan Yang Maha Esa* (God the Almighty), the marriage has a close relationship with religion/spirituality, so that the marriage does not only have spirituality but also has an important role.

Article 2 Paragraph (1): determining that the marriage is legitimate if it is done according to the laws of each religion and belief. Paragraph (2): regulating that every marriage is recorded in accordance with the applicable legislation.<sup>4</sup>

Marriage itself, from the point of language, is a translation of the word *nakaha* and *zawaja*. The second word that is the main term used by Al Qur'an to refer to the marriage or wedding. *Zauj* means couples, *nikah* means come together. Thus, from the language, marriage is the coming of two persons who are originally separated and stand alone into a coherent whole and to be partnered. *Zauj* gives the impression of complementarity.

Furthermore, in the terminology of the substance of *syari'ah*, marriage is an inner and outer bond between a husband and wife with the aim of creating a family (household) that is happy, prosperous, peaceful, serene and eternal as written in Surah ar-Rum (30) : 21. Meanwhile, in terms of sociology, marriage means the union of two big families (uniting two families), the formation of social institutions that bring together several individuals from two different families in one relationship.

### Aim of Marriage

It is a *sunnatullah* that animate beings are created in pairs, male and female.<sup>5</sup> But there are big differences between humans who incidentally has a passion and reason with the animals that only have the lust. By only having the lust, animals cannot be cultured and cannot differentiate between the good and the bad, except in a few small things to survive, which appears based on instinct. Therefore, the animals can use his lust as they like without any restriction. It is different from the human beings, they cannot use their passion like animals, but should be with rules in the form of the marriage institution.

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<sup>4</sup> K.Wanjik Saleh, *Hukum Perkawinan Indonesia*, (Jakarta:GhaliaIndonesia, 1976), p. 52.

<sup>5</sup> Q.S. Al-Dzāriyāt; 49.

In Islam, marriage intends to meet someone's sexual needs in a religiously permitted (*halal*) and establish offspring (*hifz al-nasl*) in an atmosphere of mutual love (*mawaddah*) and compassion (*rahmah*) between husband and wife.<sup>6</sup> So Islam considers marriage not just a biological issue *an sich*, but more than that, it is a psychological and sociological issues.<sup>7</sup>

To achieve these aims needs readiness for the prospective husband and wife. Marriage readiness in *fiqh* overview is at least measured by three (3) things:

*First*, readiness of knowledge, a readiness of understanding of the laws of *fiqh* relating to the affairs of marriage, either the law before marriage, like the law of *khitbah* (proposal), at the time of marriage, such as the requirements and *rukun* of *aqad nikah*, and after marriage, such as a living law, *thalak*, and *ruju*. The first requirement is based on the principle that it is *fardhu ain* for a Moslem to know the laws of his everyday actions that are done or that will soon be done.

*Second*, readiness of material/wealth. The definition of wealth here are two kinds, wealth as *mahar* (dowry) (see Surah An Nisaa: 4) and wealth as a living of husband for his wife to meet the basic/primary needs (*al hayat al asasiyah*) for his wife in the form of clothes, food, and home (see Surah Al Baqarah: 233, and Ath Thalaq: 6). Regarding dowry, in fact it is not absolutely in the form of material wealth, but it could also be a benefit given by a husband to his wife, like a husband teaches a knowledge to his wife. The primary requirement must be given in a decent level (*bi al ma'ruf*), which is equal to the level of income that is given to other women such as the wife of a person in a society.

*Third*, readiness of physics/health, especially for men, which means that he is able to live his duties as men, not impotent. Imam Ash Shan'ani in his book *Subulus Salam* juz III page 109 states that *al ba'ah* in the hadith of married recommendation for the *syabab* above means *jima'*. Caliph Umar bin Khaththab once gave respite for one year for treatment for an impotent husband. This shows the necessity of "physical" readiness before getting married. It is generally applicable for those who marry early or not early.

### Conception, Benefits and Disadvantages of Early-Age Marriage

According to the language, marriage is "deliberately do or get mixed". Meanwhile, according to the meaning, the term of marriage is giving legal benefits of permissibility to hold a family relationship (husband and wife) between men

<sup>6</sup> Q.S. Al-Rūm; 21.

<sup>7</sup> Compared with Idris Ramulyo, *Hukum Perkawinan Islam*, (Jakarta: Bumi Aksara, 1996), pp. 16-19.

and women and helping each other and giving limits on the rights to the owner and the fulfillment of their own obligations". Early-age means young, or teenaged.

From the opinion outlined, the author may conclude that early-age marriage is conducted by those (people) who are young-aged as inner and outer bond between men and women to build a household, in which will give rise to the rights and obligations of each.

In essence, early-age marriage also has a positive side. We know, at this time the courtship performed by young couples often do not heed religious norms. We often see immoral acts in public as the effect of the freedom that has exceeded the limit. This fact shows how the moral of this nation has reached the alarming level. Therefore, according to some people, early early-age marriage is an attempt to minimize these negative actions.

On the other hand, we do not realize that there are a lot of impact of early-age marriage for health, psychological (mental) and the family lives of teenagers.

1. Cervical cancer

Married women under 20 years old are at risk for cervical cancer. At the age of teenagers, the cells of the cervix are immature.

2. Severe Depression

Severe depression due to early-age marriage may occur in different conditions. On the introvert person, it will make the teenager withdraw from the intercommunication. He/she will become a withdrawn and refuse to hang out. While the extrovert teenager will be pushed to do strange things to vent his/her anger. Psychologically these two forms of depression are equally dangerous.

3. Family conflict that leads to divorce

A teenager is busy arranging his very new world and in fact he is not ready to accept this change. He tries to be responsible for the results of actions undertaken along with his couple (girlfriend). It is only one problem. Early-age marriage often leads to divorce.

In addition, marriage also has a relationship with the population. *First*, that getting married for a young aged woman leads to a higher rate of birth due to a span of longer time to be pregnant. *Second*, that the immature physical and unstable personality will affect the children born and it is also very risky for women who are pregnant at a young age.

UNICEF research concludes that there are some risks caused by early-age marriage as follows:

1. Disharmony of household due to biological immaturity

2. The lack of knowledge about reproductive health, which increases the risk of HIV/AIDS infection, maternal mortality; because of early-age pregnancy and childbirth.
3. Dropout
4. Domestic violence and neglected children.
5. Poverty.<sup>8</sup>

On that basis above, the UNICEF sets 18 as the minimum age limit for marriages based on a number of researches of UNICEF, with the sample under the age of 15 years, 15-18 years and 18-21 years, which indicates that the risks contained in early-age marriage still have a relatively high percentage at the age of 15-18 years. The risks decrease drastically on married couples under the age of 18-21 years.

Based on the reality and phenomenon, it is stipulated that every marriage under the age of 18 years is a violation of human rights, women's rights and children's rights, as set out in the UDHR of 1948, CEDAW of 1979, and CRC of 1989.<sup>9</sup>

### **Early-age Marriage in the Act No. 1 of 1974**

The laws in our country have set the age of marriages. In the Marriage Law Chapter II Article 7, paragraph 1, it states that marriage is only permitted if the man has been 19 (nineteen) years old and the woman has been 16 (sixteen) years old.

The government policy in setting the minimum age limit of marriage is certainly through the process and the various considerations. This is meant that both sides are really ready and mature in terms of physical, psychological and mental.

From the medical point of view, early-age marriage has negative impacts on both mother and child born. According to the sociologists, in terms of the social side, early-age marriage may reduce family harmony. This is caused by unstable emotions, turbulent young blood, and immature thinking. Viewing early-age marriage from various aspects, it really has many negative effects. Therefore, the government only tolerates the weddings over the age of 19 years for men and 16 years for women.

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<sup>8</sup> UNICEF, *Early Marriage: A Harmful Traditional Practice* (New York: UNICEF, 2005), p. 5.

<sup>9</sup> *Ibid*

**Article 7**

1. Marriage is only permitted if the man has been 19 (nineteen) years old and the woman has been 16 (sixteen) years old.
2. In the event of deviation towards paragraph (1), this Article may request a dispensation to a court or other official designated by the parent of the men and women's party.
3. The provisions concerning the state of one or two parents mentioned in Article 6, paragraphs (3) and (4) of this Acts, are also applicable in the case of the dispensation request of paragraph (2) of this article, without prejudice to that referred to in Article 6 paragraph (6)

Therefore, the early-age marriage is a marriage held at the teenaged-time, has not ended yet or has just ended. According to WHO, the teenager age limit is 12-24 years. Meanwhile, according to the Ministry of Health, the age range is 10-19 years (with a record, not married). According to the Directorate of Youth and Reproductive Rights Protection BKKBN, the limit is 10-21 years.<sup>10</sup>

**Renewal of Islamic Law in Early-Age Marriage Problems**

Renewal or reform affecting the Islamic law in the nineteenth and twentieth centuries has more insight to the future than those done earlier. The reform encouragement comes from the internal of Islamic tradition itself, like the Islamic legal specialists who try to renew the laws in relation to the social needs and changing behavior, as well as from the external like political leaders who try to impose the changes designed to remove the old pictures that block the government modernization program.

In its effort, the reform of Islamic law (including family law) has accommodated the issues of gender equality. In relation to this study, there has been a renewal that intends to raise the status of women. For example, a new law demanding the requirement that the marriage must be recorded in order to be legally valid and that the couple must have reached a certain minimum age is to prevent early-age marriage and forced marriage.

In order to carry out a renewal, the Islamic world has a very diverse experience ranging from the most "extreme right" to "the extreme left". Abdullahi Ahmed An-Naim<sup>11</sup> in more detailed explains the techniques of reform, especially

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<sup>10</sup> Al-Muhyi, Jazimah. *Jangan Sembarang Nikah Dini!*. (Bandung: Lingkar Pena. 2006). p 10.

<sup>11</sup> Abdullahi Ahmed An-Na'im, *Toward an Islamic Reformation; Civil Liberties, Human Rights and International Law*, (terj.) Ahmad Suaedy, *Dekonstruksi Syari'ah I* (Yogyakarta: LKiS, 1994).

in the area of family law, among others: through *takhsis al-Qadha'* (the right of the authorities to decide and strengthen the court's decision), *takhayyur* (selecting various *mazhab* opinion as eclectic like Sudan), a re-interpretation of the freedom of man in doing divorce and polygamy as in Tunisia) and *siya>sah syar'iyah* (the policy of the authorities to establish administrative rules that are useful and not contrary to the *syari'ah*).<sup>12</sup>

Meanwhile Tahir Mahmood writes, in principles, the method used in the renewal of marriage legislation is similar to those used generally by the reformers, those are; (1) *ijtihad*, (2) deductive analogy, (3) *ijma*, plus two new theories, *takhayyur* and *talfiq*. In addition, to achieve the reform of marriage law there is a phenomenon: (1) a phenomenon of treating view of all *madzhab* on the same level, and the emphasis on (2) *istihsan* (3) *maslahah mursalah*, (4) *siya>sah syar'iyah*, (5) *istidlal* and any other like that.<sup>13</sup>

In general, the reform of family law used by several Moslem countries including Indonesia consists essentially of two kinds, those are:

- a. *Intra-doctrinal reform*, a reform of the Islamic family law carried out by combining the opinions of some *madzhab* or taking other opinion other than the state *madzhab* adopted. Although Turkey is the Hanafi *madzhab* follower, for example, but the family law legislation run there contains elements from other *madzhab*. Also Egypt, although the country follows *Syafi'i madzhab*, the family law legislation contains elements of other *madzhab*. In the African countries that are the followers of *Malik madzhab*, the family law legislation there also contains other *madzhab*. Compromise among these *madzhabis* one way to reform Islamic family law.
- b. *Extradocctrinal reform*, a renewal of law by giving a completely new interpretation of the existing passages. The application of West civil law by Turkey has been claimed by some scholars not as a deviation from Islamic family law, but rather as a result of interpretation of the existing understanding. Similarly, the prohibition of polygamy in Tunisia is considered as a new interpretation of the passage of polygamy and not a deviation from Islamic law.<sup>14</sup>

<sup>12</sup> Read Marzuki Wahid and Rumadi, *Fiqh Madzhab Negara; Kritik Atas Politik Hukum Islam di Indonesia*, (Yogyakarta: LKiS, 2001), pp. 89-91.

<sup>13</sup> Tahir Mahmood, *Personal law in Islamic Countries : History, text and Comparative Analysis*, (New Delhi : Time Press, 1987), p.13.

<sup>14</sup> Tahir Mahmood, *Family law in the Muslim World* (Bombay: Tripathi Ltd, 1972), p. 267-269. Khairuddin Nasution, *Status Wanita di Asia Tenggara: Studi terhadap Perundang-Undangan Perkawinan Muslim Kontemporer di Indonesia dan Malaysia*, (Jakarta: INIS, 2002), pp. 277-278.

One of the principal substances in family law that always becomes the renewal spotlight is the issue of age limit for marriages. As explained at the beginning that marriage in Islam is legitimate for women and men who have their puberty. There is no definitive explanation and provisions concerning the age of marriage. On this basis, the provisions concerning the minimum age of marriage in Muslim countries is very diverse.

Indonesia as one of the Moslem countries sets the minimum age for marriages in the Marriage Law No. 1 in 1974. Chapter 7 paragraph 1 of this law states that men must be 19 years old and women 16 years old.

If the age limit for marriages is compared with that in other countries, it is actually not too far, even for male it is relatively a bit higher. The lowest age limit for men located in northern Yemen is 15 years, and the lowest age limit for women is 15 years, those are in Jordan, Morocco, northern Yemen, and Turkey. In more detailed, the lowest age limit for marriages for men and women in 17 Islamic countries in the world, respectively, are as follows:

Algeria is 21 and 18 years old, Bangladesh is 21 and 18 years old, Egypt is 18 and 16 years old, Iraq is 18 and 18 years old, Jordan 16 and 15 years old, Lebanon is 18 and 17 years old, Libya is 18 and 16 years old, Malaysia is 18 and 16 years old, Morocco is 18 and 15 years old, northern Yemen is 15 and 15 years old, Pakistan is 18 and 16 years old, Somalia is 18 and 18 years old, southern Yemen is 18 and 16 years old, Syria is 18 and 17 years old, Tunisia is 19 and 17 years old, and Turkey is 17 and 15 years.

From these figures it is clear that the lowest age limit for marriages in Indonesia is relatively quite high for men but low for women. In the implementation level, the age limit for marriages for a woman who is already low is still not necessarily adhered. To encourage people to marry above the lowest age limit actually has been contained in the article 6 paragraph (2) by giving the provisions that to enter into marriage for someone who has not 21 years old yet must obtain permission from his parent. But in reality the parents themselves frequently tend to use the lowest age limit or even much lower. In Egypt, although the marriage is performed by someone who has not attained the lowest age limit is legitimate, but it should not be registered. In Syria, it does not only set the lowest age limit for marriages, but also the difference in age between the men and women who want to get married. If the age difference between them is too far then the court can prohibit the marriage. In Jordan, the rule is more detailed, if the difference in age between the men and women who want to get married exceeds 20 years, the marriage is expressly prohibited unless

there is a special permission from the judge. In Indonesia, there have not been provisions of this age difference yet, so we often see an old man marry a woman who deserves to be his child or even grandchild. Syria and Jordan law considers that in such a case there is a potential for the extortion against one of them.<sup>15</sup>

This provision seems to have undergone an enhancement from the provisions of *fiqh* books especially from *Syafi'i* madzhab that is mostly adopted in Indonesia that permits marriage for children.

The protection of the demographic problem, as expressed in the explanation of the Acts No. 1 of 1974 that also influences the formulation of bridegroom age limit is seemingly intended to address the challenges and needs of the community, and in line with Islamic law itself. Thus methodologically, the step of determining the age for marriage is based on the method of *maslahah mursalah* and *istislah*.<sup>16</sup>

Thus, if it is examined together, it appears that the reform of Islamic law in Indonesia in the problems of the age limit for marriages if viewed in terms of its nature, the legal reforms undertaken will be extra doctrinal reform. It is because there is a new understanding of the *nas*, particularly the one performed by Prophet Muhammad at the time who married 'Aisyah also needs to be understood in line with the demands of the circumstances at that time. And if viewed in terms of the determination method used in this case, that is *ijtihad* by reinterpreting *syari'ah* text. This is important, because the demands of merit at that time is compared with what is existing today, that is clearly different.

### **The Formulation of the Theory of Indonesian Fiqh: Answering Pros and Cons of Early-Age Marriages**

The lack of empirical discourse developed in Islamic thought, which results in the abandonment of a line of the nomenclature of socio-political problems that occur in the community, has motivated the critics of the framework (paradigm) that has been used and awakened by the *ulama* all this time. The confines of the *ulama's* mindset that is *isfahm al-'ilm li al-inqiyad* when understanding the doctrine of Islamic law contained in the treasury of classical literature (*syarwah fiqhiyah*) makes the existence of Islamic law seem resistant, unable to measure themselves, and as a consequence it presents like a panacea for socio-political issues. The

<sup>15</sup> See M. Atho Mudzhar, *Membaca Gelombang...*, pp. 179-180. See also M. Atho Mudzhar, *Esai-Esai Sejarah Sosial Hukum Islam* (Yogyakarta: Pustaka Pelajar, 2014).

<sup>16</sup> Rahmat Djatmika, "Sosialisasi Hukum Islam", in Abdurrahman Wahid et al., *Kontroversi Pemikiran Hukum Islam di Indonesia*, (Bandung: Remaja Rosdakarya, 1991). p. 251.

*ulama* looks like forgetting the history and regards it as an unimportant thing, so that criticism of the dimension is negligible. In fact, the historical paradigm will change the way to understand *fiqh* as a product of thought that is relative (*qabil li an-niqas*), not as an absolute orthodoxy truth, which absoluteness of reason deports the tradition of criticism and development. The loss of sense of history is what has led to the renewal of Islamic thought that has been done does not show a clear *kontinum*. It requires a shifting paradigm of the pattern of *fahm al-'ilm li al-inqiyad* to the pattern of *fahm al-'ilmi li al-intiqad*, in an effort to understand all forms of heritage and the products of the past.

Circumstances above turn out to have a dominant influence in the emergence of the idea of Indonesian *Fiqh*, where the genesis has been introduced by Hasbi as-Siddiqy, an expert in Islamic studies,<sup>17</sup> in about the 1940s. With its first article entitled "*Memoedahkan Pengertian Islam*", Hasbi states the importance of making provision of *fiqh* as the result of *ijtihad* that is better suited to the needs of the Indonesia people and nation, so *fiqh* is not be treated as foreign and antique goods.<sup>18</sup> Hasbi looks giddy at the prospect and future of Islamic law in Indonesia that has no clear direction. According to him, the cult of the Islamic legal thought (*taqdis al-afkar*) that has occurred and keeps continuing until today should be reviewed within the basic framework of putting the new *ijtihad* pillar. The concept and idea of Islamic law that has been irrelevant and foreigner should immediately be changed by new alternatives that are more possible to be practiced in Indonesia.

To solve this problem, Hasbi suggests the need for collective work (*ijtihad jama'i*),<sup>19</sup> through a permanent institution - in the sense of, "Good legislation is based on the Qur'an, *Sunnah*, or *Ra'y* in consultation with governments, not with *ijtihad fardi* (individuals) - with the number of expert members of the specialization of science. According to him, this effort will result in a relatively good legal product than if it is only done by an individual or group of people with the same expertise.<sup>20</sup> For this purpose, Hasbi suggests that the supporters of Indonesian *Fiqh* establish the institution of *Ahl al-Hall wa al-'Aqd*. The institution

<sup>17</sup> Mahsun Fuad, *Hukum Islam Indonesia: Dari Nalar Partisipatoris hingga Emansipatoris*, (Yogyakarta: LKiS, 2005), p. 64.

<sup>18</sup> Nouruzzaman Siddiqi, "Muhammad T.M. Hasbi Ash-Shiddieqy dalam Perspektif Sejarah Pemikiran Islam Di Indonesia, in *Al-Jami'ah*, No. 35, 1987, p. 50.

<sup>19</sup> Yudian Wahyudi, *Ushul Fikih versus Hermeneutika: Membaca Islam dari Kanada dan Amerika*, (Yogyakarta: Pesantren Nawesea Press, 2007), p. 41.

<sup>20</sup> *Ibid.* See also, Hasbi ash-Shiddieqy, "Tugas Para Ulama Sekarang dalam Memelihara dan Mengembangkan Qur'an, Hadits, dan Fiqh dalam Generasi yang sedang Berkembang", in *Panji Masyarakat*, year of XIV No. 123, March 15, 1973, p. 17.

is supported by two sub-institutions. First, the political institutions (*hay'at al-siyasah*), whose members consist of people who are elected by the people, of the people and for the people, but must master the field they represent. Second, institutions of *Ahl al-Ijtihad* (the *mujtahid*) and *Ahl al-ikhtisas* (the specialist) who are also the representative of the people, by the people and for the people.<sup>21</sup>

Reason of thinking used by Hasbi with the idea of Indonesian *Fiqh* is a belief that the principles of Islamic law in fact provides a wide space for the development and new *ijtihad*. The basic of Islamic law that has been established, such as *ijma'*, *qiyas*, *maslahah mursalah*, *urf*, and the principle of "legal changes due to changes in time and place", will reap a discrepancy when there are no more new *ijtihad*. By adhering to the paradigm, in the context of overall development today, the closing movement of the doors of *ijtihad* (*insidad bab al-ijtihad*) is an obsolete issue that must be abandoned.

To establish a new *fiqh* made in Indonesia, it requires a high awareness and wisdom from many parties, especially when they have to pass the first step, the historical reflection on Islamic legal thought in the early days of its development. This perspective teaches that the new Islamic law could go well if being in accordance with legal awareness, which is, the laws are established by the state of the environment, or with culture and local traditions, not by imposing Islamic law format built from a certain context to a new context of space and time that are much different. Such annexation would be in vain, not because of the complete lack of a long thought, but rather it is already anachronistic. Thus, the Indonesian *Fiqh* is expected to have a "taste" of Islamic law with its own characteristics that are different from the characteristics of the Arab community, because Islam does not mean Arabs, especially the ancient Arabs.<sup>22</sup>

Considering the presence of traditions (customs, *urf*) as a reference for the establishment of the new format of Islamic legal thought, in the view of Hasbi, becomes a necessity. Islamic *syari'ah* adheres to the principle of equality. Egalitarianism of Islam regards all people are equal before God. Consequently, once again, all the *urf* of every society-not just the *urf* of Arab society - can be a source of law. Correspondingly, the coming of Islam is not intended to remove the cultural and religious *syari'ah* that already exist, as long as it does not conflict with the principles of Islam, that is monotheism/*tauhid*. Thus, all the *urf* within certain limits will always be accepted as a source of Islamic law. From this point, the formation of Indonesian *Fiqh* should consider the *urf* growing in Indonesia.

<sup>21</sup> *Ibid.*, p. 42. See also *Al-Jami'ah* No. 58 (1995): pp. 98-105.

<sup>22</sup> Yudian, *Ushul Fikih...*, p. 31.

However, as said by Yudian Wahyudi, one thing that may need to be noted here is that, the idea of Indonesian *Fiqh* raised by Hasbi up to this limit is in fact still an idea, not down to earth yet, so it is necessary to be Indonesianized.<sup>23</sup>

According to Yudian, the demands that the Indonesian *Fiqh* implies *usul al-Fiqh* Indonesia will be answered when the two main components in the Indonesia *Fiqh* methodology are Indonesianized. First, '*urf*' of Indonesia becomes one source of Islamic law in Indonesia. Here Hasbi plays a major role to close the old view (the Puritan reformists) with the legal practice of Indonesian Moslems. Second, *ijma'*, where Hasbi has just arrived in the theoretical level through *Ijtihad jama'i* with its institution of *Ahl al-Hall wa al-'Aqd*. Here Hasbi uses the term taken away from the history of Islam. In addition, some institutions founded by Indonesian Moslems have not been there when Hasbi expressed his thoughts. Therefore, it would be better if the "raw" institutions are associated with social and political institutions existing in Indonesian society.

The institution of *Hay'at al-Tasyri'iyah* can be equated with the Indonesian Ulama Council (MUI), in which the *mujtahid* is taken from the representatives of the Islamic organisations such as Nahdlatul Ulama (NU), Muhammadiyah, Persatuan Islam and Al-Irsyad, assuming that the candidates of Indonesian *mujtahid* are those who have graduated their first degree at the faculty of Syari'ah, which can be tolerated up to 1985. As for the post-1985 to 2000, the requirement is a graduate of the post-graduate degree and the post-2025 they should have been passed their doctoral degree. Those who do not have formal certificate are still recognized as the candidates of *mujtahid* after their expertise have been proven.

Meanwhile, *Ahl al-Ikhtisas* in Hasbi version can be translated into the Association of Indonesian Moslem Intellectuals (ICMI). Furthermore, *Hayat al-Siyasah* of Hasbi version can be translated into the House of Representatives (DPR) and the People's Consultative Assembly (MPR). This was done on the ground of '*urf*' in the wider sense, in which both institutions are a place for Indonesia to make legislation. Moslems can take advantage of this institution for the same purpose for the sake of the legal application of values of Islamic law which implementation does require legitimacy of power. Formal education requirements that are applicable to candidates of *mujtahid* are also applicable to the specialists according to their respective fields.

If all members of *Ahl al-Hall wa al-'Aqd* have agreed to impose the Islamic law for the Indonesian Moslems, then the legislation is a manifestation of Indonesian

<sup>23</sup> *Ibid.* p. 42.

*Fiqh*, such as the Acts No. 1/1974 on Marriage (including articles related to the age limitation for marriages as the basis of early-age marriage prohibition), the Acts No. 7/1989 on Religious Courts, Presidential Instruction No. 1/1991 on the Compilation of Islamic Law in Indonesia. In fact, Yudian continues, legislations that are not even labeled as Islam (Bung Hatta mentioned this term with the philosophy of salt, not visible but affecting) should also be the manifestation of the Indonesian *Fiqh*, such as the Constitution of 1945 and the Acts No. 14/1992 on Road Traffic and Road Transport, as long as these legislations are proved to defend *maqasid ash-syari'ah* (objectives of *syari'ah*), do not justify the unlawful and forbid the *halal* goods and its merit is essential, real and for common people.

With the paradigm of Indonesian *Fiqh*, there is no reason to discriminate and segregate one legislation with the other ones if it has been approved by the institution of *Ahl al-Hall wa al-'Aqd*, as the result of collective consensus (collective *ijtihad*) based on state. Therefore, based on the philosophy of salt Bung Hatta, there should be no more differences of opinion at this level, which says that one legislation is the secular or sacred one, one is the law of Islam and the other one is the law of "infidels". It includes a debate on the phenomenon of early-age marriage, where some people still think that "early-age marriage is permitted by the religion but not permitted by the law" is wrong when viewed with glasses of Indonesian *Fiqh* paradigm. Because, once again, actually the Acts No. 1/1974 on Marriage is a collective consensus of *Ahl al-Hall wa al-'Aqd*, so the majority vote becomes the authority rather than the individual vote that states the permissibility of early-age marriage. Of course, this kind of Indonesian *fiqh* requirement are necessary to be a counter to the practice of early-age marriage that in fact is still mistaken by most Indonesian Moslem society.

### Early-Age Marriage In Perspective of Maslahah

Early-age marriage in the perspective of Islamic family law is a legal product that is *ijtihadi*, therefore it is open to interpretation, depending on the proposition / argument, context, and purpose of the law. Therefore, in principles, the stipulation of law related to all matters about early-age marriage is very dependent on the excavation effort of *nas* proposition as complete as possible, so that the visions of Islam related to early-age marriage can be understood as a whole. The effort of law rationalization contained in the *nas* should be reinforced, started from the excavation of *asbab al-wurud* or *asbab al-nuzul*, the social context of the time, and *maqasid al-shari'ah* to be achieved. Afterwards, it needs to make some efforts of recontextualisation by understanding the socio-cultural situation that developed

at that time as comprehensively as possible. It requires careful sociological and anthropological studies to be used as a basis to analyze the impacts of the application of a law, to a legal formula with the most minimal negative impact. With these efforts the formulation of Islamic law related to early-age marriages can be performed as soon as possible according to the needs and final project to be achieved.

To do a refresher for the thought of Islamic family law, the paradigm of *maslahah* is absolutely necessary as a foundation of application of Islamic law. This is based on the fact that *maslahah* is dynamic and flexible. It means that the development of *maslahah*, which contains the public interest, is in line with the times. Consequently, it is possible that what is regarded as *maslahah* in the past is not necessarily regarded as *maslahah* at the present time. Thus, the renewal of Islamic law through *ijtihad* activity with *maslahah* consideration should always be done. Such a view is in line with trends in society today that demand for increasing the role of *maslahah* in a variety of considerations and also the renewal of Islamic law including family law.<sup>24</sup>

In KHI Article 15 Paragraph 1 it is mentioned:

“For the merit of the family and household, a marriage should only be carried out by the prospective bridegroom who has attained the age specified in Article 7, the Acts No. 1 of 1974, the prospective husband is at least 19 years old and the prospective wife is at least 16 years old”.<sup>25</sup>

As we know, that the law of the family (personal law) is a field that is not only considered to be important, but is also considered to be the most fundamental of Islamic law. This is because al-Qur'an pays great attention to the issues of law relating to the family (private), such as marriage, divorce, and inheritance, rather than the other legal matter. Because the very fundamental legal issues are related to the individuals, N.J. Coulson<sup>26</sup> and Esposito<sup>27</sup> suggest that family law is the fort of Islamic law. In this sense, family law represents a core of religion and the Moslems in general think that following the principles of these rules is a criterion of religious adherence both individual and collective. Therefore, it seems quite reasonable why the Islamic law of personal status generally remains valid in Islamic countries and countries with Moslems as the majority like Indonesia.

<sup>24</sup> Akh. Minhaji, “Prof. K.H. Ali Yafie dan Fiqh Indonesia”, in Journal of Islamic Law *al-Mawarid*, edition of VI-December 1997, p. 11.

<sup>25</sup> Suparman Usman, *Hukum Islam Asas dan Pengantar Studi Hukum Islam dalam Tata Hukum Indonesia*, (Jakarta: Radar Jaya, 2002), p.229.

<sup>26</sup> N.J. Coulson, *A History of Islamic Law* (Edinburg: Edinburgh University Press, 1964), p. 161.

<sup>27</sup> John L. Esposito, *Women in Muslim Family Law* (New York: Syracuse University Press, 2001), p. 12.

Therefore, the age limitation for marriages in Indonesian Islamic family law is in order to realize the merit of the family. This is one form of the application of *ijtihad intiqā'i* and *insya'i* that contain the merit. Because as we know that the classical *fiqh* books do not give the age limitation for marriages. But in Article 7 of the Arts No. 1 of 1974 on Marriage and KHI Article 15 Book 1 of marriage law, it clearly sets the age of marriage for men is 19 years old and woman is 16 years. The provision of this age limit is based on the consideration of the merit of the family and household.

In connection with this, the prospective husband and wife must have had mature soul so that they can realize the aim of marriage in good and harmonious manner and it will not end up in divorce. The age maturity is necessary because based on the observation and analysis of the various parties to the case of unharmonious and dissolution of a household, it is often caused by the age immaturity and instability of personal integrity, so it is very influential in resolving the problems that arise in domestic life. It needs to pay attention on the age factor to do the wedding to make the early-age not be regretted because early-age marriage does not always lead to the beauty.<sup>28</sup>

For the author, the issue of age limitation for marriages is closely related to legal capacity (*al-ahliyah*) of the parties that make the contract agreement. The ability to act and accept this law requires an individual maturity because if someone makes an agreement, then the agreement is declared legally as the *syari'ah* law, and if he commits an unlawful action, the action is accountable to him.<sup>29</sup> The ability is possessed by the subject of law since he enters *tamyiz* age and will continue until he dies. In the period of *tamyiz* the ability of legal action is not perfect yet because the subject of law can only be seen as a legitimate legal action in some cases. Therefore, this ability is called the imperfect legal action ability. Only after reaching adulthood this ability turns out to be perfect legal action.

However, the author agrees with the view of Syamsul Anwar that distinguishes the maturity and *tamyiz* in relation to worship with maturity and

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<sup>28</sup> The efforts and dissemination of awareness and the importance of considering the maturity factor in the building a household is often carried out by related parties in our country. But on the other hand the promotion of early-age marriage is so rampant. There are some works or books that has been circulated, among others are *Indahnya Pernikahan Dini, Ku Pinang Kau dengan Hamdalah, Saatnya untuk Menikah*, all are the works of Fauzil Adhim; *Nikah Dini Keren*, the work of Haekal Siregar and *Pernikahan Dini Dilema Generasi Ekstravaganza*, the work of Abu Al-Ghifari.

<sup>29</sup> Syamsul Anwar, *Hukum Perjanjian Syari'ah; Studi Tentang Teori Akad dalam Fikih Muamalah*, (Jakarta: Rajawali Press, 2007), p. 111.

*tamyiz* in the legal field of wealth (*muamalah maliah*). Provision as proposed by the experts of Islamic law is more appropriate to be applied to the maturity and *tamyiz* in the field of worship laws that rule the relationship between man and his God.

The maturity for the sake of the relationship of *muamalah maliah* field (law of wealth) is more appropriate based on the QS 4: 6, which states:

And try orphans (as regards their intelligence) until they reach the age of marriage. If then, you find sound judgement in them, release their property to them, but consume it not wastefully and hastily fearing that they should grow up, and whoever (amongst guardians) is rich, he should take no wages, but if he is poor, let him have for himself what is just and reasonable (according to his labour). And when you release their property to them, take witness in their presence; and Allah is All-Sufficient in taking account.

The context of this verse is very clear, that is talking about legal action in the field of wealth (*muamalah maliah*). In this verse it seems clear that the wealth of underaged orphans is under the authority of their guardian and "to be handed over the wealth to them there must be fulfilled two conditions, *baligh*, marriage and mature (*ar-rusyd*)."*Baligh* to get married in that verse means that the child is *talah ihtilam*, has ejaculated his semen thus may get married. The *ulama* have different opinion when the *ihartilam* happens. Some argue it happens at the age of nine, ten or twelve years. According to as-Sharaksi (490/1096), children at the age of twelve years has got his *inzal* (ejaculating the semen). According to al-Mawardi, just being *baligh* is not enough for someone to be in charge of wealth, but rather he must meet the second requirement, that is maturity (*ar-Rusyd*).*Ar-Rusyd* literally means the ability to act appropriately (*ishabatul -haqq*) according to al-Kasani (w.857 / 1190). *Ar-Rusyd* is the right and controlled attitude in an action of managing the wealth. "Therefore, we translate *ar-Rusyd* into Indonesianas maturity. In everyday life, we see that the fifteen-year-old child (junior high student) is not so mature in thinking, moreover in doing action regarding the wealth, therefore, to demand a maturity in the field of property law (*muamalat maliah*), the author tends to the opinion of Hanafi *fukaha* that being mature is when someone is "18 years old and has entered the age of 19 years," because at that time the child has been mature physiologically and psychologically, without distinguishing between men and women because as al-Mawardi says, there is no basic distinction. This is also in line with the customs (*uruf*) prevailing in our society today that think maturity is reached at the age of 18 years.

Regarding the age of *tamyiz*, in *fiqh* it begins since the age of seven. This provision should also be seen as *tamyiz* in connection with the issue of worship. For the field of wealth, according to the author, it requires older age but immature (*ar-Rusyid*), the age of 12 to 18 years. It is based on the opinion in *al-Mugni* that children can perform purely beneficial action at the age of 12 years as has been mentioned above. Meanwhile, children aged less than 12 years is seen as a child. This is also in line with the *ijtihad* of Islamic law in Indonesia as reflected in article 105a in the Compilation of Islamic Law in Indonesia (KHI).<sup>30</sup>

For the merit of families and households, the prospective bridegroom is required to reach adult age, having the ability to perform an act. Maturity in doing is reasonable because marriage requires the ability of both husband and wife to carry out responsibilities and obligations of each. Weddings performed by people who do not have the ability, his actions are like a small child, or a madman, would be invalid, because it does not have the clear in accordance with the Islamic law.

The Qur'an suggests that both prospective bridegrooms must have reached the age of adulthood. Allah says, "And try orphans (as regards their intelligence) until they reach the age of marriage. If then, you find sound judgment in them, release their property to them ..." (QS.4: 6). The words "reach the age of marriage" in the verse means that a wedding takes a certain age or maturity to get married.

Islamic law does not rule out the possibility to determine the minimum age limit based on the *ijma'* or agreement in view of the blessing of marriage. Therefore, the minimum age limit for a wedding can be tailored to the needs and fairness according to the circumstances of local communities.

Compilation of Islamic Law in Indonesia, which is the *fiqh* as the result of *ijma'* of the *ulama* and intellectuals in Indonesia, determines the prospective husband at least 19 years old, and the prospective wife at least 16 years. But they still require permission from their own parents to get married. If they have reached the age of each, marriage can not be implemented. Parental permission is no longer required if the prospective husband and wife have reached the age of 21 years.

Finally, as we already know, a marriage between a man and a woman is intended as an effort to maintain self-respect or (*hifz al-'irdh*) so they do not fall into forbidden actions, maintain human survival or offspring (*hifz an-nasl*) that healthy, establish a home life filled with love between husband and wife, and mutual help between them for mutual merit, because the maintenance of self-

<sup>30</sup> *Ibid.*, pp.114-116.

respect (hifz al-'ird) and offspring (hifz al-nasl) is a part of *maslahah daruriyah* in human life and *maqasid al-syari'ah* as the conception of *al-Gazzali* in the previous explanation.

Verse of al-Qur'an in this case has made it clear:

"And among His Signs is this, that He created for you wives from among yourselves, that you may find repose to them, and He has put between you affection and mercy. Verily, in that are indeed signs for a people who reflect."<sup>31</sup>

For the purposes above, *tanzim al-usrah* (family setting) and efforts to maintain the reproductive health into something endeavor should be seriously noticed by all parties, including the setting of age limit of marriages to guarantee the fulfillment of reproductive health and the beneficiaries.

In this regard, Muhammad 'Uqlah (Jurist civil from Jordan) in his book, *Nizam al-Usrah fi al-Islam*, as quoted by Lutfhi Assyaukanie, rejects the idea of underage marriages. It is, he says, because the purpose of marriage is not merely a release of sexual desire, but rather to foster a harmonious household (*mawaddah wa rahmah*). And to create such a household requires a mental and physical maturity.<sup>32</sup>

Responding to this phenomenon, there are some things that can be taken, one of which is to streamline the functions of law as a tool of social engineering. The theory of law that has been developed by the experts as described in the beginning and in Indonesia that has been developed by Mochtar Kusumaatmadja in the era of the 1970s is to make "the law as a means of renewal of society", which characteristics are more highlight the role of regulation in the legal reform. In this effort, there are several aspects to be considered, those are legal-substance, legal structure, and legal culture. Of legal substance, there should be the legislative provisions that set a limit on the ideal minimum age of marriages in terms of various aspects. Application of legal-substance role obviously must be supported by the paradigm and the actions of law enforcement officers. Here lies the significance of the role of the legal structure. This role is also not maximized without the participation of the community leaders and social institutions that hold certain important role in the legal culture.<sup>33</sup> According to the author, towards

<sup>31</sup> Q.S. Ar-Rum (33):21.

<sup>32</sup> Luthi Assyaukanie, *Politik, HAM ...*, P. 115

<sup>33</sup> Eko Mardiono, "Pemberantasan Praktik Perkawinan Sirri", *Kedaulatan Rakyat*, Year of LXIV, No. 166 (March 19, 2009), 15, column 1.

the minimum age of marriages, there is no opportunity of exception with court permission. The law is functioned as a social engineering tool consistently. The violators are subject to strict sanctions. Then, to minimize the negative impact on the weaker party, the consequences of early-age marriages are identified, so it can guarantee the rights claims of the early-age marriage.

What will be conveyed by this article is that the role and function of social engineering of Indonesian Marriage Legislations is understood correctly and carefully, even more emphasize on the core of the role and function of social control. In turn this function is used as the basis for a decision by the components of society, particularly those dealing with marriage, KUA officers (prince), the judge in the Religious Court, community leaders and religious leaders, because the facts show a lot of bad consequences of the practice of under-age marriages, forced marriages and others.

### Concluding Remarks

The substance of Islamic family law is to create a social merit for people in the present and the future. Islamic law is humane and always brings mercy to the world. What Imam Syatiby has ever echoed in his magnum opus should be kept in our mind. It intends to make the Islamic law remain up to date, relevant and able to respond to the dynamics of the times.

The next problem is that both the government policy and the religious law contain elements of goodness. The government prohibits early-age marriages by various considerations above. Similarly, the religion does not limit the age of marriages, but it also has a positive value. Such a problem is quite a dilemma.

Addressing these problems, the author remembers the idea of Izzudin Ibn Abdussalam in on his book *Qowa'id al Ahkam*. He says that if there are two merits, then we are required to measure which one is more important to be implemented.

Therefore, in such a context Islam is a mercy to the universe, including Indonesia, the grounding of Islamic law in the faces that follow the movement of the people of Indonesia to follow the motion flow of the Indonesian people to be a necessity. Thus, in the view of the author, in the Indonesian context, the grounding of values of Islamic law, or, more precisely, the adaptation of Islamic law in the social change of Indonesian people, then the paradigm of *Islam rahmat li al-'alamin* must always be transformed into *Islam rahmat li-Indonesia*.

Furthermore, if the theory of the Indonesian *Fiqih* is developed further, it can be used as a counter towards the practice of early-age marriages that are in fact

still be mistaken by most Indonesian Moslem society. Thus, the assumption that early-age marriages are permitted by religion but not permitted under the law is wrong and is the form of ignorance about the history of the building concept of the establishment of *syari'ah* law in general, the history and formation as well as the enactment of the Act No. 1 in 1974 in particular, as well as the understanding and dissemination of the concept and application of the Indonesian *Fiqh* that may still be strange for the Indonesian Moslems.

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